

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF MEDFORD

and

MEDFORD FIRE FIGHTERS UNION,
LOCAL 1032

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Case No.: MUP-13-2687

Date Issued: July 7, 2014

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Jillian Ryan, Esq.

Representing Medford Fire Fighters Union,
Local 1032

Albert Mason, Esq.

Representing City of Medford

HEARING OFFICER'S DECISION

SUMMARY

1 The issue is whether the City of Medford (City), discriminated against Timothy
2 Beckwith (Beckwith) and William O'Brien (O'Brien) for engaging in concerted, protected
3 activities in violation of Section 10(a)(3) and, derivatively, Section 10(a)(1) of
4 Massachusetts General Laws, Chapter 150E (the Law) when it issued letters of
5 reprimand against O'Brien and Beckwith on March 7 and 8, 2013, respectively. Based
6 on the record, and for the reasons explained below, I find that the City violated the Law

1 when it reprimanded O'Brien and Beckwith on March 7 and 8, 2013, in retaliation
2 against their concerted, protected activities.

3 STATEMENT OF THE CASE

4 On March 18, 2013, Medford Fire Fighters Union, Local 1032 (Union) filed a
5 Charge of Prohibited Practice (Charge) with the Department of Labor Relations (DLR)
6 alleging that the City had engaged in prohibited practices within the meaning of the Law.
7 On August 28, 2013, a DLR Investigator issued a Complaint of Prohibited Practice
8 (Complaint), alleging that the City had violated Section 10(a)(3) and, derivatively,
9 Section 10(a)(1) of the Law by retaliating against Beckwith and O'Brien for engaging in
10 concerted, protected activity. On August 29, 2013, the Union filed a Motion to Amend
11 the Complaint (Motion to Amend). On September 9, 2013, the City filed its Answer to
12 the Complaint and its Opposition to the Motion.

13 On October 3, 2013, the City filed a Motion to Dismiss the Complaint (Motion to
14 Dismiss). On October 4, 2013, the Union filed its Opposition to the City's Motion to
15 Dismiss, which the DLR denied on October 4, 2013. On October 4, 2013, the
16 Investigator also issued her Ruling on the Motion to Amend and issued an Amended
17 Complaint, alleging that the City had violated Section 10(a)(3) and, derivatively, Section
18 10(a)(1) of the Law by retaliating against Beckwith and O'Brien for meeting with the
19 Mayor's designate Director of Personnel and Budget Stephanie Burke (Burke) and filing
20 a grievance on March 5, 2013. The City did not file an Amended Answer.

21 I conducted a hearing on April 18, 2014, at which both parties had the
22 opportunity to be heard, to examine and cross-examine witnesses and introduce
23 evidence. On May 29 and 30, 2014, the Union and the City, respectively, filed their

1 post-hearing briefs. On the entire record, I make the following findings and render the
2 following decision.

3 STIPULATIONS OF FACT

- 4 1. The City is a public employer within the meaning of Section 1 of the Law.
- 5
- 6 2. The Union is an employee organization within the meaning of Section 1 of the
- 7 Law.
- 8
- 9 3. The Union is the exclusive bargaining representative for fire fighters
- 10 employed by the City.
- 11
- 12 4. The medical physicians for Lieutenants Daniel Lennox (Lennox) and Beckwith
- 13 completed the medical questionnaires related to this case.
- 14
- 15 5. Chief Frank Giliberti (Chief Giliberti) was on vacation leave when Beckwith's
- 16 Doctor Joseph J. Czarnecki (Dr. Czarnecki) submitted a "follow-up evaluation"
- 17 letter to Chief Giliberti on or about February 21, 2013.
- 18

19 FINDINGS OF FACT

20 **The Memoranda of Agreement**

21 At all relevant times, the signatories for the parties' collective bargaining
22 agreements (CBA) and memoranda of agreements (MOA) have been the Union and the
23 City. Chief Giliberti is not a signatory to those documents. On June 30, 2003, the
24 parties entered into a memorandum of agreement, effective from July 1, 2003 to June
25 30, 2006 (2003-2006 MOA). Article 6 of the 2003-2006 MOA pertains to a Grievance
26 Procedure and states, in pertinent part:

27 **Step 1.** The Union shall present the grievance in writing to the Chief of
28 the Fire Department or his designate, who shall then meet with the
29 Union's grievance committee within forty-eight (48) hours...to discuss and
30 attempt to adjust the grievance. In the event the grievance cannot be
31 adjusted satisfactorily within seven (7) calendar days of its presentation to
32 the Chief of the Fire Department, it thereafter may be presented to the
33 Mayor or his designate, for discussion in Step Two (2).
34

1 **Step 2.** Within ten (10) calendar days after the presentation of a grievance
2 to the Mayor or his designate, the grievance committee shall meet with the
3 Mayor or his designate to discuss and attempt to adjust the grievance. If
4 the grievance cannot be adjusted satisfactorily within three (3) weeks of its
5 presentation to the Mayor or his designate, it thereafter may be submitted
6 within sixty (60) days to the American Arbitration Association for arbitration
7 in accordance with its rules....
8

9 Pursuant to Article 6 and, at all relevant times, the Mayor's designate was Burke
10 who negotiates with the Union to resolve potential contractual disputes and violations.
11 Chief Giliberti is not the "Mayor's designate" for purposes of negotiating, processing or
12 resolving disputes related to the MOA or CBA. If Chief Giliberti denies a grievance at
13 Step 1, the Mayor or Burke has the power to hear the grievance at Step 2 and rule on it
14 differently than the Chief.

15 Article 22, Section 2 of the 2003-2006 MOA pertains to Sick and Injury Leave
16 and states, in full, "A doctor's report shall be required for all absences in excess of five
17 (5) calendar days." For at least 15 years prior to the 2003-2006 MOA, the parties have
18 included the Article 22, Section 2 language in their CBAs and MOAs. Pursuant to that
19 language, the parties had established a practice where the Chief would permit unit
20 members who had sustained off-the-job injuries to return to work after using more than
21 five-days of sick leave if they provided a one-sentence return-to-work notice from their
22 physicians.

23 On or about November 14, 2006, the parties entered into another MOA, effective
24 from July 1, 2006 to June 30, 2009 (2006-2009 MOA), extending the terms of the 2003-
25 2006 MOA. They also executed a third MOA, effective from July 1, 2010 to June 30,
26 2013 (2010-2013 MOA), extending the terms of the 2006-2009 MOA.¹

¹ Hereinafter, I collectively refer to all of the MOAs as MOA.

1 Lennox's Sick Leave, Return to Work and Grievance

2 By letter dated August 17, 2012, Chief Giliberti contacted Lennox's doctor David
3 Samenuk (Samenuk), requesting certain medical information about Lennox in the form
4 of five questions and an attached questionnaire/checklist.² That letter stated, in
5 pertinent part:

6 Since February 24, 2012 and continuing, Lt. Lennox has not yet reported
7 for duty.... He was cleared to return to duty from the shoulder injury in
8 early May [of 2012], however, once cleared to return from the injury, [he]
9 then declared that he would be out on personal sick leave.... On or about
10 June 7, 2012, you wrote a brief letter...documenting that Daniel Lennox
11 was evaluated in your office and that he was undergoing further cardiac
12 testing. You further documented that he would be following up
13 immediately after these tests. You asked that he be excused from work
14 until the work-up was complete.

15

16 I received a message...that Lt. Lennox intended to return to unrestricted
17 duty on or about August 12, 2012. I had previously documented that
18 before considering his return to duty, I would need answers to my
19 questions regarding his fitness for duty.

20

21 Given the above, I am asking Lt. Lennox to provide you with this letter so
22 that you can provide me with your best medical opinion relative to Lt.
23 Lennox's fitness for duty, and ability to perform the duties of a fire fighter,
24 including the rank of lieutenant, without posing a risk to himself, his fellow
25 fire fighters and/or the public....

26

27 Please provide your best medical opinion as follows:

28

29 1. Please provide the diagnosis that has prevented Lt. Lennox
30 from returning to duty and resulted in your June 7, 2012
31 letter....

32

33 2. Please provide your best medical opinion with regard to Lt.
34 Lennox's fitness for duty and ability to return to the full duties

² The Chief referred to the questionnaire/checklist as the "Physical Demands and Essential Task Check List." Neither party submitted that document into evidence, but Union President O'Brien testified that it was similar to Beckwith's questionnaire/checklist, and the City did not dispute that testimony.

1 of a fire fighter, taking into consideration the physical
2 demands and essential task check list that is attached.

3
4 3. If Lt. Lennox is documented by you to be fit for duty with
5 regard to the above diagnosis, should he be able to report
6 for duty on a regular and reliable basis?

7
8 4. If Lt. Lennox is documented by you not to be fit for duty due
9 to the above diagnosis, would you expect that this inability
10 will likely remain in effect indefinitely, even though he may
11 recover at some remote, unknown time in the future?

12
13 5. Are there any other duty-related concerns involving Lt.
14 Lennox fitness for duty that I should be aware of if he is
15 documented to be fit for a return to full, unrestricted duty?

16
17 ...I would respectfully request that you complete your responses and
18 return them to Lt. Lennox as soon as possible so that I may take your
19 responses into consideration with determining if and when Lt. Lennox will
20 or will not be returning to duty.

21
22 Lennox completed the Chiefs questionnaire under protest, and the Union filed a
23 grievance on his behalf, processing the matter to arbitration, which was held on
24 February 11, 2014. At the time of the hearing for this case, the arbitration decision was
25 pending.

26 **Beckwith's Sick Leave and Return to Work**

27 At some point prior to January 24, 2013, Beckwith sustained an off-the-job injury
28 that required medical attention and sick leave. On or about January 24, 2013, Dr.
29 Czarnecki notified Chief Giliberti that Beckwith was scheduled for "right knee surgery on
30 February 15, 2013." At some point between January 24, 2013 and February 11, 2013,
31 Dr. Czarnecki canceled Beckwith's surgical appointment, determining that he was fit to
32 return to work without surgery.

33 By telephone on February 11, 2013, Beckwith contacted Chief Giliberti, informing
34 him of his revised medical status and requested a return to work. By letter on February

1 12, 2013, Chief Giliberti contacted Dr. Czarnecki, requesting additional medical
2 information about Beckwith and asked a series of specific questions about Beckwith's
3 "fitness for duty." To that letter, Chief Giliberti also attached a 26-question medical
4 questionnaire/checklise for Dr. Czarnecki's completion. The letter stated, in pertinent
5 part:

6 Since approximately November 23, 2012 and continuing, Lt. Beckwith has
7 been reporting pain...which has interfered with his ability to report for duty
8 on a regular and reliable basis through no fault of his own. On January
9 18, 2013, he was relieved of duty [due to an off-the-job injury] that
10 prevented him from continuing his shift.

11
12In a telephone conversation yesterday, Lt. Beckwith documented that
13 rather than have surgery, which would require that he remain out of work
14 for approximately three months, his treatment plan was modified, by you,
15 to reflect conservative treatment involving structured physical therapy.
16 Given the above, I felt that it would be appropriate to clarify the condition
17 of Lt. Beckwith's [injury] and the prescribed treatment in relationship to the
18 physical demands and essential tasks that he is expected to be able to
19 perform, if and when circumstances dictate.

20
21 As such, I would ask for your best medical opinion as follows:

- 22
- 23 1. Please confirm the diagnosis or diagnoses that are
24 preventing Lt. Beckwith from reporting for duty....
 - 25
26 2. Please document the treatment plan that you have
27 prescribed for Lt. Beckwith including the nature of the
28 treatment, as well as the frequency and expected
29 duration of said treatment.
 - 30
31 3. Please provide your best medical opinion with regard to
32 Lt. Beckwith's prognosis for a return to full, unrestricted
33 duty upon completion of the above, documented
34 treatment plan, taking into consideration the physical
35 demands and essential tasks that may confront Lt.
36 Beckwith when he is on the job....
- 37

³ The Chief referred to the questionnaire/checklist as the "Massachusetts Fire Department Hands-On Task List." The parties jointly submitted that document into evidence.

- 1 4. If the above prognosis is poor, unknown, uncertain,
2 guarded or similarly worded, is that prognosis likely to
3 remain in effect indefinitely, even though he may recover
4 at some remote, unknown time in the future?
5
6 5. If the above prognosis is good, excellent or similarly
7 worded, when would you expect Lt. Beckwith to safely
8 and reliably return to the full duties of his position?
9
10 6. Are there any other duty-related concerns involving Lt.
11 Beckwith's fitness for duty relative to his [injury] that I
12 should be aware of, if and when he is documented to be
13 fit for a return to full, unrestricted duty?
14

15 I would respectfully request that you complete your responses and
16 return them to Lt. Beckwith as soon as possible so that he can review
17 those responses with me in connection with his current absence and
18 expected return to duty.
19

20 **Dr. Czarnecki's Follow-Up Evaluation of Beckwith**

21 By follow-up evaluation on February 21, 2013, Dr. Czarnecki determined that
22 Beckwith was fit for duty and sent a copy of his evaluation to the City. Specifically, Dr.
23 Czarnecki's follow-up evaluation reported that:

24 [Beckwith] may return to work on February 25, 2013. I have reviewed [the
25 City's] list of job requirements and examined the patient and his MRI⁴ and
26 I have given him clearance to return to work full duty without restrictions.
27 Additional information regarding his condition, treatment and prognosis
28 are privileged under HIPAA⁵ regulations.
29

30 By telephone conversation on or about Monday, February 25, 2013, Burke
31 notified Chief Giliberti that she had received Dr. Czarnecki's follow-up evaluation for
32 Beckwith. During their conversation, the Chief informed Burke that he rejected the

⁴ MRI stands for "magnetic resonance imaging."

⁵ HIPAA stands for Health Insurance Portability and Accountability Act of 1996 (Pub.L. 104-191, 110 Stat. 1936); codified at 42 U.S.C. § 300gg, 29 U.S.C § 1181 et seq. and 42 USC 1320d et seq.

1 follow-up evaluation and had provided Beckwith with a medical questionnaire/checklist
2 for Dr. Czarnecki's completion.

3 By letter on February 22, 2013, the Union notified Chief Giliberti that Dr.
4 Czarnecki's February 21, 2013 follow-up evaluation was sufficient for Beckwith's
5 immediate return to work pursuant to Article 22, Section 2 of the MOA, and that any
6 additional requests by the City for medical information from Beckwith or his doctor
7 would be inappropriate, unnecessary and in violation of the MOA. Specifically the
8 Union's letter stated, in pertinent part:

9 As you know from our recent disagreements, under the parties' contract, a
10 member returning from an extended personal sick leave (other than the
11 one occasioned by an on-the-job injury) may only be required to provide a
12 doctor's note clearing him to return to duty. However, as has become a
13 troubling practice of late, you have directly contacted Lt. Beckwith's doctor
14 and asked that he provide a great deal of personal medical information
15 that you have no contractual right to obtain and that Lt. Beckwith has
16 absolutely no obligation to provide.

17

18 We expect that, upon his return to duty, Lt. Beckwith will provide the [Fire]
19 Department with a note from his medical provider clearing him to return to
20 full duty and will thus have satisfied his obligations. As before, we
21 demand that you cease and desist from your attempt to access any further
22 personal medical information and that you comply with the parties'
23 agreement....

24

25 **Beckwith's Complaint about the Chiefs Request for Additional Information**

26 By letter on February 27, 2013, Beckwith complained to Chief Giliberti about his
27 request for additional medical information via the questionnaire, objecting to the request
28 and asking the Chief to adhere to the MOA. That letter stated, in pertinent part:

29 During a phone conversation between you and I [on] the evening of
30 ...February 13[, 2013,] you asked me to come look at the documents that
31 you had prepared for my doctor in reference to my recent sick leave. The
32 next day I picked them up. You asked that after looking at those
33 documents if I had any objections to them that I put them in writing. My
34 objections are that while using my sick leave benefit with the City of

1 Medford I feel I have the right to control the communication with my doctor
2 about any medical issues that I may or may not have. That exercising that
3 right should in no way be held against me. I believe that I shared more
4 medical information than was required of me at the beginning of my recent
5 sick leave.
6

7 During a phone conversation that I had with you on [February 11, 2013,] I
8 called you to inform you that my plans had changed, that I was feeling
9 much better and that my doctor and I had changed our plans for
10 treatment. I was excited that instead of a forecasted 8-12 week rehab
11 after surgery that my doctor and I had forecast my return to full,
12 unrestricted duty within two weeks of this phone call. The details of my
13 treatment are private and protected. Your response to this news was a
14 series of specific questions about the treatment. You inquired about how
15 much physical therapy I had [and] when, and continued the questioning
16 with wanting to know when my future appointments would be. At that
17 time, I told you that I was becoming uncomfortable with the questioning
18 and assured you that I and my doctor would be very sure that I was ready
19 before returning to work.
20

21 I found [that] the line of questioning felt like an interrogation. It made me
22 feel like you thought I was trying to get away with something, that I was
23 not capable of making a sound decision about my own health and welfare,
24 or, even worse, like my words could not be trusted....
25

26 I have been advised by my union officers that I have more than fulfilled my
27 requirements for communication and documentation on this recent sick
28 leave.
29

30 I would ask that you respect my rights as a union employee to work within
31 the contract that the union has with the city....
32

33 By telephone on February 27, 2013, Chief Giliberti informed Beckwith that his
34 return to work was contingent on his completion of the medical questionnaire and
35 checklist. By letter dated February 28, 2013, Beckwith notified Chief Giliberti of his
36 intent to comply with the questionnaire and checklist, and that he would complete that
37 document under protest, stating, in full:

38 It is my intention to communicate very clearly and document the
39 communication between us in the past few days. During our two phone
40 conversations yesterday you have told me that you will not accept my note
41 from Dr. Czarnecki dated February 21[, 2013,] for return to full active duty.

1 You also have received my letter dated February 27[, 2013], which you
2 requested, stating my objections to your request for further medical
3 information on this matter. You have made it clear that you will not allow
4 my return to full active duty until I return the documents that you have
5 asked me to have Dr. Czarnecki complete. As I told you yesterday, I will
6 comply with these orders in order to return to full active duty. I do so
7 under protest and my intention is to have Local 1032 represent me in a
8 grievance procedure on this matter. If the outcome of this process is a
9 judgment in the union's favor I will be asking for the return of any sick
10 leave that I may have used after February 21st for this incident.

11

12 **Beckwith's Grievance and O'Brien's Meeting with Burke at Step 2**

13 By letter on March 5, 2013, the Union filed a grievance on Beckwith's behalf,
14 alleging a violation of the MOA for refusing to allow Beckwith's return to work from sick
15 leave without first completing the medical questionnaire/checklist. By letter on March 7,
16 2013, Chief Giliberti denied the grievance at Step 1.⁶

⁶ In the cover letter attached to the grievance, the Union stated that it was alleging a violation of "Article X (The Saving Clause)" but did not specifically allege a violation of Article 22, Section 2. Although the parties did not submit the actual grievance into evidence, I find that grievance also pertained to Article 22, Section 2 of the MOA because O'Brien testified to that effect and the City did not rebut his testimony. Article X states in full:

Section 1. This Agreement has not been designed to violate any Federal, State, County or Municipal laws nor shall anything in this Agreement be interpreted as diminishing the rights of the City to determine and prescribe the methods and means by which its operation of the Fire Department shall be conducted, except as those rights may be limited by this Agreement.

Section 2. Excluding the subjects of shift manning and total complement, all job benefits presently enjoyed by members which are not specifically provided for or abridged by this contract shall continue under the conditions upon which they had previously been granted.

Section 3. Should any provision of this Agreement be held unlawful by a court [or] administrative agency of competent jurisdiction, all other provisions of this Agreement remain in force for the duration of this Agreement.

1 At some point prior to Beckwith's return to work, O'Brien met with Burke to
2 resolve his grievance. Because Lennox's grievance against the City was pending,
3 O'Brien explored settlement of Beckwith's issue with Burke to avoid the costs of further
4 litigation. At their meeting, Burke and O'Brien agreed that certain language provided by
5 Dr. Czarnecki in his February 21, 2013 follow-up evaluation of Beckwith would be
6 sufficient to satisfy the Chiefs concerns. Specifically, they agreed that if Beckwith's
7 doctor submitted the following one-sentence statement to the City, then the Chief would
8 permit Beckwith's return to work: "I have reviewed [the City's] list of job requirements
9 and examined the patient and his MRI and I have given him clearance to return to work
10 full duty without restrictions." Burke and O'Brien also agreed to hold Beckwith's
11 grievance in abeyance, pending the outcome of Lennox's arbitration.

12 At no point during their meeting, did Burke instruct O'Brien to meet with Chief
13 Giliberti or that discussing Beckwith's case with her was inappropriate.

14 **The Chiefs Written Reprimands of O'Brien and Beckwith**

15 By letter on March 7, 2013, Chief Giliberti reprimanded O'Brien for circumventing
16 the Chiefs chain-of-command by meeting with Mayor's designate Burke concerning
17 Beckwith's grievance. That letter stated, in pertinent part:

18 I am providing you with this notice that your failure or refusal to follow the
19 collective bargaining agreement by and between the City of Medford and
20 Local 1032 by circumventing me as your Chief and the step one
21 collectively bargained and designated bargaining representative is
22 unacceptable.

23
24 Most recently, while I, as Chief of the Department, was dealing with Lt.
25 Beckwith, a firefighter in our Department, on an issue involving a fitness
26 for duty matter, you became involved and, rather than taking any concerns
27 that you may have had up with me, you took the matter up directly with
28 Stephanie Muccini-Burke at City Hall. This kind of action is, in fact,

1 circumventing the contractually agreed-upon grievance process involving
2 disputes that may arise in our department....

3
4 As we both know, at the point in time that Lt. Beckwith felt that he was
5 aggrieved by my directive, he should have obeyed my directive and then
6 filed a Step 1 grievance. Instead, contrary to what I had directed him to
7 do, he went to his doctor and asked for a note, that declared him fit for
8 duty, but he did not answer the specific questions that were included in the
9 letter that I had given to Lt. Beckwith and directed him to talk to his doctor
10 and obtain the responses. These questions were developed in order to
11 allow me to make an "informed and reasoned" determination as to his
12 medical fitness for duty.

13
14 In your case, once you became involved, rather than follow the mutually
15 agreed-to collective bargaining process that we have, the matter was
16 taken up with Ms. Stephanie Burke at City Hall. This kind of action is, in
17 my opinion, an unacceptable circumventing of me as your chief and a
18 designated bargaining representative, as well as the process that has
19 been mutually agreed-to and contractualized.

20
21 For the record, I, as the Public Safety Department Head, am responsible
22 for all matters of fitness for duty, whether it involves the line of duty injury
23 or illness, or [a] personal sick leave issue. In this regard, as the
24 responsible Public Safety Department Head, if, in my opinion, I need what
25 I deem to be appropriate capability information for making informed and
26 reasoned fitness for duty determinations, I will communicate with an
27 individual's treating physician designated by the City, or both, whichever in
28 my personal, subjective opinion will provide me with the documentation
29 that I require in order to make reasoned and informed decisions involving
30 a firefighter's fitness for duty. This kind of information is both reasonable
31 and necessary for me to be able to make both informed and reasoned
32 determinations relative to an individual's safety as well as the operational
33 needs and public safety interests of the City of Medford.

34
35 This being said, should you, in the future, fail or refuse to follow the
36 agreed upon process for employees grievances, by circumventing me as
37 well as the agreed-upon collective bargaining process and the designated
38 bargaining representative at the first step, you will be subject to
39 disciplinary action as well as an unfair labor practice charge⁷ relative to

⁷ On April 22, 2013, the City filed a charge with the DLR against the Union alleging a violation of Sections 10(b)(1) and 10(b)(2) of the Law for repudiating Article VI of the MOA when O'Brien met with Burke about Beckwith's grievance in February of 2013. By letter on August 22, 2013, the DLR dismissed the City's charge, which the City appealed to the Commonwealth Employment Relations Board (CERB) on August 27, 2013. On December 13, 2013, the CERB affirmed the dismissal of the charge.

1 bad faith bargaining by circumventing me as well as the agreed-upon
2 collective bargaining process.

3
4 By virtue of this letter, you are hereby being given notice that your actions,
5 as documented above are unacceptable, and you are being given this
6 warning as an opportunity to correct this matter going forward.

7
8 Lt. Beckwith will be given a similar letter of notice and opportunity for his
9 failure to follow the agreed-upon collective bargaining process.

10
11 By a similar letter on March 8, 2013, Chief Giliberti reprimanded Beckwith for
12 failing to complete the medical questionnaire in a timely manner, and for completing the
13 questionnaire under protest. Specifically, that letter stated, in full:

14 I am writing to you to provide you with notice that your failure or refusal to
15 comply with my directive to take a letter of inquiry involving your fitness for
16 duty to your doctor on a timely basis is unacceptable. After approximately
17 one and one-half weeks, you finally took the letter to the doctor, under
18 protest, and provided me with the answers that I needed in order to make
19 a reasoned and informed decision with regard to your fitness for duty and
20 return to your full duties. At one point you provided a note from your
21 doctor, briefly stating that he had reviewed the essential tasks of a Fire
22 Lieutenant and that you were ok[ay] to return to duty. Normally that would
23 have been acceptable, had that been what I had asked for. The fact of the
24 matter is that I had drafted a letter to your doctor and directed you to take
25 that letter to your doctor so that he could respond to all of my questions
26 and concerns involving your fitness for duty.

27
28 As you are aware, the City and Local 1032 have a collective bargaining
29 agreement that sets forth the process to be followed when a [unit] member
30 believes that he or she was aggrieved by a matter covered by the
31 collective bargaining agreement. In my opinion, you circumvented the
32 process and circumvented me as both your Chief and the first step
33 collectively bargained and designated bargaining representative. When
34 you did this and failed or refused to comply with my directive the minimum
35 result was unnecessary overtime during your unnecessary absence.

36
37 In the future, should you feel that you are aggrieved, you are to initially
38 obey the directive given unless it is an illegal or unsafe directive and then,
39 pursue a Step I Grievance if you feel that the collective bargaining
40 agreement has been violated.

41
42 Should you in the future fail or refuse to comply on a timely basis with the
43 directive of your chief, you will be subject to disciplinary action to and

1 including a termination of employment. Hopefully, we will not have to
2 address any such issue again in the future.

3
4 OPINION

5 The CERB applies a three-step analysis when reviewing an alleged violation of
6 Section 10(a)(3). Trustees of Forbes Library v. Labor Relations Commission, 384 Mass.
7 559, 565-66 (1981); Town of Clinton, 12 MLC 1361, 1364, MUP-5659 (Nov. 9, 1985);
8 Boston City Hospital, 11 MLC 1065, 1071, MUP-4893 (July 25, 1984). First, the CERB
9 determines whether a prima facie case has been established. To establish a prima facie
10 case of a Section 10(a)(3) retaliation violation, a charging party must show that: (1) the
11 employee engaged in concerted activity protected by Section 2 of the Law; (2) the
12 employer knew of the concerted, protected activity; (3) the employer took adverse
13 action against the employee; and, (4) the employer's action was motivated by a desire
14 to penalize or discourage the protected activity. City of Holyoke, 35 MLC 153, 156,
15 MUP-05-4503 (Jan. 9, 2009); Town of Carver, 35 MLC 29, 47, MUP-03-3094 (June 30,
16 2008); Quincy School Committee, 27 MLC 83, 92, MUP-1986 (Dec. 29, 2000); Town of
17 Clinton, 12 MLC at 1364-65. Once the charging party has established a prima facie
18 case, the employer may rebut it by producing evidence that the action was motivated by
19 a legitimate reason. Town of Clinton, 12 MLC at 1365; Boston City Hospital, 11 MLC at
20 1071. If the employer produces such evidence, then the charging party must show that
21 the employer would not have taken the adverse action "but for" the employee's
22 protected activity. Town of Clinton, 12 MLC at 1365; Boston City Hospital, 11 MLC at
23 1071; Trustee of Forbes Library, 384 Mass. at 566.

24 The Union argues that O'Brien and Beckwith were engaged in protected activities
25 when O'Brien filed the March 5, 2013 grievance on behalf of Beckwith and then met

1 with Burke to resolve that grievance. It also argues that the City was aware of those
2 concerted, protected activities and took adverse action against O'Brien and Beckwith to
3 discourage them from engaging in those activities when Chief Giliberti reprimanded
4 them on March 7 and 8, 2013, for untimely completing the medical questionnaire, filing
5 a grievance and meeting with Burke to resolve that grievance in violation of Section
6 10(a)(3) of the Law.⁸

7 The City argues that Beckwith's grievance and O'Brien's meeting with Burke to
8 resolve the grievance are not protected activities because Beckwith completed the
9 medical questionnaire/checklist in an untimely manner and because O'Brien
10 "circumvented" Chief Giliberti's authority as head of the Public Safety Department by
11 meeting with Burke and agreeing to medical language that would permit Beckwith's
12 return to work, even though the Chief has the exclusive authority to make fitness-for-
13 duty determinations. The City does not dispute that it was aware of Beckwith's
14 grievance or O'Brien's meeting with Burke to resolve that grievance. However, it
15 asserts that the March 7 and 8, 2013 letters issued by Chief Giliberti were not
16 reprimands but warnings for O'Brien and Beckwith to adhere to the MOA and not
17 circumvent the Chiefs authority.

18 In the alternative, the City argues that even if Beckwith's grievance and O'Brien's
19 meeting with Burke constituted concerted, protected activities and, even if the March 7

⁸ For the first time in its post-hearing brief, the Union alleged that the City committed an independent 10(a)(1) violation. The Union failed to raise this allegation in its Charge or in its Motion to Amend the Complaint; and, neither the Ruling on the Motion to Amend the Complaint nor the Amended Complaint mentioned an independent 10(a)(1) allegation. Further, the Union did not raise the issue in its opening statement at the hearing and did not litigate the matter during the presentation of its case-in-chief. Based on these facts, I decline to address the Union's argument that the City committed an independent 10(a)(1) violation of the Law.

1 and 8, 2013 letters constituted adverse action, the Union cannot satisfy its prima facie
2 case because it can only show the timing of those letters in connection to the grievance
3 and the Burke meeting, but it cannot show any other evidence pointing to unlawful
4 motivation. Rather, the City emphasizes that the issue is not about contractual sick
5 leave but about fitness-for-duty, which the Chief in his capacity as head of the Public
6 Safety Department is exclusively authorized to determine. For the reasons that follow, I
7 conclude that the City violated Section 10(a)(3) when it reprimanded O'Brien and
8 Beckwith on March 7 and 8, 2013.

9 **I. The Concerted, Protected Activity**

10 Although the City contends that neither Beckwith nor O'Brien were engaged in
11 concerted, protected activity, the record shows that Beckwith filed a grievance on March
12 5, 2013, which protested Chief Giliberti's requirement that Dr. Czarnecki provide
13 additional medical information about Beckwith in the form of a questionnaire/checklist
14 before permitting Beckwith to return to work. The record also shows that O'Brien met
15 with the Mayor's designate Burke to resolve Beckwith's grievance without resorting to
16 arbitration.

17 The filing and processing of grievances constitutes concerted activity protected
18 by Section 2 of the Law. See Newton School Committee, 35 MLC 9, 11, MUP-04-4131
19 (June 25, 2008); Quincy School Committee, 27 MLC 83, 92, MUP-1986 (Dec. 29,
20 2000); City of Somerville, 23 MLC 11, 14, MUP-8450 (June 6, 1996); Town of Clinton,
21 12 MLC at 1365. Here, Beckwith's act of filing a grievance on March 5, 2013 was
22 protected, concerted activity.

1 It is well-established that performing official union duties as Union President and
2 representing unit members' interests through filing and resolving grievances constitutes
3 concerted, protected activity. See generally Athol-Royalston Regional School
4 Committee, 28 MLC 204, 213-15, MUP-2279 (Jan. 14, 2002) (processing grievances in
5 employee's capacity as union president and complaining to the press and another
6 agency about how the employer processed those grievances constitutes protected
7 activity). O'Brien's status as Union President and his assistance in helping Beckwith to
8 process his March 5, 2013 grievance was protected activity because O'Brien was acting
9 on behalf of Beckwith and the bargaining unit when he filed the grievance and met with
10 Burke to resolve the grievance. Town of Andover, 14 MLC 1571, 1582, MUP-6443
11 (March 3, 1988), affd 17 MLC 1475 (Feb. 6, 1991); see generally Board of Selectman
12 of Natick v. Labor Relations Commission, 16 Mass. App. Ct. 972, 973 (1983).
13 Therefore, I find that both Beckwith and O'Brien were engaged in concerted, protected
14 activities when they filed the March 5, 2013 grievance and O'Brien met with Burke to
15 resolve the grievance. Accordingly, the Union satisfies this element of its prima facie
16 case.

17 II. The Adverse Action

18 The City argues that there is no evidence of adverse action because the March 7
19 and 8, 2013 letters issued by Chief Giliberti were not reprimands but, instead, were
20 warnings for O'Brien and Beckwith to adhere to the MOA and not circumvent the Chiefs
21 authority as head of the Public Safety Department. In those letters, Chief Giliberti
22 explicitly warned O'Brien and Beckwith against circumventing his authority and
23 threatened them with future discipline-up to termination and including an unfair labor

1 practice charge, which the City filed on April 22, 2013-if they continued to: (1) protest
2 the medical questionnaire/checklist; (2) complete the questionnaire checklist in an
3 untimely manner; and (3) meet with the Mayor's designate to resolve Beckwith's
4 grievance. However, contrary to the City's position, the CERB has long recognized that
5 written warnings constitute adverse employment actions. City of Somerville, 23 MLC at
6 14.

7 Although the City argues that Chief Giliberti was permitted to reprimand O'Brien
8 and Beckwith for circumventing his authority, and contends that nothing adverse
9 occurred as a result of the March 7 and 8, 2013 warning letters, the evidence shows
10 that the Chiefs' action was adverse because it was punitive in nature and reproached
11 O'Brien and Beckwith for exercising their contractual and legal rights to file a grievance
12 and meet with the Mayor's designate to resolve that grievance. Suffolk County Sheriffs
13 Department, 27 MLC 155,159, MUP-1498 (June 4, 2001) (citing; Town of Holbrook, 15
14 MLC 1221, 1225, MUP-6344 (Nov. 3, 1988)); compare Billerica School Committee, 8
15 MLC 1083, MUP-3922 (June 9, 1981) (employer unlawfully reprimanded a union official
16 for his "error in judgment" after meeting with the employer about a grievance meeting
17 and advising other employees to disregard the employer's instructions based on that
18 union official's interpretation of the employer's statements during the meeting); Southern
19 Worcester Regional Vocational School District Committee, MUP-2201 through MUP-
20 2206, MUP-2232, MUP-2278 and MUP-2310 (Dec. 28, 1978) (CERB found that the
21 employer's reprimand against the unit members who distributed leaflets at a school
22 open house was unlawful). Based on this evidence, I find that the Union also satisfies
23 this element of its prima facie case.

1 **III. The Unlawful Motivation**

2 A charging party can prove unlawful employer motivation, with direct or indirect
3 evidence of discrimination. Lawrence School Committee, 33 MLC 90, 97, MUP-02-
4 3631 (Dec. 13, 2006). Direct evidence is evidence that, "if believed, results in an
5 inescapable, or at least a highly probable inference that a forbidden bias was present in
6 the workplace." Wynn & Wynn. P.C. v. Massachusetts Commission Against
7 Discrimination, 431 Mass. 655, 667 (2000), (citing, Price Waterhouse v. Hopkins, 490
8 U.S. 228, 277 (1989); Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300
9 (1991)). In discrimination cases arising under Section 10(a)(3) of the Law where the
10 charging party has proffered direct evidence of discrimination, the CERB applies the
11 two-step analysis articulated in Wynn & Wynn. Id. at 667. Under the first step of the
12 Wynn & Wynn analysis, a charging party meets its initial burden by proffering direct
13 evidence that proscribed criteria played a motivating part in a respondent's adverse
14 action. Id. at 667.

15 The Union argues that there is both direct and indirect evidence of unlawful
16 animus. First, it contends that Chief Giliberti's March of 2013 letters are direct evidence
17 of discrimination because they expressly reprimanded Beckwith and O'Brien for trying to
18 resolve a contractual dispute with the Mayor's designate at Step 2 of the parties'
19 contractual grievance procedure. It also asserts that Chief Giliberti admitted that he
20 wanted to punish Beckwith and O'Brien for meeting with Burke in February of 2013
21 because he felt that neither Burke nor the Union had the authority to determine
22 Beckwith's fitness-for-duty but, instead, that authority rested exclusively in the Chiefs
23 capacity as head of the Public Safety Department. Next, the Union contends that in

1 addition to the direct evidence it presented, the Chiefs letters also show indirect
2 evidence of discrimination based on the timing of the March 7 and 8, 2013 letters in
3 relation to Beckwith's grievance and O'Brien's meeting with Burke, which occurred in or
4 around March 5, 2013, just two days prior to the Chiefs first warning letter to O'Brien on
5 March 7, 2013. The Chiefs warning letters also show inadequate reasoning because
6 the Chief admitted that "many, many" times before he permitted one-sentence doctor's
7 notes in lieu of medical questionnaires. Last, the Union argues that the letters show a
8 deviation from past practice because Chief Giliberti acknowledged the Union's right to
9 resolve contractual disputes, including grievances, with the Mayor's designate but, in
10 Beckwith's March 8, 2013 warning letter, the Chief expressly refused to recognize the
11 Union's contractual right to meet with Burke.

12 The City contends that there is neither direct nor indirect evidence of unlawful
13 animus because the Chief was merely acting within his exclusive authority as head of
14 the Public Safety Department by ensuring that Beckwith was fit to return to work without
15 harming himself, his colleagues or members of the public. The City also contends that
16 the Chief was acting within his exclusive authority as head of the Public Safety
17 Department when he required additional medical information from Beckwith on February
18 12 and 27, 2013, and warned O'Brien against meeting with Burke in March of 2013. In
19 the alternative, the City argues that because timing alone is insufficient to prove
20 unlawful motivation, and because the only evidence presented by the Union is the
21 timing of the March 7 and 8, 2013 warning letters in relation to Beckwith's filing of the
22 grievance, the Complaint should be dismissed.

1 Responding to the Union's contention that the City deviated from the established
2 practice of permitting unit members to provide one-sentence doctor's notes when
3 returning to work from sick leave related to off-the-job injuries, it relies solely on Town
4 of Andover, 23 MLC 3, MUP-9079 (June 4, 1996), in which the union alleged a violation
5 of Section 1O(a)(5) when the town police department required a unit member to be
6 examined by a town-designated physician prior to returning to work from an off-the-job-
7 illness. While the CERB found that the physical examination requirement by a town-
8 appointed doctor constituted a mandatory subject of bargaining, it concluded that there
9 was no change in past practice and dismissed the complaint.

10 Specifically, the City points to the fact that the town had established a practice of
11 requiring police officers to undergo medical examinations prior to returning to work after
12 they had taken injured-on-duty (100) and/or sick leave for injuries/illness sustained off-
13 the-job. One officer refused to be examined by a town-designated physician, preferring,
14 instead to submit a note in lieu of examination from his own personal doctor. The CERB
15 found that even though the town exercised discretion in permitting that officer to submit
16 a doctor's note in lieu of examination, it upheld the town's practice of requiring
17 examinations. Based on that case, the City contends that even though Chief Giliberti
18 had previously permitted unit members to submit one-sentence doctor's notes before
19 returning to work from 100 leave and/or sick leave, his discretion in requiring Beckwith
20 to submit additional information does not change the Chiefs exclusive authority to order
21 that requirement. However, Town of Andover is distinguished because the issue here is
22 not whether Chief Giliberti unlawfully changed an establish practice under Section

1 10(a)(5) of the Law, but whether he unlawfully retaliated against Beckwith and O'Brien
2 for engaging in protected, concerted activities in violation of Section 10(a)(3) of the Law.

3 Direct Evidence of Animus

4 Chief Giliberti's March 7 and 8, 2013 warning letters are direct evidence of the
5 Chiefs animus against Beckwith and O'Brien because the letters reprimanded Beckwith
6 for filing a grievance protesting the questionnaire and reprimanded O'Brien for assisting
7 Beckwith with the grievance and meeting with Burke to resolve it. The City does not
8 dispute that Chief Giliberti issued the March 2013 letters and expressly warned O'Brien
9 against protesting the questionnaire, filing grievances that protested the questionnaires
10 and meeting with Burke to resolve such grievances. Nor does the City dispute that on
11 "many, many" occasions the Chief permitted unit members to provide one-sentence
12 doctor's notes for off-the-job injuries when they sought to return to work. See generally
13 Town of Andover, 14 MLC at 1582, aff'd 17 MLC at 1482 (after engaging in protected
14 activity, CERB found unlawful motivation after town retaliated against employee by
15 departing from its normal practice for granting promotions); see also Labor
16 Relations Commission v. Blue Hills Spring Water Co., 11 Mass. App. Ct. 50 (1981);
17 Town of Somerset, 15 MLC 1523,1529, MUP-6404 (Mar. 9, 1989).

18 Further, it is undisputed that Chief Giliberti is not a signatory to the parties' CBA
19 or the MOA, nor is it disputed that the Union has the right to resolve grievance disputes
20 at Step 2 of the contractual grievance process, which includes meeting with Burke as
21 the Mayor's designate. Based on this evidence, I find that the Union has successfully
22 presented direct evidence showing that Chief Giliberti's adverse actions were unlawfully
23 motivated. Thus, the Union has satisfied all elements of its prima facie case.

1 The City's Shifting Burden

2 Once a charging party meets its initial burden by proffering direct evidence that
3 proscribed criteria played a motivating part in a respondent's adverse action, the burden
4 shifts to the respondent to show that its legitimate reason, standing alone, would have
5 induced it to make the same decision. Town of Dennis, 29 MLC at 83 (citing Wynn &
6 Wynn, 431 Mass. at 667); City of Easthampton, 35 MLC 257, 264-65, MUP-04-4244
7 (April 23, 2009). Here, the City contends that Chief Giliberti issued warning letters to
8 O'Brien and Beckwith on March 7 and 8, 2013, because Beckwith delayed the
9 submission of the completed medical questionnaire and then filed a grievance
10 protesting that document. The City also contends that O'Brien circumvented the Chiefs
11 authority as head of the Public Safety Department when he bypassed Step 1 of the
12 parties' contractual grievance procedure and assisted Beckwith with his grievance by
13 meeting with Burke to resolve the matter.

14 Even if O'Brien did circumvent Chief Giliberti's authority by meeting with Burke,
15 the record shows that the Chiefs March of 2013 letters expressly punished Beckwith
16 and O'Brien for exercising their contractual rights under Article 22, Section 2 and Article
17 6 of the MOA. Nothing in the record supports the City's argument that Chief had the
18 exclusive, managerial authority to deviate from Article 22, Section 2 by denying
19 Beckwith's right to submit a one-sentence doctor's note prior to his return to work. Nor
20 is there anything to support the City's position that the Chief had the exclusive authority
21 to deny the Union's Article 6 rights to meet with the Mayor's designate to resolve
22 Beckwith's grievance. Although the City argues that the Chief ordered Beckwith to
23 complete the questionnaire based on Chief Giliberti's concern for Beckwith's well-being

1 and the well-being of other fire fighters and the public, at large, the March 2013 letters
2 show that the Chief expressly sought to reprimand Beckwith and O'Brien exercising
3 their collective bargaining rights protected under Section 2 of the Law. Chief Giliberti's
4 reasons for issuing those reprimands (i.e., due to the Union's circumvention of his
5 authority as head of the Public Safety Department and as the Step 1 grievance resolver)
6 still show that he admonished Beckwith and O'Brien for attempting to resolve a
7 grievance with the Mayor's designate, which a legally protected right. Based on this
8 evidence, I do not find that the City's legitimate reasons, standing alone, would have
9 caused Chief Giliberti to issue the March 7 and 8, 2013 warning letters.

10

11 For all of the above reasons, I conclude that the only reason that the Chief
12 Giliberti issued the March 7 and 8, 2013 reprimands against O'Brien and Beckwith was
13 because of their participation in concerted, protected activities. Accordingly, I find that
14 the City violated Section 10(a)(3) and, derivatively Section 10(a)(1) of the Law.

15

CONCLUSION

16 Based on the record and for the reasons explained above, I conclude that the
17 City violated Section 10(a)(3) of the Law when it issued warning letters against O'Brien
18 on March 7, 2013 and Beckwith on March 8, 2013.

19

ORDER

20 WHEREFORE, based on the foregoing, it is hereby ordered that the City of Medford
21 shall:

22 1. Cease and desist from:
23

- 1 a. Discriminating against Timothy Beckwith and William O'Brien or any
- 2 other employee for engaging in concerted, protected activity;
- 3
- 4 b. In any like manner, interfering with, restraining and coercing Timothy
- 5 Beckwith and William O'Brien or any other employee in any right
- 6 guaranteed under the Law.
- 7
- 8 2. Take the following affirmative action that will effectuate the purpose of the
- 9 Law:
- 10
- 11 a. Rescind the March 7, 2013 and March 8, 2013 reprimands;
- 12
- 13 b. Sign and post immediately in conspicuous places where employees
- 14 usually congregate or where notices to employees are usually posted,
- 15 including electronically, if the City customarily communicates to its
- 16 employees via intranet or e-mail, and maintain for a period of thirty (30)
- 17 consecutive days thereafter signed copies of the attached Notice to
- 18 Employees; and
- 19
- 20 c. Within thirty (30) days, notify the DLR in writing of the steps taken to
- 21 comply with this decision and Order.

22 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

KENORAH DAVIS, 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)U), 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.



COMMONWEALTH OF MASSACHUSETTS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF A HEARING OFFICER OF THE 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 City of Medford (City) has violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of G.L. Chapter 150E (the Law) by retaliating against Timothy Beckwith and William O'Brien for engaging in concerted, protected activities. The City posts this Notice to Employees in compliance with the Hearing Officer's order.

Section 2 of the Law gives all employees: (1) the right to engage in concerted protected activity, including the right to form, join and assist unions, to improve wages, hours, working conditions, and other terms of employment, without fear of interference, restraint, coercion or discrimination; and, (2) the right to refrain from either engaging in concerted protected activity, or forming or joining or assisting unions.

WE WILL NOT discriminate against Timothy Beckwith and William O'Brien or any other employee for engaging in the concerted, protected activity;

WE WILL NOT, in any like manner, interfere with, restrain and coerce Timothy Beckwith and William O'Brien or any other employee in the exercise of their rights guaranteed under the Law.

WE WILL rescind the March 7, 2013 and March 8, 2013 reprimands.

City of Medford

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 Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).