COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
CITY OF WORCESTER	*	Case No. MUP-12-2131
and	*	Date Issued: December 16, 2014
THOMAS C. DUFFY	*	

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

William R. Bagley Jr., Esq.	-	Representing the City of Worcester
Peter J. Duffy, Esq.	-	Representing Thomas C. Duffy

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the City of Worcester (City) violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by retaliating against Thomas C. Duffy (Duffy) for engaging in concerted, protected activity. I find that the City violated the Law in the manner alleged.

STATEMENT OF THE CASE

On August 7, 2012, Thomas C. Duffy (Duffy or the Charging Party) filed a charge with the Department of Labor Relations (DLR), alleging that the City of Worcester (City) had engaged in prohibited practices within the meaning of Sections 10(a)(4) and (1) of Chapter 150E of the Massachusetts General Laws (the Law). A DLR hearing officer

conducted an investigation on September 26, 2012.[1] On October 9, 2012, the investigator issued a complaint alleging that the City violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by retaliating against Duffy for engaging in concerted, protected activity when it suspended Duffy for two days. The City filed an answer to the complaint on October 30, 2012.

I conducted a hearing on November 7, 2013 and November 14, 2013. Both parties had an opportunity to be heard, to examine witnesses and to introduce evidence. The parties submitted their post-hearing briefs on January 6, 2014. Upon review of the entire record, including my observation of the demeanor of the witnesses, I make the following findings of fact and render the following decision.

Stipulated Facts

1. The City is a public employer within the meaning of Section 1 of the Law.

2. The New England Police Benevolent Association, Local 911 ("Association") is an employee organization within the meaning of Section 1 of the Law.

3. The Association is the exclusive bargaining representative for patrol officers employed by the City.

4. Duffy is a police officer and a member of the bargaining unit.

5. On December 24, 2011, the City recorded Duffy's absence as a sick day.

6. On a date after December 24, 2011, Duffy protested to the Association that he had been denied the right to take approved time off on December 24, 2011, and his time off had been improperly recorded as sick time.

7. On an unidentified date after December 24, 2011, the Association grieved the matters on behalf of Duffy.

8. In January of 2012, the Worcester Police Department ("Department") and the Association settled the grievance.

[1] At the investigation, Duffy moved to amend the charge to allege a violation of Sections 10(a)(3) and (1) of the Law and withdrew all other allegations.

9. Pursuant to the settlement of the grievance, the City credited Duffy with a wellness day on December 24, 2011 rather than a sick day.

10. On February 10, 2012, the Department suspended Duffy for two shifts.

FINDINGS OF FACT[2]

Background

Duffy has worked as a patrol officer in the City's Police Department for approximately twenty-five years. Because of Duffy's length of service, he earns twenty-eight days of paid leave per year, which are referred to as furlough days,[3] and is eligible to earn two additional days of paid leave, which are referred to as wellness days,[4] if he satisfies certain physical fitness requirements. The City credits police officers with their furlough days and wellness days on January 1st of each year. Shortly thereafter, police officers submit their requests to use furlough days for the entire calendar year. On or about April of each year, the City informs the officers whether their leave requests have been approved. The City's Work Schedule Policy provides that no more than ten percent of the employees on a particular shift in each division of the Police Department may take furlough or wellness days at the same time. If more than ten percent of the officers on a shift request to take furlough or wellness days on a certain date, the City

[2] The DLR's jurisdiction in this matter is uncontested.

[3] Furlough days are similar to vacation days.

[4] Wellness days are similar to floating leave days.

approves the requests based upon seniority.[5] Each division's sergeants and lieutenants maintain a hardbound, handwritten log of approved leave requests for their shifts, which is referred to as that division's Red Book.

As of January 2011, Duffy worked in the operations division from 11 PM to 7 AM, the so-called last-half shift, and was the most senior patrol officer on that shift. On or about that time, Duffy submitted a request to take time off on certain dates in 2011. The Operations Division subsequently approved his requests. On or about August 11, 2011, the City temporarily reassigned Duffy from the Operations Division to the Service Division[6] on the last-half shift and placed him on restricted duty[7] in the cell room.[8] After Duffy's reassignment, he did not inform his new supervisors in the Service Division about those upcoming dates for which the Operations Division previously approved him to use time off.[9] After his transfer, he made a request to the Service Division to take a

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[5] Police officers can request to use wellness at different times throughout the year. However, employee requests to use furlough days supersede requests to use wellness days, when ten percent of the police officers on a shift already have requested to take time off.

[6] The Service Division oversees prisoners and their assets, which includes operating the cell room.

[7] The reasons for Duffy's August 11, 2011 reassignment are not pertinent to the present case.

[8] Police Chief Gary Gemme (Chief Gemme) issued an order that required Duffy to remain in the cell room during his tour of duty.

[9] Duffy testified that there was no written policy that a police officer who is involuntarily transferred must notify his superiors in his new division of requests to use furlough days, which his prior division previously approved. His commander in the Service Division Deputy Chief Edward McGinn (McGinn) testified that a longstanding, unwritten practice existed whereby an involuntarily transferred police officer would give such notification to his new superiors. However, I need not reconcile the testimony of Duffy and McGinn because it is not inconsistent as McGinn confirmed on cross-examination that no written policy existed.

furlough day in October 2011, which was granted, and the approved request was recorded in the Service Division's Red Book.

November 23, 2011

On November 23, 2011, the evening before Thanksgiving, Duffy did not report for duty even though he was listed on the roster as scheduled to work. When Sergeant Ronald LaPointe (LaPointe), the supervisor on the shift, became aware that Duffy had not reported to work and that the shift was short-staffed,[10] he checked the Service Division's Red Book. LaPointe observed that Duffy was not listed as being on paid leave. LaPointe then directed a police officer named Dowd, who was working in the Service Division's office,[11] to contact Duffy. Dowd telephoned Duffy and informed him that he was on the roster to work that evening. Duffy responded that he had taken a furlough day and that his approved request for leave was listed in the Operations Division Red Book. Duffy also urged Dowd to go upstairs and check out the Operations Division Red Book.[12]

Dowd then reported his conversation with Duffy to LaPointe. LaPointe subsequently reviewed the Operations Division red book and verified that Duffy was listed as being approved to take a furlough day on November 23rd. LaPointe did not require Duffy to report to work on November 23, 2011 and listed him as on a furlough

[10] The cell room is on a lower level in the Police Station than the Service Division's office where LaPointe works.

[11] The Service Division's office is upstairs from the cell room.

[12] The Operations Division office is on a floor above the Service Division office.

day in the Service Division red book. Subsequent to November 23, 2011, LaPointe informed Duffy that he did not want "any more surprises."

December 24, 2011

On December 24, 2011, Duffy also was listed on the roster as scheduled to work.[13] When he had not reported to work by 11:30 PM, his shift commander Lieutenant James Grady (Grady) called him. Grady informed Duffy that he was on the roster to work that evening and asked what Duffy was doing. Duffy replied that he was having a glass of wine and enjoying his family. Grady then inquired why Duffy had not shown up for work. Duffy responded that he had asked for the day off back in January 2011. Grady stated that Duffy's approved leave for December 24th was not listed in the Service Division Red Book but that Grady would check the Operations Division Red Book. The call then ended without Grady ordering Duffy to report to work. After the call ended, Grady checked the Service Division Red Book, which listed Duffy as being approved for leave on December 24, and the Police's Department computerized personnel records, which showed Duffy as having a wellness day but no furlough days left to use in 2011. Grady then recorded Duffy's absence as a sick day.

Thereafter, Grady informed LaPointe that Duffy had failed to show up for work on December 24th. LaPointe then told Grady that Duffy had failed to appear for work on November 23rd. LaPointe also related the conversation that he had with Duffy in which he informed Duffy that he did not want any more surprises.

[13] Duffy had worked earlier that week and admittedly did not check the roster to see whether he was scheduled to work on December 24, 2011.

On December 26, 2011, when Duffy returned to work, he approached Grady and asked why Grady had charged him sick leave for December 24th. Duffy expressed the concern that his eligibility to receive holiday pay[14] for Christmas might be jeopardized if he were designated as having called in sick on December 24th. Duffy also noted that he had other leave time to use. Grady responded that he would not change the designation. Duffy then approached Timothy Reynolds, the third-shift Union steward, and asked him to initiate a grievance over the matter.[15]

Also, on December 26, 2011, Grady notified Deputy Chief Edward McGinn (McGinn), who oversees the Service Division, that Duffy had failed to report to work on December 24, 2011 and about his phone conversation with Duffy.[16] Grady also told McGinn that Duffy had failed to report to work on November 23, 2011 and related what LaPointe had told him about his conversation with McGinn. Several days later, McGinn informed Chief Gary Gemme (Chief Gemme) that he was going to launch an

[14] Police officers earn a special higher rate of pay for Christmas and certain other holidays.

[15] Step 1 of the parties' contractual grievance procedure provides that Step 1 is an informal process where the aggrieved employee raises his grievance orally with his immediate supervisor and the immediate supervisor makes an oral disposition of the grievance. However, Chief Gemme indicated that since before he became police chief, including the periods when he was president of both the patrol officers' union and the superior officers' union, the unions presented grievances in the first instance to the then police chief(s) rather to an aggrieved employee's immediate supervisor. I need not reconcile the differences between the contractual language and Chief Gemme's testimony because it is not material to the outcome of the case.

[16] Grady usually did not bring up personnel matters with McGinn.

investigation[17] into the matters that Grady had discussed with McGinn concerning Duffy.

Shortly thereafter, incoming Union president Brian Halloran notified Grady about Duffy's grievance. Within a week of December 26, 2011, Grady informed McGinn[18] that Duffy had grieved Grady charging him sick leave for December 24th.[19] Thereafter, McGinn requested that Grady and LaPointe submit reports regarding the events of November 23, 2011 and December 24, 2011.

On January 10, 2012, the Union filed a written grievance on behalf of Duffy that summarized the grievance as:

> Officer Duffy was not given an opportunity to utilize one of his wellness days prior to the end the calendar year. This resulted in Officer Duffy's wellness day being "lost" in accordance to the "Use it or lose it" policy. Officer Duffy had been scheduled in the "red book" in operations for the day in question prior to being transferred to service division.

The Union also requested the following remedy:

> Officer Duffy should have his wellness day rolled into the current calendar year (2012) where he may utilize the time in accordance with the "Use it or lose it" policy as well as his division's time off structure.[20]

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[17] The Police Department conducts two types of investigations into alleged employee misconduct. The Bureau of Professional Standards investigates major incidents, while unit commanders investigate more minor incidents (commander level investigations). Because the service division does not have a captain in charge, McGinn conducts its commander level investigations.

[18] Grady and McGinn typically spoke on a weekly basis.

[19] Grady testified that he informed McGinn about Duffy's grievance during the same conversation that he informed McGinn about Duffy's December 24, 2011 absence. However, McGinn testified that he had two conversations with Grady approximately one week apart. The first conversation concerned Duffy's December 24, 2011 absence and the second conversation concerned Duffy's grievance. I credit McGinn's testimony on this point because he testified with greater clarity and in more specific detail about the matter than Grady did.

[20] Chief Gemme received a copy of Duffy's grievance on January 10, 2012.

When Chief Gemme received a copy of Duffy's grievance, he determined that charging Duffy for sick leave to cover his absence on December 24, 2011 was inappropriate because Duffy was not sick on that date. Chief Gemme ordered payroll to credit Duffy with a sick day and to charge him for a wellness day on December 24th. Chief Gemme subsequently notified the Union, and the City's payroll office made the change on January 13, 2012. Duffy did not become aware of the change until several months later.[21]

Reports of Grady, LaPointe and McGinn

On January 15, 2012, Grady submitted the following report to McGinn:[22]

> On 24 December 11 Officer Thomas Duffy was listed as working on the roster in the cell, 2300-0700HRS. As of 2320HRS on that date he had not reported for duty. I called his phone. He answered, and I asked how are you doing. He said, I'm sitting here having a glass of wine enjoying my family. I told him you are on the roster to work tonight. He said no I'm on furlough. I said you are not in the book. He said he was in the book in Operations and he has taken the day the last ten years. I hung up the phone. I checked the computer. He had no furlough time left. He had one wellness day left. I checked the red book and there were two people in the book already. That is the maximum allowed. So I put him down sick.
>
> The next day when he reported for duty he asked why he was put down sick. I told him he had no furlough time and the red book was full.
>
> He was told previously on November 23, 2011 by Sgt. LaPointe that if he

[21] The parties introduced as Joint Exhibit #4 a snapshot of a computer screen from the City's administrative timekeeping system, which showed that the City restored Duffy's sick time on January 13, 2012 and which contained the surname of the City employee who made the change. However, Duffy asserted that the City had not actually credited him with a sick day on January 13, 2012 but that at a later date, the City altered its computer files to reflect that change. However, the snapshot of the computer screen is consistent with Chief Gemme's testimony that he ordered the change made on or about January 13, 2012. Thus, I decline to credit Duffy's assertion on this point.

[22] The report bore the subject reference of "P.O. Duffy, Wellness Day"

> had any more time in the Operations Book to notify us so we would not have any surprises at 2300HRS.[23]
>
> On December 24, 2011 he was not listed for any day off in the red book. Officer Duffy was not denied his wellness day for 2011. He never asked to take the day. He could have taken the wellness day on Wednesday December 28, 2011, Thursday, December 29, 2011 or Friday, December 30, 2011. There was only one person in the red book on those days. Duffy furlough October 10, 2011.

On January 23, 2012, LaPointe submitted a report to Grady regarding Duffy.[24]

LaPointe's January 23, 2012 report stated:

> The undersigned Sergeant recalls that on one occasion I came in to work to find that Officer Duffy had not shown up for a scheduled day of work. There was no notation in our "red" book of his having a scheduled day off. Upon contacting Officer Duffy he informed me that he had scheduled the day off in Operations prior to being transferred to Services. The undersigned gave Duffy the scheduled furlough day, but informed him that we needed to know ahead of time of any scheduled days so as to preclude any last minute surprises.[25] The undersigned believes that this is the November 23 furlough day that is listed in our morning reports.

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[23] I have reprinted Grady's report above, because this is the report that he submitted to the Employer. However, Grady's description of LaPointe's conversation with Duffy varies somewhat from LaPointe's testimony about that conversation. Earlier in the findings on page 6, I credited LaPointe's testimony as to the nature of the conversation because Grady was not actually present when LaPointe made the statements but instead was stating his second-hand understanding of the conversation.

[24] The subject bore the reference "P.O. Duffy, Furlough from Ops".

[25] I have reprinted LaPointe's report above, because this is the report that he submitted to the Employer. LaPointe's description of his statement in the January 23, 2012 report varies somewhat from his testimony at hearing. During cross-examination, LaPointe repeatedly described his "word for word" comments to Duffy as "I don't want any more surprises." In the findings, I have credited LaPointe's testimony on this point, because it was made under oath and subject to questioning from both the Charging Party and the Employer.

On February 8, 2012, McGinn submitted a report[26] to Chief Gemme regarding Duffy.[27] In the February 8, 2012 report, McGinn described the nature of the complaint against Duffy as:

> On Monday 26 December 2011, this reporting Deputy was notified by Lt. James Grady, Unit Commander of the Service Division LH, of an issue involving P.O. Thomas C. Duffy and that officer's failure to report to work on the night of 24 December 2011; Christmas Eve.
>
> Lt. Grady further advised me that Officer Duffy failed to adhere to the directives of his supervisors to properly notify his current supervisors of any time off requests he may have submitted to his commanders when he worked in the Operations Division LH.
>
> A perfunctory review of the allegations suggests that Officer Thomas C. Duffy may have violated the following Worcester Police Department's Rules and Regulations:
>
> 1516.1 Neglect of Duty
> 1515.1 Insubordination

McGinn made certain findings in his report and then completed an analysis of the complaint against Duffy. McGinn in his analysis stated:

> Officer Duffy's contention that he was validly on a furlough day off on December 24th is summarily rejected. Despite being told to transfer his time from his prior unit, he failed to do so; at least in the case of this December 24th. Moreover, there is no policy, procedure, rule regulation or departmental custom that would assure that an officer that is transferred from one unit to another is guaranteed specific benefit days off.
>
> According to the report of Lt. James Grady, Officer Duffy was directed at least twice to inform his current supervisors of any days that he had

[26] The subject of the report bore the heading Unit Investigation: PO Thomas C. Duffy.

[27] At that time, McGinn and Chief Gemme had a brief conversation in which McGinn informed the Police Chief that he was submitting the report.

requested off to Operations Division supervisors so as to avoid any "11:00 PM surprises."[28]

It seems that this directive was offered to Officer Duffy as a courtesy as the commanders and supervisors of one unit are not bound by a granting of time off given by officials of another unit. In practice, if an officer has already been granted a day off in a past unit, efforts will be made to accommodate him provided that the maximum day off number has not been reached. In this matter, this is not the case as Officer Duffy had no furlough days remaining and even if he did, he never informed his current officials of any such days having been logged.

Duffy's Suspension

On February 10, 2012, Chief Gemme issued Duffy a two-day suspension.[29] The February 10, 2012 suspension letter stated in pertinent part:

> This letter is being served to advise you that you are being suspended without pay for your failure to report to work on December 24, 2011, as stated below:
>
> You were scheduled for a tour of duty on December 24, 2011 and when contacted by Lieutenant James Grady via telephone phone that night, you replied to Lieutenant Grady that you were on *"furlough"* [emphasis in original] and that you were, *"home enjoying a glass of wine enjoying your family"*. As a result, Lieutenant Grady subsequently listed you as being sick for December 24th and called in a replacement officer to work your shift on an overtime basis.
>
> In his report to the investigating Deputy, Lt. Grady stated that early on in your reassignment from Operations Last Half to Service Division Last Half, you were directed to notify your supervisors of any time off requests that

[28] McGinn identified LaPointe's comments to Duffy as one instance where a supervisor had directed Duffy to inform his supervisors of any days off that he had requested in the Operations Division. When asked on cross-examination, McGinn could not identify the second supervisor who gave a similar direction to Duffy or exactly when the supervisor issued those directions. Therefore, I decline to find that a second supervisor directed Duffy to inform his supervisors of any days off that he requested in the Operations Division.

[29] Shortly before Chief Gemme issued Duffy the two-day suspension, he informed McGinn about the discipline that he intended to impose. The Police Chief also discussed with McGinn the recommendations that McGinn had made in the February 8, 2012 report.

> you had submitted to your supervisors from Operations Last Half, however, you failed to do so.
>
> The fact that you were at work the preceding three (3) days, would have had access to all time records as well as the automated Administrative Time System, clearly demonstrate that you knew or should have known that you were scheduled to be working on December 24, 2011. Furthermore, on December 24, 2011, you had no furlough days remaining for calendar year 2011. Lastly, there were two Service Division Last Half officers, the maximum permitted to be off, already scheduled on days off on December 24, 2011.
>
> As a result of the investigation I have determined that you have violated the following two Rules and Regulations of the Worcester Police Department:
>
> **1515.1 Insubordination** [Emphasis in the Original]: Deliberately failing or refusing to obey a lawfully issued order.
>
> **15616.1 Neglect of Duty**: Being absent from assigned duty without leave or failing to take suitable and/or required police action when a crime, public disorder or other incident requires police attention.
>
> Accordingly, you are hereby suspended without pay for a period of two days, Monday February 13, 2012 and Tuesday, February 14, 2012.[30] You may request a hearing before the City Manager within forty-eight hours of the receipt of this notice on the question whether there is just cause for this suspension ...[31]

Civil Service Proceedings

Duffy subsequently requested a hearing before the City Manager. On June 14, 2012, the City reduced Duffy's suspension from two days to one day. Duffy then appealed his one-day suspension for neglect of duty to the Civil Service Commission.

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[30] Although the City suspended Duffy for two days, Duffy indicated that he actually lost three days of pay.

[31] Chief Gemme testified at hearing that he suspended Duffy because he failed to report to work on November 23, 2011 as well as on December 24, 2011. He indicated that although he did not reference Duffy's November 23, 2011 absence in the February 10, 2012 suspension letter, McGinn's February 8, 2012 letter report referenced that absence and that the Police Chief relied on that report when he imposed the discipline.

On April 18, 2013, the Civil Service Commission voted to adopt the March 1, 2013 findings and recommended decision (March 1, 2013 decision) of Administrative Magistrate Judithann Burke (Burke), which vacated Duffy's one-day suspension and ordered the City to reimburse Duffy for any lost pay and benefits related to his one-day suspension. The March 1, 2013 decision stated in pertinent part that:

> After a careful review of all the testimony and documents in this case, I have concluded that the Appointing Authority did not have just cause to impose the one-day suspension on the Appellant. The Appointing Authority has not proven by a preponderance of the evidence that the Appellant violated Paragraph 1516.1 of the WPD Rules and Regulations on December 24, 2011.
>
> Rule 1516.1 is labeled "Neglect of Duty" and defines same as being absent from assigned duty without leave. In actuality, after Lt. Grady spoke to the Appellant [Duffy] on December 24, 2011, he put the latter down as "sick." Sick leave is a form of leave in the WPD. Several weeks later, after the Union's filing of the grievance, December 24 was recorded as a "wellness" day. This is also an authorized leave. Under either scenario, sick day or wellness day, the Appellant was granted leave for December 24. Ergo, he was not absent from assigned duty on December 24 without leave.
>
> Next the testimony of all parties was found to be credible with regard to the individual beliefs of each concerning the use of single wellness and furlough days in the various divisions as well as the use of the Red Book. In this case, the Deputy Chief and the superior officers in the SD all believe that it was incumbent upon the Appellant to re-request his desired days off in the SD after the transfer from the OD. At the same time, the Appellant and Lt. Fogarty share the legitimate belief that past practice dictated that the Red Book entries were shared among shift supervisors after transfers and the Appellant did not need to take the initiative.
>
> The fissure in this case appears to be the lack of communication among the parties. Deputy Chief McGinn, Sgt. LaPointe and Lt. Grady all acknowledged that there is no written rule or regulation compelling an officer who is involuntarily transferred to approach the supervisor in his new division and re-request his desired days off. As such, the Appellant's belief that he did not need to do anything further regarding his time off appears reasonable. He had already used furlough days in August, September and October as a member of the SD. On November 23, he was phoned at home, but not ordered into work. He was given a furlough

> day for that time. It is unclear exactly what additional message he may have received concerning future furlough days in the SD in his November 23 conversation with Sgt. LaPointe. As such, there is no evidence that he should have known he was required to work on December 24.
>
> The best remedy in this and similar situations is a clear set of written directives concerning the transfer of furlough and wellness time among divisions in the WPD.[32]

The City subsequently did not appeal the Civil Service Commission ruling and made Duffy whole for his lost wages.

Opinion

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 Reg. Voc. School District v. Labor Relations Commission, 388 Mass. 414 (1982); School Committee of Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327 (1996). To establish a prima facie case of discrimination, a charging party must show that: 1) an employee was engaged in activity protected by Section 2 of the Law; 2) the employer knew of that conduct; 3) the employer took adverse action against the employee; and 4) the employer took the adverse action to discourage the protected activity. Quincy School Committee, 27 MLC 83, 92, MUP-1986 (December 29, 2000); Town of Clinton, 12 MLC 1361, 1365, MUP-5659 (November 9, 1985).

Prima Facie Case

Turning to the first three elements of the prima facie case. Duffy engaged in activity protected by Section 2 of the Law when he requested that the Union file a

[32] At the hearing in this case, McGinn acknowledged that the City had not yet issued a clear set of guidelines concerning the transfer of furlough and wellness time among divisions in the Police Department.

grievance on his behalf in late December 2011, and when the Union subsequently filed a written grievance on his behalf on January 10, 2012. See Boston City Hospital, 11 MLC 1065 (1984). Second, the City was aware of Duffy's grievance because Halloran, the incoming Union president, notified Grady about the grievance and, in turn, Grady notified McGinn about the grievance. Also, Chief Gemme received a copy of the Union's written grievance on or about the date of its submission. Third, Duffy's suspension constitutes adverse action. See Town of Dracut, 25 MLC 131, 133, MUP-1397 (disciplinary actions are examples of adverse action).

Animus

Next, I must consider whether there is evidence of employer animus towards Duffy's protected activity. A charging party may proffer direct or indirect evidence of discrimination in support of its claim. See Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002), aff'd sub nom., Town of Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005). Here, Duffy proffers indirect evidence in support his claim of animus. The burden of proof in indirect evidence cases is set forth in Trustees of Forbes Library v. Labor Relations Commission (Trustees of Forbes Library), 384 Mass. 559 (1981).

Absent direct evidence of unlawful motivation, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001). Circumstantial factors may include; the timing of the adverse action in relation to the protected activity, Town of Somerset, 15 MLC 1523, 1529, MUP-6404 (March 9, 1989); the insubstantiality of the reasons given for the adverse action, Commonwealth

of Massachusetts, 14 MLC 1743, 1749, SUP-3081 (May 19, 1988); and the employer's divergence from longstanding practices. Town of Mashpee, 36 MLC 163, 171, MUP-02-3653 (April 15, 2010). The City argues that because Chief Gemme approved Duffy's grievance in January 2012, his decision to subsequently suspend Duffy could not have been motivated by animus towards Duffy's protected activity.

The facts before me show that Chief Gemme issued a notice of suspension to Duffy within six weeks of Duffy initiating his grievance and within four weeks of his receipt of the written grievance. Chief Gemme in his February 10, 2012 letter states that he suspended Duffy because of his failure to report to work on December 24, 2011. However, at hearing, Chief Gemme contended that he suspended Duffy not only for his December 24, 2011 absence but also for his absence on November 23, 2011, and that both absences were discussed in McGinn's February 8, 2012 report. The close timing of the suspension notice to Duffy's concerted, protected activity coupled with the inconsistent and shifting reasons that the City has given as the basis for Duffy's suspension leads me to conclude that the City's decision to suspend Duffy was motivated by animus towards his protected activity. See Everett Housing Authority, 13 MLC 1001, 1006-1007 (inferring animus when circumstantial evidence such as timing and shifting and inconsistent reasons are present). Thus, Duffy has established the four elements of his prima facie case.

Employer's Burden of Production

Under the three-part Trustees of Forbes Library analysis, once a charging party establishes a prima facie case of retaliation, it is the employer's burden to produce a legitimate, non-discriminatory motive for taking the adverse action. The employer's

burden to produce legitimate, non-discriminatory reasons for taking the adverse action is more than simply stating an unsubstantiated allegation. Commonwealth of Massachusetts, 25 MLC 44, 46, SUP-4128 (August 24, 1998). The employer must state a lawful reason for its decision and produce supporting facts indicating that the proffered reason was actually a motive in the decision. Trustees of Forbes Library, 384 Mass. at 566; Quincy School Committee, 27 MLC at 92; Commonwealth of Massachusetts, 25 MLC at 46.

Collateral Estoppel

Duffy argues that pursuant to the doctrine of collateral estoppel, the City cannot claim any legitimate reasons for Duffy's suspension. Specifically, because the Civil Service Commission ruled that the City did not have just cause to suspend Duffy, the City is precluded from raising the issue of the legitimacy of Duffy's discipline in this forum. The judicial doctrine of collateral estoppel provides that when an issue of fact or law is actually litigated and determined by a final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. Martin v. Ring, 401 Mass. 59, 61 (1987). Duffy points to the Supreme Judicial Court (SJC) decision in Alba v. Raytheon Co. (Alba), 441 Mass. 836 (2004) to support his claim that the doctrine may apply to administrative determinations, such as the Civil Service Commission, as well as judicial decisions. The SJC in the Alba case delineated four factors that must be satisfied before the doctrine applies. The four factors are: 1) was there a final judgment on the merits in the prior adjudication; 2) was the party against whom estoppel is asserted a party (or in privity with a party) against whom the judgment is asserted; 3) was the issue decided in the prior adjudication

identical with the one presented in the action in question; and 4) was the issue decided in the prior adjudication essential to the judgment in the prior adjudication. See Id. at 842. Here, it is undisputed that the decision of the Civil Service Commission became a final order because the City did not appeal the order, and that the parties in both actions are identical. However, a review of the Civil Service Commission decision shows that the issue in that proceeding, which was whether pursuant to M.G.L. c.31, the City had just cause to suspend Duffy, is not the same issue that is the subject of the present case, which is whether the City retaliated against Duffy for engaging in concerted, protected activity in violation of Section 10(a)(3) of the Law. Because the issues are not identical, I decline to find that the City is estopped from claiming that it had legitimate reasons to discipline Duffy.

Turning to the City's proffered reasons for its actions, the City cites Duffy's absence on December 24, 2011 and his failure to advise his supervisors before December 24, 2011 that the Operations Division had granted him the time off as legitimate reasons. It is undisputed that Duffy was absent from work on December 24, 2011. Further, the City presented testimony from LaPointe, one of Duffy's supervisors, to show that when Duffy did not report to work on November 23, 2011, LaPointe subsequently informed him that he did not want any more surprises. McGinn, who as deputy chief conducted the investigation into Duffy's conduct on December 24, 2011 and Chief Gemme, who made the decision to suspend Duffy, relied, in part, on LaPointe's comments to Duffy as grounds for disciplining Duffy. As the City correctly points out, pursuant to Trustees of Forbes Library, the City need not persuade the trier of fact that it was correct in its belief that Duffy had committed transgressions but only

that City had proposed reasons for the discipline and facts to support it. Trustees of Forbes Library, 384 Mass. at 566. Consequently, the City has met its burden or production.

"But For' Analysis

Once an employer produces evidence of a legitimate, non-discriminatory reason for taking the adverse action, the case becomes one of "mixed motives." Under the Trustees of Forbes Library analysis, the Commonwealth Employee Relations Board (CERB) considers whether the employer would have taken the adverse action but for the employee's protected activities. Suffolk County Sheriff's Department, 27 MLC at 160; Quincy School Committee, 27 MLC at 92. The charging party bears the burden of proving that, but for the protected activity, the employer would not have taken the adverse action. Athol-Royalston Regional School Committee, 28 MLC 204, 214, MUP-2279 (January 14, 2002); Town of Athol, 25 MLC 208, 211, MUP-1448 (June 11, 1999).

For the following reasons, I find that the City would not have suspended Duffy for his December 24, 2011 absence if he had not engaged in concerted protected activity. The facts before me show that the City actually condoned Duffy's absence on December 24, 2011 before it cited his absence as grounds for discipline on February 10, 2012. When Grady called Duffy on December 24, 2011 to inquire about his whereabouts and Duffy told him that the Operations Division previously had approved him for leave, Grady did not order Duffy to report to work. Grady subsequently confirmed that Duffy previously had been approved for the time off when he worked in the Operations Division and that Duffy still had a wellness day available to him. Because the Service Division already had two police officers on leave on December 24,

2011, which was the ten-percent of the total shift and the maximum permissible under the Work Schedule Policy, Grady marked Duffy as sick. It was only after Duffy protested the sick leave designation to Grady that Grady notified McGinn about Duffy's absence and about LaPointe's earlier comments to Duffy that he did not want any more surprises.[33]

After Grady complained to McGinn about Duffy's absence on December 24, 2011, McGinn commenced an investigation into Duffy's actions that evening. Within a week, Grady informed McGinn about the grievance and McGinn subsequently requested that Grady and LaPointe submit reports about Duffy's absence on December 24, 2011 and November 23, 2011 respectively.

During the pendency of the investigation, Chief Gemme on or about January 13, 2012 affirmed Duffy's contractual right to use his wellness day on December 24, 2011 when he upheld Duffy's grievance and ordered the payroll department to charge Duffy for a wellness day on December 24th and to credit him with the sick day that he had previously been charged for that date. Thus, Chief Gemme acknowledged the legitimacy of Duffy's actions on December 24th. However, approximately one month later, Chief Gemme cited Duffy's conduct on December 24th as neglect of duty and insubordination and grounds for a two-day suspension.

Additionally, in the February 10, 2012 suspension letter, Chief Gemme claimed that Duffy had committed insubordination by ignoring directives to notify his supervisors

[33] While LaPointe subsequently cautioned Duffy about not wanting any more surprises after Duffy was absent on November 23, 2011, he also condoned Duffy's absence by designating Duffy as being on a furlough day even though Duffy was only listed as approved for leave in the Operations Division Red Book and not in the Service Division Red Book.

of any time off requests that he had submitted to his prior supervisors in the Operations Division. However, the City's witnesses could not identify any supervisor other than LaPointe who had given Duffy directives about time off requests. Finally, McGinn acknowledged that the City did not have a written policy that required Duffy to notify his supervisors about time off requests that he had submitted in the Operations Division.

CONCLUSION

Based on the record and for the reasons stated above, I conclude that the City violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by retaliating against Duffy for engaging in concerted, protected activity.

ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the City shall:

1. Cease and desist from:

   (a) Retaliating against Duffy for engaging in concerted, protected activity.

   (b) In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

2. Take the following action that will effectuate the purposes of the Law: [34]

   (a) Post immediately in all conspicuous places where members of the patrol officers' bargaining unit usually congregate, or where notices are usually posted, including electronically, if the City customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

[34] I do not order the City to revoke Duffy's suspension or to make Duffy whole for any lost pay and benefits related to his suspension because the Civil Service Commission already ordered that remedy when rendering its decision.

(b) Notify the DLR in writing of steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

MARGARET M. SULLIVAN
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, the decision shall become final and binding on the parties.

THE COMMONWELATH 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 (DLR) has held that the City of Worcester (City) violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) when it suspended Patrol Officer Thomas C. Duffy (Duffy) for two days in retaliation for his engaging in concerted activity protected by Section 2 of the Law.

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 retaliate against Duffy for engaging in concerted activity protected under Section 2 of the Law.

_____ _____

City of Worcester 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, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).