

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of
SPRINGFIELD HOUSING AUTHORITY
and
AFSCME COUNCIL 93, AFL-CIO

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Case No.: MUP-10-5998
Date issued:
August 4, 2011

Hearing Officer:

Kathleen Goodberlet, Esq.

Appearances:

John P. Talbot, Jr., Esq. - Representing the Springfield Housing Authority
Joseph L. DeLorey, Esq. - Representing AFSCME Council 93, AFL-CIO

HEARING OFFICER'S DECISION

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Summary of the Case

The issues in this case are whether the Employer's actions in (1) sending a May 20, 2010 letter to an employee regarding decertification and (2) issuing a June 24, 2010 verbal warning to the Union President, encouraged, promoted and provided assistance in the initiation, signing or filing of a July 9, 2010 decertification petition, thereby interfering with, restraining and coercing its employees in the exercise of their Section 2 rights. For the reasons explained below, I find that the May 20, 2010 letter was lawful, but that the June 24, 2010 discipline violated the Law. I further find that the discipline is

1 precisely the type of conduct that would tend to interfere with, restrain and coerce
2 employees with regard to filing a decertification petition.

3 Statement of the Case

4 On September 13, 2010, AFSCME Council 93, AFL-CIO (Union) filed a charge
5 with the Division of Labor Relations¹ alleging that the Springfield Housing Authority
6 (Employer) engaged in prohibited practices within the meaning of Sections 10(a)(1), (2)
7 and (5) of the Law. Following an investigation, the Department issued a one-count
8 complaint of prohibited practice and partial dismissal on December 9, 2010, alleging
9 that the Employer violated Section 10(a)(1) of M.G.L. c.150E (the Law). The Union did
10 not seek a review of the partial dismissal. The Employer filed its answer on December
11 21, 2010. I conducted a hearing on April 6, 2011 at which both parties had the
12 opportunity to be heard, to examine witnesses and to introduce evidence. The Union
13 filed its post-hearing brief on May 31, 2010 and the Employer filed its post-hearing brief
14 on June 1, 2010. On the entire record, including my observations of witness demeanor,
15 I make the following findings of fact and render the following opinion.

16 Stipulations of Fact

- 17
- 18 (1) The Springfield Housing Authority ("SHA") is a public employer within the
19 meaning of Section 1 of the Law.
 - 20
 - 21 (2) The Union is an employee organization within the meaning of Section 1
22 of the Law.
 - 23
 - 24 (3) The Union is the exclusive bargaining representative for certain
25 employees of the SHA, including trades workers, mechanics and
26 painters in its bargaining unit A, maintenance foremen in its bargaining
27 unit B, and clerical administrative and technical employees in its
28 bargaining unit C and managerial positions in its bargaining unit D.

¹ Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations' name is now the Department of Labor Relations (Department).

- 1 (4) Judge William Abrashkin is the Executive Director of the SHA.
2
3 (5) Kathy Hardy is the SHA's director of human resources.
4
5 (6) Michelle Booth, Nicole Contois, and Wallace Kisiel are Assistant
6 Executive Directors of the SHA.
7
8 (7) David Thompson is an employee of the SHA, a member of bargaining
9 unit A, and president of the Union local.
10
11 (8) On June 17, 2010, the SHA received a complaint from Rosa Leo, a SHA
12 employee and member of Unit D, reporting that she had received a
13 telephone call from David Thompson.
14
15 (9) Mr. Thompson filed a grievance appealing the verbal warning. On
16 August 11, 2010, pursuant to the collective bargaining agreement, a
17 Step III grievance hearing was held by the Executive Director.
18
19 (10) At this hearing, Mr. Thompson was represented by AFSCME attorney,
20 Joseph DeLorey and Martha Fila. At the close of this hearing, Attorney
21 DeLorey proposed that Mr. Thompson's verbal warning be reduced to a
22 counseling memo. Attorney DeLorey further proposed that Mr.
23 Thompson write a letter of apology to Ms. Leo.
24
25 (11) The Executive Director caucused with his staff and agreed to Attorney
26 DeLorey's settlement proposal, stating that he believed the point had
27 been sufficiently made and that there was no need for the dispute to
28 continue. On August 12, 2010, as part of a negotiated settlement (the
29 terms of which were proposed by the union), Mr. Thompson's verbal
30 warning was reduced to a counseling memo. Attorney DeLorey stated
31 that acceptance of his proposed disposition would resolve the dispute
32 and gave no indication that he intended, or reserved the right, to pursue
33 an unfair labor practice charge after his proposed disposition was
34 accepted.
35
36 (12) In 2008 Judge William Abrashkin was appointed Executive Director of
37 the SHA, following a difficult history where management representatives
38 and their families were prosecuted and incarcerated for their decades'
39 reign of public corruption. According to court records, SHA bargaining
40 unit members were interrogated by the FBI officials regarding the public
41 corruption.
42
43 (13) Subsequent to William Abrashkin's appointment as Executive Director it
44 was suggested that he meet with the various departments of the SHA to
45 meet employees and establish an atmosphere of open communications.

1 One of the individuals who suggested these types of meetings was
2 David Thompson, union president. William Abrashkin thanked Mr.
3 Thompson for his suggestion and agreed that it was a good idea and
4 that it would be implemented.

5
6 (14) As a result, in 2010, the Executive Director held one of a series of
7 departmental meetings to meet employees. Lisa Sanford, of unit C, was
8 present.

9
10 (15) During that meeting, Ms. Sanford expressed disagreement regarding the
11 union and asked the Executive Director for information as to what she
12 could do if she disagreed that she should become a member of the
13 union.

14
15 (16) The Executive Director told her that he could not respond to her request,
16 but rather would consult with SHA attorneys whether it was permissible
17 to respond.

18
19 (17) After consultation with legal counsel, the SHA sent a letter to Ms.
20 Sanford in response to her request. The letter expressly states that
21 management "will not interfere in the right of employees to engage in
22 collective activity." The letter was drafted for the SHA by experienced
23 labor counsel and William Abrashkin accepted counsel's advice that the
24 letter was a permissible and appropriate response to Ms. Sanford. He
25 signed the letter drafted by counsel without making any changes to it.

26
27 (18) The letter was sent directly to Ms. Sanford's home address.

28 Findings of Fact

29 Background

30
31 The Employer appointed Judge William Abrashkin (Abrashkin) as Executive
32 Director of the Springfield Housing Authority in 2008. The Union, consisting of four
33 units, is the exclusive bargaining representative for employees employed by the
34 Springfield Housing Authority at twenty-seven residential areas. Unit A includes about
35 50 trades workers, mechanics, and painters, including building maintenance employees,
36 exterminators, locksmiths, plumbers, and electricians. Unit B includes about six
37 maintenance foremen. Unit C includes about 40 technical employees and clerical staff.

1 Unit D includes about 15 managers. The parties did not enter into the hearing record
2 the applicable collective bargaining agreement or employee handbook. There is no
3 dispute that the employee handbook prohibits harassment and intimidation.

4 The May 20, 2010 Letter

5 After Abrashkin's 2008 appointment, Union President and Unit A member Dave
6 Thompson (Thompson) suggested that department meetings with employees would
7 establish an atmosphere of open communications. The parties stipulated that during
8 one such meeting on an unidentified date in 2010, Unit C member Lisa Sanford
9 (Sanford) asked Abrashkin what she could do if she disagreed that she should become
10 a member of the Union.² The parties further stipulated that Abrashkin told Sanford that
11 he would consult with the Employer's attorneys to determine whether it was permissible
12 for him to respond. Abrashkin subsequently sent a letter written by the Employer's legal
13 counsel and dated May 20, 2010 to Sanford's home address stating:

14 Recently you expressed to me your desire to receive information
15 regarding your membership in Unit C, of the union, AFSCME, Council 93,
16 as well as whether you are able to withdraw from representation. This
17 letter is designed to answer your questions about representation.
18

19 Please be advised that the Springfield Housing Authority, takes no
20 position regarding your inquiry and presents this response only for your
21 information. The Springfield Housing Authority will not interfere in the right
22 of employees to engage in collective activity. I take seriously the
23 obligation to avoid interfering with the rights of the employees and beyond
24 presenting information responsive to your questions, as a matter of law, I
25 am not permitted to assist you with the process of decertifying the union.
26

27 The Union Certification Process

28
29 The position you hold within the Springfield Housing Authority, was
30 certified as being part of Unit C, on or about March 31, 2009. The entity
31 that ruled your position is part of Unit C is the Massachusetts Division of

² Sanford works at the Riverview Development with about five or six other employees.

1 Labor Relations. The DLR made this ruling after the union, AFSCME,
2 Local Council 93, filed a petition asking the DLR to certify the unit. It
3 appears from documents maintained by the SHA, that in its petition for
4 certification, the union must have presented information to the DLR
5 showing that a majority of employees in Unit C wanted to be represented
6 by the union.
7

8 The employees covered by Unit C, as identified in the DLR
9 decision, have the legal right, if they choose, to seek to decertify the
10 union. The process of exploring your rights related to union
11 representation, or not, is described for you in this letter.
12

13 Union Decertification

14

15 "Union decertification" is the term used for ousting a union. A union
16 can be lawfully ousted only by action of the employees. Any active
17 management support or assistance to employees interested in ousting a
18 union is unlawful and will prevent a union from being ousted.
19

20 The process that governs public employees of the Springfield
21 Housing Authority is guided and overseen by the Massachusetts Division
22 of Labor Relations (DLR) and involves a few steps. You can find more
23 information on the web at www.mass.gov/dlr. The decertification process
24 is triggered by the filing of a "petition" with the DLR. Essentially, a Unit C
25 member would need to present objective evidence that the union lacks
26 majority support among the employees and request, by petition, that the
27 DLR hold a secret ballot election to determine whether the Unit C
28 employees wish to be represented by AFSCME.
29

30 The type of objective evidence mentioned above requires that
31 signatures of fifty percent (50%) of employees covered by the labor
32 contract be obtained on petitions, cards or letters bearing language stating
33 a desire for no more representation by the union. A petition, like the one
34 attached, is common, but notes, postcards, or just slips like the one
35 attached, can also be objective evidence from the employees. The SHA is
36 merely providing the attached as a reference and does not want any
37 employee to use the attached documents for any reason other than as an
38 illustration.
39

40 If the DLR is satisfied that at least 50% of the employees have
41 indicated that they do not want to be covered by Unit C, and the petition is
42 submitted to the DLR, the DLR will make a decision regarding whether it
43 will hold a secret ballot decertification petition.

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Timing

Where there is a contract in place, there are a number of timing requirements regarding when the objective evidence must be presented to the DLR. In the case of Unit C, where there is no contract, and the union was certified more than one year ago, the petition may be something that the DLR could act upon. You likely could find out more by contacting the DLR.

No Further Communications and No Retaliation

As I stated earlier, the SHA takes no position on the question of whether the employees want to be represented by any union. You will not be asked whether you shared this letter with you[r] co-workers or whether your co-workers took any action. No employees of SHA will be retaliated against for exercising his or her rights related to union representation.

Thompson's June 24, 2010 Discipline

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On June 17, 2010, between about 11:00 a.m. and 12:30 p.m. several bargaining unit members called Union President Thompson to inform him that Sanford and Rosa Leo (Leo) were targeting Units C and D for decertification.³ At about 1:00 p.m. on June 17, 2010, Thompson called Leo.⁴ Their conversation lasted about ten to fifteen minutes. Thompson began the conversation by telling Leo that he was calling "friend to

³ Rosa Leo (Leo), a Unit D member and twenty-six year Springfield Housing employee, works at the 82 Division Street warehouse. Leo is the chief storekeeper in charge of the warehouse and supplies. At an unidentified time prior to June 17, 2010, Leo began circulating a decertification petition.

⁴ Thompson knows Leo's husband, who is not a Springfield Housing Authority employee, socially as they have a common interest in union activities.

1 friend," not as a Union representative, locksmith or Springfield Housing Employee.⁵
2 Thompson informed Leo that other employees had called him because of the petition
3 that she and Sanford were circulating. Thompson told Leo that she could get in trouble,
4 which her husband could confirm.⁶ Thompson informed her that another employee
5 could file a complaint with the administration and that she could circulate the petition on
6 her own time, or lunchtime, but not during company hours. When Leo asked Thompson
7 what she should do, he said he couldn't tell her, but that she was in Unit D and had to
8 stick to the Unit D members. When she asked, Thompson declined to give her the Unit
9 D members' names. The conversation ended when Leo said goodbye to Thompson.

10 Leo testified that she was "shocked, angry, [and] mad" about Thompson's phone
11 call. She found Thompson's tone of voice "persistent" and testified that "because he
12 was pushing the Union, I felt like he was intimidating me." According to Leo, she "went
13 right over to Lisa Sanford" at 82 Division Street to ask whether Thompson had called
14 her too. He had not. In fact, Thompson never called Sanford regarding decertification.

⁵ The hearing record contains conflicting testimony on this point. Leo testified on direct exam that when she picked up the phone, Thompson said, "is this the union buster?" In contrast, Thompson testified on direct exam that he "stated right off the bat that this was a call friend to friend" and on cross-exam flatly denied calling Leo a union buster. I credit Thompson's testimony on this point because Leo's testimony appeared contrived based on her demeanor and inability to recall specific events. In contrast, Thompson's demeanor reflected an earnest effort to accurately convey the events and confidence in his recollections.

⁶ The Employer asserts in its brief that Thompson admitted telling Leo that she could be fired, however, Thompson did not testify on either direct or cross-exam that he told Leo she could be fired. He specifically testified that he never told Leo the nature of the trouble that she could get into with the Employer. Although Leo testified that Thompson told her that she could be fired, I do not credit her testimony on this point for the above-stated reasons.

1 Either on the afternoon of June 17, 2010 or the following morning, Leo went to
2 the administration building at 25 Saab Court to pick up the mail and saw Assistant
3 Executive Directors Booth and Nicole Contois (Contois).⁷ Booth, Contois, Hardy, and
4 Leo had a ten-minute conversation in Booth's office regarding Thompson's phone call.⁸
5 Booth testified at the hearing that during the meeting Leo seemed nervous and upset
6 and said she felt intimidated. Leo testified at the hearing that she wanted "to let them
7 know what happened and [that] it made me angry, and I wanted to know if I could get
8 fired for what I did. Just wanted to see if I did anything wrong. I just wanted to make
9 sure that I wasn't going to get fired."

10 Subsequently, Booth called Thompson's supervisor, Assistant Executive Director
11 Wallace Kisiel (Kisiel) and Executive Director Abrashkin. Booth informed Kisiel about
12 her conversation with Leo. Kisiel, with Abrashkin's approval, made the decision to
13 discipline Thompson. The Employer did not speak to Thompson or the Union regarding
14 his June 17 telephone conversation with Leo prior to issuing discipline. Nor did the
15 Employer offer mediation, although previously, when an intimidation issue arose

⁷ The parties stipulated that on June 17, 2010, Leo complained to the Employer about Thompson's telephone call. Additionally, Thompson's June 24, 2010 verbal warning memorandum states that Leo complained to the Executive Director on June 17 about an intimidating telephone call and reported the details of the call to the Administrative Office on June 18. However, Leo testified that she did not complain to the Employer until she went to get the mail either the afternoon of June 17 or the next day. Booth also testified that she met with Leo on June 18 around 9:00 a.m. after she saw Leo walking past her office to pick up the mail and that the meeting was not pre-arranged. Nevertheless, I need not resolve the discrepancy between the stipulation and testimony because the date that Leo reported the alleged intimidation is not a material fact.

⁸ The Employer states in its post-hearing brief that Leo met with only Booth. However, Leo testified that she spoke with Contois and Hardy and that Booth was also present for the conversation. Booth testified that she, Contois, and another assistant executive director met with Leo.

1 between two employees, the Employer had investigated the matter and referred
2 employees to mediation. Specifically, in June of 2009, Thompson complained to
3 Human Resources Director Kathy Hardy (Hardy) that employee Keith Barlow (Barlow)
4 had threatened him. After an investigation, Hardy and Booth met with Thompson and
5 Barlow and informed them that they would resolve the problem through mediation.⁹

6 Kisiel's June 24, 2010 verbal warning to Thompson stated, in relevant part:

7 On June 17, 2010, the Executive Director received a complaint from a
8 SHA employee that characterized a telephone call that you had made to
9 that employee as "intimidating." On June 18, the employee who received
10 the call from you came to the Administrative Office and reported that in the
11 phone call you stated to her that you were her friend and wanted to let her
12 know that you had received telephone calls from 11 different employees,
13 between the hours of 11:00 a.m. and 1:00 p.m., on June 17th complaining
14 about union related activities in which this employee and two other
15 employees were alleged to be engaging. The employee related that you
16 said, "I couldn't believe it was you passing a petition." You also referred to
17 this employee as a "union buster." She reported that you told her, "Your
18 husband is in a union and I just couldn't believe you were doing this." She
19 reported that you told her, "You should be careful because they can
20 terminate you for this."

21
22 Intimidation of fellow employees is unacceptable and in violation of SHA's
23 employee handbook. You have no authority to address a fellow employee
24 in that manner or to suggest that her job was in jeopardy. Any dispute you
25 may have with a fellow employee should be brought to management's
26 attention. Due to your conduct towards a fellow employee, in violation of
27 SHA policy, I am issuing you this verbal warning.

28
29 Upon learning that this phone call involved a dispute among employees
30 concerning unionization, the SHA advised the employee that with limited
31 exceptions, union activity is not allowed during work hours. This
32 employee was specifically instructed that the activity she was engaged in
33 was not permitted during work hours.

34
35 After having such a conversation with that employee I am obligated to also
36 remind you of the restrictions of union activity during work hours. Article 3

⁹ Booth testified that she did not recall Thompson ever reporting to her that Barlow threatened or intimidated him. However, Thompson testified that he complained to Hardy and that she investigated the matter. Hardy did not testify at the hearing.

1 of your contract states: "Union Stewards and other Union Representatives
2 shall be granted reasonable time off during work hours to investigate and
3 settle grievances." Please be advised that accepting 11 union-related
4 calls and making a union-related phone call to another employee is not
5 considered activity tied to an investigation or a grievance. Although I am
6 not issuing you discipline on this matter I am advising you that your
7 activities were also improper and constituted a violation of the Union's
8 contract with the SHA.

9
10 After Thompson filed a grievance appealing the June 24, 2010 verbal warning,
11 Abrashkin held a step three grievance hearing on August 11, 2010. Booth and Hardy
12 also attended for the Employer. Joseph DeLorey (DeLorey) and Martha Fila (Fila)
13 represented Thompson. The parties discussed the basis of the discipline. Abrashkin,
14 Booth and Hardy explained that Leo had found Thompson's conversation with her
15 intimidating. Thompson said that was not his intent. Thompson asked whether the
16 Employer could arrange a meeting with Leo. In the midst of the discussion about each
17 party's point of view, DeLorey requested a caucus. DeLorey subsequently proposed
18 that the Employer reduce Thompson's verbal warning to a counseling memo and that
19 Thompson write an apology to Leo to resolve the dispute. Abrashkin, Booth and Hardy
20 discussed the matter and determined that it was a good way to resolve the grievance.
21 Subsequently, the Employer accepted the Union's proposal and the grievance hearing
22 ended. The parties stipulated that DeLorey did not indicate that he intended or reserved
23 the right to pursue an unfair labor practice charge. However, there is no evidence that
24 the settlement agreement included a waiver of all rights.

25 Pursuant to the parties' August 11, 2010 agreement, Director of Human
26 Resources Kathy Hardy (Hardy) issued a counseling memo to Thompson dated August
27 12, 2010 and Thompson subsequently wrote an apology to Leo. The August 12, 2010
28 counseling memo states, in relevant part:

1 In meeting with you to discuss this complaint, you have emphatically
2 stated that it was never your intention to intimidate another employee, nor
3 did you call the employee a union buster or suggested [sic] she would be
4 terminated. However, the employee emphatically states that although you
5 stated to her that you were calling her as a friend, the [sic] she felt
6 intimidated. As you know, SHA is obligated to investigate any allegation
7 of intimidation. Based upon the SHA's investigation of the complaint, the
8 SHA concluded that a reasonable person could have perceived your
9 actions to be intimidation.

10
11 As mutually agreed upon at the Step 3 Hearing, the verbal warning is
12 being reduced to a counseling memo and a letter of apology will be given
13 to the employee. I am advising you to be aware of how your actions, use
14 of words and how the message is delivered can have unintended
15 consequences.

16
17 In addition, Thompson sent Leo a letter stating that he was sorry if she misinterpreted
18 what he had said as something other than what it was and that he hoped that their
19 friendship could remain on an up and up basis.

20 Decertification Filed

21 On July 9, 2010, Sanford filed a petition with the Division seeking to decertify the
22 Union as the exclusive bargaining representative for Unit C.

23 OPINION

24 Statement of Law

25 A public employer violates Section 10(a)(1) of the Law when it engages in
26 conduct that tends to interfere with, restrain or coerce employees in the exercise of their
27 rights under Section 2 of the Law. Quincy School Committee, 27 MLC 83, 91 (2000).

28 The test for unlawful interference, restraint, or coercion does not turn on the employer's
29 motive or the subjective impact of the employer's conduct on a particular employee. Id.

30 Rather, the Board applies an objective test that focuses on the impact that the
31 employer's conduct would have on reasonable employees' exercise of Section 2 rights.

1 Town of Winchester, 19 MLC 1591, 1596 (1992). Therefore, even absent a showing of
2 animus, an employer may still violate the Law if it discharges or takes other adverse
3 action against an employee while he or she is engaging in protected activity so long as
4 the employee's own conduct does not remove him or her from the Law's
5 protection. Whitman Hanson Regional School Committee, 9 MLC 1615, 1618 (1983).

6 Expressions of employer anger, criticism and ridicule directed at employees'
7 protected activities are unlawful. Groton-Dunstable Regional School Committee, 15
8 MLC at 1556-1557 (1989). However, the prohibition against making statements that
9 would tend to interfere with employees in the exercise of their rights under the Law does
10 not impose a broad "gag rule" on employers. Town of Bolton, 32 MLC 20, 25 (2005).
11 The ultimate test remains whether the employer's statements would chill a reasonable
12 employee's right to engage in activity protected by Section 2 of the Law.
13 Commonwealth of Massachusetts, 28 MLC 250, 253 (2002).

14 The Board has not addressed the issue of whether certain employer conduct in
15 the preparation or filing of a decertification petition violates Section 10(a)(1) of the Law.
16 Pursuant to National Labor Relations Board (NLRB) precedent, an employer violates
17 Section 8(a)(1) of the National Labor Relations Act (Act) by actively soliciting,
18 encouraging, promoting, or providing assistance in the initiation, signing, or filing of an
19 employee petition seeking to decertify a union.¹⁰ Mickey's Linen & Towel Supply Inc.,
20 349 NLRB 790, 791 (2007) (citing Wire Products Manufacturing Corporation, 326 NLRB

¹⁰ The Commonwealth Employment Relations Board (CERB) frequently looks to National Labor Relations Board (NLRB) decisions for guidance in construing similar statutory provisions. Salem School Committee, 35 MLC 199 (2009); Plainridge Race Course, Inc., 28 MLC 185, 186 (2001) (citing Greater New Bedford Infant Toddler Center, 12 MLC 1131, 1155 n.42 (1985), aff'd 13 MLC 1620 (1987)).

1 625 (1998)). Although an employer does not violate the Act by rendering ministerial aid,
2 its actions must occur in a "situational context free of coercive conduct." Eastern States
3 Optical Co., Inc., 275 NLRB 371, 372 (1985) (quoting D&H Mfg. Co., 239 NLRB 393,
4 404 (1978)).

5 There is no bright line test to distinguish unlawful assistance from mere
6 ministerial aid. Glasser v. Heartland-University of Livonia, MI, LLC, 632 F. Supp. 2d
7 659, 668 (E.D. Mich. 2009). In determining whether an employer's conduct constitutes
8 more than ministerial aid, the NLRB examines whether "the preparation, circulation, and
9 signing of the petition constituted the free and uncoerced act of the employees
10 concerned." Eastern States Optical Co., Inc., 275 NLRB at 372 (quoting KONO-TV-
11 Mission Telecasting, 162 NLRB 1005 (1967)). Whether an employer's conduct was
12 actually coercive is immaterial, if the conduct would have a reasonable tendency in the
13 totality of the circumstances to intimidate. NLRB v. Transpersonnel, Inc., 349 F.3d 175,
14 180 (4th Cir. 2003).

15 In limited circumstances, employers may provide employees accurate, factual
16 decertification information, including sample language. Bridgestone/Firestone Inc., 335
17 NLRB 941, 942 (2001); Amer-Cal Industries, 274 NLRB 1046, 1051 (1985). Employees
18 must independently decide to decertify a union, seek the employer's advice, and
19 request decertification information. Process Supply, 300 NLRB 756, 758 (1990); Amer-
20 Cal Industries, 274 NLRB at 1051. An employer may not encourage or suggest that an
21 employee file a decertification petition. Ernst Home Centers Inc., 308 NLRB 848
22 (1992). The decision whether or not to decertify a union and the responsibility to
23 prepare and file a decertification petition belongs solely to the employees. Harding

1 Glass Co., 316 NLRB 985, 991 (1995). Threats or benefits to secure support for
2 decertification may not accompany the information that the employer provides to an
3 inquiring employee. Armored Transport, Inc., 339 NLRB 374, 377 (2003); Terminix-
4 International Co., 315 NLRB 1283, 1287-1288 (1995); Lee Lumber and Building
5 Material Corp., 306 NLRB 408, 409 (1992).

6 Other than to provide general information about the decertification process in
7 response to an unsolicited inquiry, an employer has no legitimate role to instigate or
8 facilitate decertification. Harding Glass Co., 316 NLRB at 991. An employer's
9 assistance is unlawful where the employees would reasonably believe that the employer
10 is sponsoring or instigating the petition. Process Supply, 300 NLRB at 758. Therefore,
11 an employer may not provide concrete aid in circulating a petition or acting as a go-
12 between in the furtherance of the decertification effort. Vic Koenig Chevrolet, 321 NLRB
13 1255, 1260 (1996), enforcement denied in part, Vic Koenig Chevrolet Inc. v. NLRB, 126
14 F.3d 947 (7th Cir. 1997).

15 Express appeals by management to decertify, or management involvement in
16 circulating a petition, are not essential to a finding that an employer effectively solicited
17 decertification. Armored Transport, Inc., 339 NLRB at 378; Wire Products
18 Manufacturing Corporation, 326 NLRB 625, 626 (1998). It suffices that an employer's
19 communications to employees regarding a decertification petition, when viewed in the
20 context of the relevant circumstances, reasonably communicate that employees will fare
21 better with respect to employment opportunities and security if they act in accordance
22 with the employer's desire to get rid of the union. Wire Products Manufacturing
23 Corporation, 326 NLRB at 626.

1 May 20, 2010 Letter

2 The first issue for consideration is whether the Employer's May 20, 2010 letter
3 encouraged, promoted, and provided assistance in the initiation, signing or filing of
4 Sanford's July 9, 2010 decertification petition. The Union argues that the Employer's
5 May 20, 2010 letter exceeds the bounds of ministerial aid because the Employer: (1)
6 sought the advice of counsel after Sanford asked representation questions; (2) provided
7 a detailed legal blueprint tailor-made for Sanford and her bargaining unit; (3) included in
8 the letter the Unit C description, certification date, and the percentage of unit members'
9 signatures required to decertify; and (4) included a sample petition and legal guidance
10 on the timing for filing. The Union maintains that by such actions, the Employer
11 conveyed the message that it supported employee efforts to decertify. The Union also
12 notes the "close nexus in time and substance" between the May 20 letter and Sanford's
13 July 9, 2010 decertification petition filing.

14 The Employer insists that its May 26, 2010 letter to Sanford is permissible
15 pursuant to NLRB guidelines and does not violate Section 10(a)(1). The Employer
16 argues that it is not subject to a gag rule, is not required to remain silent on the subject
17 of unionization, and has a right to non-coercively communicate with employees and
18 provide factual answers to questions. The Employer maintains that its May 26, 2010
19 letter was not coercive because it expressly stated that it would not interfere with the
20 rights of employees to engage in collective activity. The Employer argues that in Amer-
21 Cal Industries, 274 NLRB 1046 (1985), the NLRB found that an employer acted lawfully
22 in providing blank decertification petitions even when it did not tell employees that it had
23 no position on decertification.

1 The Employer further contends that Abrashkin's neutral conduct when Sanford
2 raised the decertification issue at the department meeting on the unidentified date in
3 2010, and the fact that Abrashkin merely provided factual decertification information to
4 Sanford, is strong evidence of its lawful conduct. Moreover, the Employer emphasizes
5 that the May 20, 2010 letter repeatedly states that the Employer has no position
6 regarding Sanford's request and that it would avoid interfering with employees' rights.
7 The Employer notes that in Lee Lumber and Building Material Corp., 306 NLRB 408,
8 410 (1992), the NLRB found that the employer acted lawfully although it provided
9 decertification information to a group of employees at a meeting. The Employer argues
10 that its conduct in this case was much less likely to interfere with employee rights than
11 the employer's conduct in Lee Lumber.

12 I find that the Employer's May 20, 2010 letter constitutes lawful ministerial aid.
13 First, the evidence demonstrates that Sanford independently decided to decertify the
14 union, sought the employer's advice, and requested decertification information. The
15 parties stipulated that during a department meeting on an unidentified date in 2010,
16 Sanford asked Abrashkin what she could do if she disagreed that she should become a
17 member of the Union. Therefore, Sanford, not the Employer, first raised the issue of
18 removing the Union as the bargaining representative. The Employer provided
19 decertification information to her only in response to Sanford's request. There is no
20 evidence that the Employer induced or influenced Sanford's opposition to the Union or
21 her desire to get out of the Union. See Bridgestone/Firestone Inc., 335 NLRB 941
22 (2001) (finding only lawful ministerial aid where there was no evidence that the

1 employer induced or influenced the employee's opposition to the union or his desire to
2 get out of the union).

3 Second, the Employer's May 20, 2010 letter to Sanford contains accurate, factual
4 decertification information without threats or benefits. The NLRB has held that providing
5 accurate information upon request of an employee, even for sample language, does not
6 constitute conduct that would tend to coerce or intimidate. See Bridgestone/Firestone
7 Inc., 335 NLRB at 942 (determining that the employer provided only lawful ministerial
8 aid in drafting a decertification petition where, in a context free of coercion, an employee
9 initiated contact and asked if there was any way he could get out of the union). In
10 addition to providing accurate, factual decertification information without threats or
11 benefits, the Employer expressly states in the May 20, 2010 letter that it cannot interfere
12 in employees' rights to engage in collective bargaining or assist Sanford in removing the
13 Union, and suggests that she contact the Division.

14 I reject the Union's argument that the Employer provided more than ministerial
15 aid by seeking legal advice and providing Sanford with the unit description, certification
16 date, percentage of signatures required, sample petition and guidance on timely filing.
17 In Eastern States Optical, 275 NLRB 371 (1985), the employer's attorney either dictated
18 the decertification petition or affirmed the petition's wording and provided the unit
19 description, names, and the number of signatures necessary for decertification. In
20 finding that this employer conduct did not rise to the level of unlawful assistance, the
21 NLRB explained that merely providing readily available factual information did not
22 encourage decertification. Id. at 372. Likewise, in Lee Lumber and Building Material
23 Corp., 306 NLRB 408 (1992), the NLRB found that the employer provided mere

1 ministerial aid despite volunteering the information that bargaining unit members
2 needed to file quickly due to the timing of the open period. Finally, in
3 Bridgestone/Firestone, 337 NLRB 941 (2001) the NLRB found that the employer
4 provided only lawful, ministerial aid by drafting a decertification petition for an employee
5 who asked if there was any way he could get out of the union. Therefore, I find the
6 Employer's conduct in providing Sanford with the unit description, certification date,
7 percentage of signatures required, sample petition and guidance on timely filing lawful.

8 Finally, I am unpersuaded by the Union's argument regarding the "close nexus in
9 time and substance" between the Employer's May 20, 2010 letter and Sanford's filing of
10 the decertification petition July 9, 2010. In Ernst Home Centers, 308 NLRB 848 (1992)
11 the union argued that the petition would not have been filed but for the employer's
12 suggestion that the employee file a decertification petition. However, the NLRB
13 disagreed, concluding that, although the employer provided decertification language,
14 the evidence did not indicate who suggested or encouraged the employee to file the
15 decertification petition. Id. The NLRB found that the employer merely replied to the
16 employee's request for petition language and that such conduct, without more, does not
17 constitute a violation. Id. Moreover, the NLRB has held that otherwise lawful
18 statements do not become unlawful merely because they have the effect (intended or
19 otherwise) of causing employees to abandon their support for a union. Lee Lumber and
20 Building Material Corp., 306 NLRB at 410. Therefore, I do not find that the "close nexus
21 in time and substance" between the Employer's letter and the decertification petition
22 filing to be a significant fact.

1 For all of the reasons stated above, I find that the Employer's May 20, 2010 letter
2 to Sanford constituted mere ministerial aid issued in a situational context free of
3 coercive conduct. Although, for the reasons discussed below I find that the Employer's
4 June 2010 Thompson discipline was unlawful, the Employer sent the letter to Sanford in
5 May, before the Employer disciplined Thompson. Moreover, lawful, unambiguous
6 statements, such as those in the Employer's May 2010 letter, are not rendered unlawful
7 because of other unlawful actions. Children's Center For Behavioral Development, 347
8 NLRB 35, 36 (2006); Lee Lumber and Building Material Corp., 306 NLRB at 411 n.12.
9 Therefore, the Employer's May 20, 2010 letter did not encourage, promote and provide
10 assistance in the initiation, signing or filing of the July 9, 2010 decertification petition,
11 thereby interfering with, restraining and coercing its employees in the exercise of their
12 Section 2 rights.

13 June 24, 2010 Discipline

14 The second issue for consideration is whether the Employer's June 24, 2010
15 verbal warning to Thompson was unlawful. The Union insists that the subject matter of
16 the conversation between Thompson and Leo was an intra-union matter into which the
17 Employer wrongfully interjected itself in order to advance the decertification effort.
18 According to the Union, the Employer perceived Thompson to be interfering with the
19 decertification effort and, because of its commitment to decertification, disciplined
20 Thompson without the due process applied in prior instances of employee
21 disagreements. The Union concludes that the Employer "sent the message" that it
22 disciplined Thompson because of his decertification conversation with Leo and that the
23 parties' negotiated settlement of Thompson's grievance is irrelevant.

1 The Employer first argues that Thompson's discipline did not arise from protected
2 activity because Thompson called Leo on June 17, 2010, as a friend, expressed
3 disagreement with her circulation of the decertification petition, and told her she was
4 going to be fired. The Employer next argues that it did not target protected activity in a
5 harsh or demeaning way because it expressly stated in writing that it was disciplining
6 Thompson for intimidation, not union activity. The Employer insists that it was
7 compelled to act because Thompson had no supervisory authority to contact Leo and
8 tell her what she could or could not do, and Leo complained of a violation of Employer's
9 intimidation policy. The Employer maintains that the settlement agreement between the
10 parties is evidence that the Union and Thompson acknowledged that Thompson's
11 conduct was wrong. Finally, the Employer argues that the Union and Thompson must
12 be estopped from asserting an unfair labor practice charge because it signed a
13 negotiated settlement agreement of Thompson's discipline without reserving its rights.

14 As a threshold matter, I reject the Employer's argument that the Union should be
15 estopped from asserting an unfair labor practice charge because it signed a negotiated
16 settlement agreement of Thompson's discipline without reserving its rights. There is no
17 evidence that the Employer secured in the settlement agreement a waiver of all rights.
18 Therefore, I do not find that the Union waived its right to pursue the matter as an unfair
19 labor practice.

20 I also disagree with the Employer's argument that Thompson's June 17, 2010
21 telephone call to Leo as a friend, as opposed to as Union President, did not constitute
22 protected activity. An employee's activity is protected when it is directed at perceived
23 threats to the union's existence. City of Lawrence, 15 MLC 1162, 1166 (1988). Here,

1 the impetus for, and substance of, Thompson's conversation with Leo was her collection
2 of signatures for a decertification petition, a threat to the Union's existence. Therefore,
3 regardless of whether Thompson called Leo as a friend or Union President, his
4 telephone call to Leo constitutes protected activity.

5 There is also no evidence in the hearing record that Thompson's conduct on
6 June 17, 2010 removed his actions from the protection of the Law. Activity protected by
7 Section 2 of the Law can lose its protected status if it is unlawful, violent, in breach of
8 contract in certain circumstances, disruptive or indefensibly disloyal to the employer.
9 Town of Bolton, 32 MLC 13, 18 (2005). For instance, conduct that is physically
10 intimidating, egregious or disruptive of the employer's business is beyond the pale of
11 protection. Id. Thompson's conduct on June 17, 2010 was none of the above. Neither
12 Leo's complaint nor the Union's settlement agreement reducing the verbal warning to a
13 counseling letter supports the conclusion that Thompson's conduct was beyond the pale
14 of protection. Leo's complaint to the Employer was a self-serving report, uninvestigated
15 by the Employer. Additionally, neither the Union nor Thompson admitted wrongdoing in
16 negotiating to reduce the verbal warning to a counseling letter. In fact, the Employer
17 acknowledges in its August 12, 2010 counseling memorandum that Thompson
18 "emphatically" denied that he intentionally intimidated Leo. Also, Thompson merely
19 states in his letter to Leo that he was sorry she misinterpreted him. Accordingly, I do
20 not find that Thompson's conduct on June 17, 2010 was beyond the pale of protection.

21 Thus, the question is whether the Employer's discipline interfered with employee
22 rights under Section 2 of the Law. I find that it did. An employee who is disciplined for
23 alleged misconduct ancillary to or in the course of protected activity, but who in fact is

1 innocent of the misconduct, suffers a violation of Section 10(a)(1) of the Law regardless
2 of the employer's motive or good faith mistake of fact. Whitman-Hanson Regional
3 School Committee, 9 MLC 1615, 1618 (1983). Here, the hearing revealed the following
4 information. Leo spent ten to fifteen minutes on the telephone with Thompson, a friend
5 of her husband. Thompson advised Leo not to circulate the decertification petition
6 during work hours because she could get in trouble and urged her to speak with her
7 husband. Leo sought advice from Thompson about the decertification process,
8 including the names of other bargaining unit members. He declined to share that
9 information and the conversation ended simply when Leo said goodbye to Thompson.
10 Leo did not find Thompson's tone of voice intimidating, but merely "persistent." Despite
11 the alleged nature of the incident, Leo only made a report after coincidentally seeing
12 Booth and Contois while she was picking up the mail in the administration building. She
13 testified that she was "shocked, angry and mad" at Thompson and wanted Booth,
14 Contois, and Hardy to tell her whether she did anything wrong. In fact, the basis of
15 Leo's intimidation allegation against Thompson was that "he was pushing the Union."
16 Nevertheless, the Employer issued the verbal warning to Thompson for intimidation
17 based solely on Leo's allegations, without any further investigation and without following
18 its prior practice regarding such allegations.¹¹ Therefore, the Employer made no
19 attempt to determine whether Thompson was in fact guilty of the intimidation allegation.
20 Thus, Thompson must be seen as blameless in this matter.

¹¹ The Employer failed to follow its prior practice of investigating such allegations with both parties and referring them to mediation. Thus, the Employer's failure to interview Thompson prior to issuing the verbal warning is evidence of unlawful motive, although, motive is not an element of a Section 10(a)(1) analysis. Town of Bolton, 32 MLC at 19.

1 I also note that the Employer's June 24, 2010 disciplinary letter links the alleged
2 misconduct to Thompson's protected activity. Indeed, the Employer's warning
3 describes the phone call between Thompson and Leo as "a dispute among employees
4 concerning unionization." Because the Employer disciplined Thompson based upon an
5 unfounded allegation that he was engaged in misconduct ancillary to his protected
6 activity, I conclude that the discipline would tend to interfere with, restrain or coerce
7 other employees in decertification related activities. See Whitman-Hanson Regional
8 School Committee, 9 MLC at 1620 (finding that discipline based on an erroneous
9 assumption tended to interfere with employees participation in grievance and arbitration
10 proceedings). Where, as here, an unfair labor practice is directly related to a
11 decertification effort, the NLRB does not make a specific causation finding. SFO Good-
12 Nite Inn, 352 NLRB 268, 271 (2008). Therefore, I conclude that the Employer's June
13 2010 discipline of Thompson provided unlawful assistance in the filing of the July 2010
14 decertification petition.

15 CONCLUSION

16 Based on the record, and for the reasons stated above, I conclude that the
17 Employer's May 20, 2010 letter did not violate the Law in the manner alleged. However,
18 I find that the Employer's June 24, 2010 verbal warning to Thompson unlawfully
19 assisted in the July 9, 2010 decertification filing and violated Section 10(a)(1) of the Law
20 as alleged in the complaint.

21 REMEDY

22 Having found that the Employer has engaged in certain unfair labor practices, I
23 find that it must be ordered to cease and desist and to take certain affirmative action,

1 including the posting of appropriate notices, designed to effectuate the policies of the
2 Law.

3 ORDER

4 WHEREFORE, based upon the foregoing, it is hereby ordered that the Springfield
5 Housing Authority shall:

6 1. Cease and desist from:
7

- 8 a) Disciplining employees, in particular David Thompson, for
9 discussing intra-union affairs based upon unfounded allegations of
10 misconduct connected with such discussions thereby providing
11 assistance to employees in the circulation of a petition to remove
12 the Union as their bargaining representative;
- 13
14 b) Otherwise interfering with, restraining or coercing employees in the
15 exercise of their rights guaranteed under the Law.

16
17 2. Take the following affirmative action that will effectuate the purposes of the Law:
18

- 19 a) Remove the June 24, 2010 memorandum of Thompson's verbal
20 warning and the August 12, 2010 counseling memorandum from
21 Thompson's personnel file and cease and desist from providing
22 assistance to employees in the circulation of a petition to remove
23 the Union as their bargaining representative.
- 24
25 b) Post immediately in all conspicuous places where members of the Union's
26 bargaining unit usually congregate and where notices to these employees
27 are usually posted, including electronically, if the Employer customarily
28 communicates to its employees via intranet or email, and maintain for a
29 period of thirty (30) consecutive days thereafter, signed copies of the
30 attached Notice to Employees.
- 31
32 c) Notify the Department in writing of the steps taken to comply with this
33 decision within ten days of receipt of the decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KATHLEEN GOODBERLET, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF A HEARING OFFICER OF
THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A hearing officer of the Massachusetts Department of Labor Relations has held that the Springfield Housing Authority has violated Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by issuing a June 24, 2010 verbal warning to Union President David Thompson that encouraged, promoted and provided assistance in the initiation, signing or filing of a July 9, 2010 decertification petition, thereby interfering with, restraining and coercing its employees in the exercise of their Section 2 rights.

The Springfield Housing Authority posts this Notice to Employees in compliance with the hearing officer's order.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

- to engage in self-organization; to form, join or assist any union;
- to bargain collectively through representatives of their own choosing;
- to act together for the purpose of collective bargaining or other mutual aid or protection;
- and
- to refrain from all of the above.

WE WILL NOT unlawfully discipline employees, in particular David Thompson, for discussing intra-union affairs based upon unfounded allegations of misconduct connected with such discussions thereby providing assistance to employees in the circulation of a petition to remove the Union as their bargaining representative.

WE WILL NOT otherwise interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law.

WE WILL take the following affirmative action to effectuate the purposes of the Law:

- Remove the June 24, 2010 memorandum of Thompson's verbal warning and the August 12, 2010 counseling memorandum from Thompson's personnel file.
- Cease and desist from providing assistance to employees in the circulation of a petition to remove the Union as their bargaining representative.

SPRINGFIELD HOUSING AUTHORITY

DATE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).