COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of		
COMMONWEALTH OF MASSACHUSETTS SECRETARY OF ADMINISTRATION AND FINANCE, DEPARTMENT OF PUBLIC SAFETY		Case No. SUP-12-2357
and		Date Issued: September 26, 2014
MASSACHUSETTS ORGANIZATION OF STATE ENGINEERS AND SCIENTISTS		

Hearing Officer:

Brian K. Harrington, Esq.

Appearances:

Melinda Willis, Esq.	-	Representing the Commonwealth of Massachusetts Secretary of Administration and Finance, Department of Public Safety
Michelle Gates, Esq.	-	Representing the Massachusetts Organization of State Engineers and Scientists

HEARING OFFICER'S DECISION AND ORDER

SUMMARY

The issue is whether the Commonwealth of Massachusetts (Commonwealth or Employer), Secretary of Administration and Finance, Department of Public Safety (DPS or Department) terminated Joseph Pineyro (Pineyro) in retaliation for engaging in protected, concerted activity in violation of Section 10(a)(3) and derivatively Section 10(a)(1) of

Massachusetts General Laws Chapter 150E (the Law). I find that the Commonwealth did not violate the Law when it terminated Pineyro.

STATEMENT OF THE CASE

On October 19, 2012, the Massachusetts Organization of State Engineers and Scientists (MOSES or Union) filed a charge with the Department of Labor Relations (DLR) alleging that the Commonwealth had violated Section 10(a)(3) and derivatively Section 10(a)(1) of the Law. The Commonwealth filed a Written Response to this charge on November 30, 2012. Following an investigation, the DLR[1] issued a complaint of prohibited practice on February 12, 2013, alleging that the Commonwealth had violated Section 10(a)(3) and derivatively Section 10 (a)(1) of the Law by terminating Joseph Pineyro in retaliation for engaging in protected, concerted activity. The Employer filed an answer to the Complaint on February 21, 2013

I conducted two days of hearing on January 9, 2014 and March 27, 2014 at which both parties had the opportunity to be heard, to examine witnesses and to introduce evidence. The parties filed post-hearing briefs on or about May 16, 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 Commonwealth is a public employer within the meaning of Section 1 of the Law.

[1] Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations (DLR) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the body within the Department charged with deciding adjudicatory matters. References in this decision to the Board include the former Labor Relations Commission (former Commission).

2. The Union is an employee organization within the meaning of Section 1 of the Law.

3. The Union is the exclusive bargaining representative all employees in the statewide bargaining unit 9, including the title of District Engineering Inspectors employed by the Department.

4. The Union and the Commonwealth are parties to a Collective Bargaining Agreement (Agreement) which expires on December 31, 2014.

5. The Commonwealth employed Pineyro, who in January 2012 held the title of District Engineering Inspector III.

6. On or about April 20, 2012, the Commonwealth terminated Pineyro.

7. On or about April 24, 2012, the Union filed a grievance challenging Pineyro's termination, and at the time of the hearing the matter was currently before an arbitrator.

FINDINGS OF FACT

The Commonwealth hired Pineyro as a District Engineering Inspector III on August 12, 2003, to work for the Engineering Division of the DPS. At all times relevant to this matter, Pineyro was a member of the Union and statewide bargaining unit 9. Pineyro was also a Union steward. Pineyro lives in Templeton, MA and resided there at all times relevant to this case.

Duties of a District Engineering Inspector

The first duty of a District Engineering Inspector is to enforce Massachusetts General Laws Chapter 146 and the Code of Massachusetts Regulations (CMR), 522 CMR 2-18; 520 CMR 6,10 and 13; 527 CMR 4 and 9; 528 CMR 10 and 11. These deal with the inspection and regulation of air tanks, boilers, refrigeration equipment, amusement rides, sprinklers and hoisting equipment.

Some of these devices, most notably for this case certain boilers, require an operator of those devices to be licensed by the DPS. According to the Form 30 job description for the

District Engineering Inspector III position, inspectors recommend "the issuing or suspension of licenses or certificates and orders shutdowns or corrective action in cases of non-compliance by conducting inspections and investigation, by performing tests and checking licenses...in order to enforce applicable law." Inspectors travel throughout their district and conduct compliance checks of devices where licensure is required to install, maintain or operate them. Where a licensed individual is required to operate a device, inspectors insure that the licenses of those individuals are current and displayed in a prominent place and, to the best of their ability, determine if the device is being operated in a safe and lawful manner.

Individuals can obtain licensure to operate these devices, including certain types of high pressure boilers, by taking and passing an examination. Inspectors issue these licenses by acting as examiners of the applicants. As part of their examination, inspectors must find the applicants to be trustworthy and competent. Should an inspector acting as an examiner refuse to issue a license, the applicant has a right to appeal to the Department's Chief of Inspections, Mechanical, who then appoints a board of three inspectors to hear the appeal.

Once an individual is granted a license to operate one of these devices, they can obtain employment. In the case of high pressure boilers, they would generally be employed as an "engineer" or "fireman". They would work for a "chief engineer", who has oversight responsibility for the device and supervised the other engineers and/or firemen, who are said to be working "under" the license of the chief engineer.

M.G.L. Chapter 146, Section 59 provides that a license as an engineer or fireman or operator of hoisting machinery shall be suspended or revoked for incompetence or untrustworthiness of the holder thereof. Where the Department becomes aware of the potential incompetence or untrustworthiness of a license holder, a hearing is convened

pursuant to M.G.L. Chapter 146, Section 66. As part of their job, inspectors take action to suspend or revoke the licenses of those who violate M.G.L. c. 146 or the relevant CMR's. Generally, these actions are initiated through show cause letters, contact from a chief engineer at a particular site, or on the spot during a compliance check if a violation is discovered. Decisions as a result of these hearings are final agency decisions subject to judicial review under M.G.L. Chapter 30A.

Pineyro authored at least nine show cause letters concerning the suspension or revocation of individual's licenses in 2003 and 2004. The record does not disclose what the eventual outcome was in any of these matters, save one where Pineyro recommended a two week suspension of an individual's license.

Pineyro's employment history prior to 2011

Prior to being hired by the Commonwealth, Pineyro worked at the Seaman Paper Company from 1989-1999. Seaman Paper is located in Templeton, MA. From the date of his hire in October 2003 until January, 2012 Pineyro was responsible for performing engineering inspections in a district which consisted of a geographical area of communities southwest of Boston. There were no reported issues with Pineyro's job performance, nor did the Commonwealth take any disciplinary action against him.

Pineyro's Union activities concerning the January 2012 Redistricting

Prior to 2011, Pineyro had been acting as a steward for the Union for approximately five years. He perceived there to be an acrimonious relationship between labor and management at DPS during that time.[2] In late 2011, in his capacity as the Union steward,

[2] No evidence was presented that the labor-management relationship between the employees where Pineyro worked and their immediate supervisor was strained.

Pineyro became aware that the Department was in the process of writing a new redistricting plan. On January 9, 2012, DPS issued a redistricting plan which changed the geographical assignments of its District Engineering Inspectors, including Pineyro. The new plan changed Pineyro's district to one which included Templeton, the town in which he lived. Inspector Thomas O'Rourke (O'Rourke) had been assigned to this district for approximately twenty years, and the redrawn district assigned some of O'Rourke's territory to Pineyro, including the town of Templeton. Pineyro immediately began to engage in concerted, protected activity concerning the new redistricting plan,[3] contending that this redistricting violated Article 14 of the Agreement. The Department's position was that it was permitted to redraw districts by the provisions of the Agreement. Through email and spoken conversations, Pineyro sought to compel the Department to rescind the new redistricting plan. These actions commenced on January 4, 2012, and continued up through the time of Pineyro's termination.

The management of the Department knew of Pineyro's continuous, vocal opposition to the redistricting plan. Jamie Johnson was Pineyro's immediate supervisor and Pineyro copied him on his emails protesting the redistricting. Also cc'ed was DPS General Counsel Beth McLaughlin (McLaughlin). Additionally, both Johnson and McLaughlin were present at the January 9, 2012 labor-management meeting where Pineyro spoke out against the new redistricting plan. Pineyro believed that when the new districts were created, the Employer should have structured a bidding process similar to what happened when an inspector left the employ of the Commonwealth. In those situations, the remaining inspectors would place bids

[3] There is extensive evidence in the record demonstrating that Pineyro had been As a steward for many years prior to 2011 Pineyro had engaged in concerted, protected activity on a number of occasions during that time. I need not describe this evidence because the level and duration of Pineyro's union activity prior to 2011 is not germane to my analysis.

to transfer to the new district if they so desired. Pineyro contended that by not following this process for the new redrawn districts, DPS violated Article 14 of the Agreement and acted contrary to established past practice. Although the issue was discussed at a labor-management meeting of January 9, 2012, the Union did not file a grievance over the redistricting issue. Pineyro continued to advocate this position to the management of the Department up to the time of his termination.

The Unit 9 Code of Conduct

All members of Unit 9 are subject to the Unit 9 Code of Conduct, which is supplied to each unit member. This Code exists "to give all employees full and fair notice of their professional and ethical obligations." The first reason given for its existence is to inform employees that they may not engage in any conduct which constitutes a conflict of interest or gives the reasonable basis for an impression of a conflict between an employee's private interest and the public interest. The Code also provides that: "No employee may participate in any official action relating to any individual with whom...the employee has a substantial personal interest....Employees have an obligation to avoid scrupulously the potential conflicts of interest which exist in their employment.... They have a duty to disclose and report promptly the existence or possible existence of a conflict of interest to their agency head or their designee....and they should request from their supervisor the transfer from their caseload of any case which involves their immediate family."

State employees are also subject to the provisions of M.G.L. c. 268A, Section 23 which, among other provisions, prohibits an employee from giving a reasonable basis for an impression that they are "unduly influenced by the kinship, rank, position or influence of any party or person". Unit 9 members receive periodic refresher training on ethics which

specifically references the Unit 9 Code of Conduct and M.GL. c. 268A. Pineyro received such training on five occasions during his ten years of employment with the Commonwealth.

Prior to Pineyro's termination only one other employee had been disciplined for a Code of Conduct violation of this nature. No evidence was presented of any Code of Conduct violations by members of the Union that resulted in no discipline. The one violation which did lead to discipline resulted in a written reprimand where an employee reported a potential conflict of interest after the fact. That employee was never involved in an actual conflict of interest.

The February 12 Incident at the Seaman Paper Company

In 2012, Pineyro's son Anthony Pineyro (Anthony Pineyro) worked at the Seaman Paper Company in Templeton, MA as a licensed third-class engineer. Templeton was part of Pineyro's new district which he oversaw as of January 9, 2012. When he was on shift at the Seaman Paper Company, Anthony Pineyro was responsible for manning the operation of four high pressure boilers and a steam turbine that required continuous attendance by the operator. Pineyro's duties as inspector in this district included periodic compliance checks of the boilers of the Seaman Paper Company, and any alleged violations of M.G.L c. 149 or the relevant CMR's which took place at the Seaman Paper Company would be reported to him as the district inspector. Although he was aware of where his son worked, Pineyro did not inform the Department that his son was a licensee in a district which had come under his oversight, as the provisions of the Unit 9 Code of Conduct and M.G.L. c. 268A provide, as a potential conflict of interest.[4]

[4] The record was unclear whether Pineyro specifically informed his supervisor of the fact that he resided in Templeton, which was part of his new district.

Anthony Pineyro reported for duty at 7:00pm on Saturday, February 11, 2012 to work a twelve hour shift as the continuous attendant for the four high pressure boilers and a steam turbine. The boilers and the steam turbine provide the energy for the mill to produce paper. At approximately 12:20 a.m. on the morning of February 12, a "mill tour boss" noticed that steam pressure which was provided to machinery in the mill was dropping to the point that it was affecting the production of paper. This was recorded on a "Steam flow chart" which is kept at the plant. The mill tour boss went to the boiler room where Anthony Pineyro was working alone. Anthony Pineyro admitted to the mill tour boss that he had been drinking alcohol before and during his shift and was unable to properly operate the equipment. Subsequently, Anthony Pineyro admitted that, on the night of February 11-12 he had been drinking alcohol while at work, left work during his shift, leaving the boilers unattended, to go to a bar and consume more alcohol, then returned to work. Another engineer was called in to address the boiler situation, and Anthony Pineyro was driven home by another employee. As a result of this incident, the Seaman Paper Company terminated Anthony Pineyro on Monday, February 13, 2012.

The February 14, 2012 email to Pineyro

On Tuesday, February 14 Mark Keney (Keney), Chief Engineer at the Seaman Paper Company emailed Pineyro at his Department email address and informed him of the termination of Anthony Pineyro, and the reasons for the termination.[5] Pineyro decided to construe this email as one from a friend,[6] although he had not spoken to Keney in

[5] Pineyro was not aware of the events of February 12, 2012 prior to the receipt of this email.

[6] Pineyro knew Keney as they had both worked together at the Seaman Paper Company at the same time.

approximately ten years. Joseph Pineyro did not inform his supervisors of this email, although he was required to do so by the Code of Conduct, did not respond to it, and subsequently deleted it from his email account.

The March 15, 2012 email to Pineyro

On March 15, 2012, Pineyro received a second email from Keney which stated that he had hoped for a reply to his earlier email, as it was his responsibility as Chief Engineer at the Seaman Paper Company to inform the district inspector of all unsafe practices which took place under his (Keney's) license. Keney requested a response from Pineyro in order to discharge his own responsibilities. Chief engineers are required by statute and regulation to report any unsafe operating situations which could jeopardize their own licensure, an obligation which Pineyro understood. Pineyro was uncertain of how to respond to Keney's email.

The termination of Pineyro by the Department

On March 16, 2012, Pineyro brought Johnson a printed copy of the March 15, 2012 email from Keney which included below it a copy of Keney's February 14, 2012 email[7], Pineyro told Johnson that he did not believe that the Department had jurisdiction to take action against a licensee once they had been terminated from their employment as an engineer, and that Keney's February 14, 2012 email did not constitute a formal complaint to

[7] The presence of the February 14, 2012 email below the March 15, 2012 seems to be as a result of Keney sending his second email as a "reply all" to his first email, which is consistent with Keney's assertion in the second email that he had hoped for a reply to his first email. Presumably, this is what Pineyro printed and brought to Johnson.

the Department.[8] Johnson indicated to Pineyro that this was not correct. On March 16, 2012, Johnson instructed inspector George Streeter to investigate the actions of Anthony Pineyro on the night of February 11-12, 2012. As a result of this investigation, the Department revoked Anthony Pineyro's license as an engineer on March 26, 2012[9].

On April 3, 2012, the Department conducted an investigatory interview with Pineyro over his actions surrounding the termination of Anthony Pineyro[10]. At this investigation, Pineyro indicated that a prior manager had told him that once a licensee had been terminated from their employment, the Department had no jurisdiction to take action against their license unless so requested by that employer. On April 11, 2012, the Department placed Pineyro on paid administrative leave pending the outcome of this investigation. After the investigation was completed DPS Commissioner Thomas G. Gatzunis decided, with input from Johnson and McLaughlin to terminate Pineyro. The Department notified Pineyro by letter dated April 20, 2012, the Department terminated Pineyro [11]. Subsequent to his termination DPS referred the matter of Pineyro's conduct concerning his son's termination to the State Ethics

[8] Although the Union submitted an online complaint form from the Department's website, there was no evidence presented that there was a standard complaint form to be used to report unsafe practices to DPS.

[9] Anthony Pineyro appealed this decision but as of the date of the hearing, no administrative or judicial proceedings had taken place.

[10] Pineyro had Union representation at the April 3, 2012 investigatory interview

[11] Under Article 9 of the Agreement, the Union filed a grievance contesting Pineyro's termination on April 24, 2012. This grievance characterized the termination as retaliatory, discriminatory and without just cause. The Union and the Employer held a step III conference over this grievance at the Commonwealth's Office of Employee Relations on June 5, 2012. By notice dated July 6, 2012 the Commonwealth denied Pineyro's grievance. The Union appealed the denial to a neutral arbitrator but, as of the date of this hearing, no arbitration date had been set.

Commission. The Ethics Commission declined further action, deferring to the Department's termination of Pineyro.

Opinion

A public employer violates Section 10(a)(3) of the Law when it retaliates or discriminates against an employee for engaging in concerted, protected activity. Southern Worcester Regional Vocational School District v. Labor Relations Commission, 386 Mass. 414 (1982); School Committee of Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327 (1996).

To establish a prima facie case of a Section 10(a)(3) retaliation violation, a charging party must show that: (1) the employee engaged in concerted activity protected by Section 2 of the Law; (2) the employer knew of the concerted, protected activity; (3) the employer took adverse action against the employee; and, (4) the employer's action was motivated by a desire to penalize or discourage the protected activity. City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (Jan. 9, 2009); Town of Carver, 35 MLC 29, 47, MUP-03-3094 (June 30, 2008); Quincy School Committee, 27 MLC 83, 92, MUP-1986 (Dec. 29, 2000); Town of Clinton, 12 MLC 1361, 1365, MUP-5659 (Nov. 9, 1985), (citing Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981).

If the charging party establishes a prima facie case, the employer may offer evidence of one or more lawful reasons for taking the adverse action. If the employer is able to produce lawful reasons for its actions, the employee must then prove that, "but for" the protected activity, the employer would not have taken the adverse action. Id.; Bristol County, 26 MLC 105, 109, MUP-2100 (Jan. 28, 2000).

The Union's Prima Facie Case

Protected, Concerted Activity, Knowledge, and Adverse Action

The Union has established the first three elements of its prima facie case. The first element, protected, concerted activity, is not in dispute. Both parties agree that Pineyro engaged in protected, concerted activity when he protested the January 9, 2012 redistricting plan. Pineyro sent and received many emails to Union staff and the Department alleging violations of the Agreement and past practice from December of 2011 until the time of his termination by the Commonwealth. He also spoke to management of the Department on many instances and raised the issue at the labor-management meeting of January 9, 2012.

With respect to the second element of the Union's prima facie case, there is no dispute that the management of the Department knew of Pineyro's continuous, vocal opposition to the redistricting plan. Johnson, to whom Pineyro brought the March 15 and February 14 emails, was cc'ed on Pineyro's emails protesting the redistricting as was McLaughlin. Both Johnson and McLaughlin were present at the January 9, 2012 labor-management meeting.

As to the third element of the prima facie case, the Union contends that Pineyro's termination was an adverse action. The Commonwealth Employment Relations Board (Board) has consistently defined "adverse action" as an adverse personnel action, such as a suspension, discharge, involuntary transfer, or reduction in supervisory capacity. City of Boston, 35 MLC 289, 291 MUP-04-4077 (May 20, 2009) (citing City of Holyoke, 35 MLC 153, 156, MUP-05-4503, (January 9, 2009). The Department does not contest that Pineyro's termination constituted an adverse action.

Unlawful Motivation

A charging party can prove unlawful employer motivation, the last element of its prima facie case, with direct or indirect evidence of discrimination. Lawrence School Committee, 33 MLC 90, 97, MUP-02-3631 (Dec. 13, 2006). The Union does not contend that there is direct evidence of discrimination; therefore, I will consider its arguments under the circumstantial evidence standard set forth below.

Unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. See Town of Carver, 35 MLC 29, 48 MUP-03-3894, (June 30, 2008); (citing, Town of Brookfield, 28 MLC 302, 327-28, MUP-2538, (May 1, 2002); see also Southern Worcester County Regional Vocational School District, 386 Mass. at 418-19 (citing Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951). Several factors may suggest unlawful employer motivation, including timing of the alleged discriminatory act, triviality of reasons given by the employer, an employer's deviation from past practices, or expressions of hostility toward a union or the protected activity. Town of Carver, 35 MLC at 48; Cape Cod Regional Technical High School District Committee, 28 MLC 332, 335, MUP-2541 (May 15, 2002); Bristol County, 26 MLC 105, 109, MUP-2100 (Jan. 28, 2000); Town of Andover, 14 MLC 1571, 1582, MUP-6443 (H.O. March 3, 1988), aff'd 17 MLC 1475, 1482, MUP-6443 (Feb. 6, 1991). Timing alone is insufficient to establish unlawful employer motivation. City of Malden, 5 MLC 1752, 1764, MUP-3017 (March 20, 1979).

The Relationship between the Commonwealth and the Union

Pineyro perceived an environment of hostility to exist between the Union and management. Such general hostility can show unlawful employer motive. Town of Halifax, 1

MLC 1486, MUP-2059 (June 30, 1975). However, such evidence is not sufficient by itself to prove unlawful employer motive, and there needs to be evidence of disparaging comments or maltreatment of Union officials to prove such a motive. Town of Andover, 17 MLC at 1483. Pineyro had been a steward since 2007, yet had received no prior discipline. No evidence was presented that the Employer disciplined any other Union officials or denied them any rights or benefits. Johnson had been promoted a short time earlier and showed no hostility to Pineyro or the Union in general. There was no record evidence that management made any disparaging comments about the Union or Union officials. While relations between the Union and the Department appeared to be sometimes difficult and occasionally contentious, this alone does not rise to the level of proving prove anti-union animus on the part of the Department.

Timing

The Union argues that the timing of the termination, coming so soon after Pineyro's vigorous opposition to the January 9, 2012 redistricting plan, establishes improper motivation by itself. I disagree. The Commonwealth first became aware of the situation involving Anthony Pineyro on March 16, 2012. Prior to that date, the Department did not know that (1) Anthony Pineyro was a licensee under the jurisdiction of the Department and was employed in the district to which Pineyro had been assigned in January, or (2) that Pineyro received an email on February 14, 2012 concerning his son's termination from the Seaman Paper Company. Once the Department received this information, it moved quickly, scheduling investigations both into the conduct of Anthony Pineyro as a licensee on the night of February 11-12, 2012 and into the conduct of Pineyro, culminating in the April 3, 2012 an investigatory

interview . While the timing of the adverse action closely followed Pineyro's vocal opposition to the redistricting plan, it does not support a finding of improper motivation.

Deviation from Past Practice/Disparate Treatment

The Union's argument - that the Commonwealth deviated from past practice and treated Pineyro disparately by terminating him is also unpersuasive. First, the Union suggests that since only one other employee had been disciplined for a Code of Conduct violation of this nature, Pineyro's termination constitutes disparate treatment. However, it introduced no evidence of any Code of Conduct violations that resulted in no discipline. Secondly, the one violation which did result in a written reprimand (where an employee reported a potential conflict of interest after the fact) does not demonstrate disparate treatment Pineyro's situation would have been analogous to the violation punished by a reprimand if he had known his son worked as a licensee under his jurisdiction in his new district but merely failed to report it for a period of time. However, the evidence demonstrates that there was no comparable infraction at the Department from which to draw a comparison of disparate treatment. Pineyro was not similarly situated to the individual who received a written reprimand. Consequently, I find that the Union has not established that the Commonwealth deviated from its past practice or treated Pineyro differently than other employees. Accordingly the Union has failed to establish a prima facie case of discrimination.

The Commonwealth's Reasons

However, even if the Union had established a prima facie case, the evidence did not show that the Employer would not have terminated Pineyro but for his protected, concerted activity surrounding the redistricting plan. It is insufficient simply for an employer to state lawful reasons for its adverse actions. Town of Clinton, 12 MLC 1361, 1365, MUP-5659 (Nov.

9, 1985). It must "state a lawful reason for its decision and produce supporting facts indicating that this reason was actually a motive in the decision." Forbes Library, 384 Mass. 559, 563 (1981). "The decision maker must find it more than plausible that legitimate reasons motivated the employer's decision. Those reasons must actually have been a motive in the decision in order to be a case of dual motive." Boston City Hospital 11 MLC at 1065, 1072, MUP-4893 (July 24, 1984).

The Commonwealth produced credible evidence that it terminated Pineyro because of his actions in the wake of his son's misconduct at Seaman Paper. First, he did not report the potential conflict in having his son as a licensee under his oversight in his new district. Second, once he received word of his son's termination through his state email account Pineyro had a duty to report that information to his supervisor. Instead, he deleted the email. Finally when Pineyro did bring both the first and the second email from Keney to his supervisor, his reasons for doing so called into question both his credibility and his knowledge of his job duties.

The Union points to his lack of prior discipline and positive evaluations and suggests that the reasons given for Pineyro's termination were shifting and insubstantial. First, the Union asserts that Pineyro did not attempt to conceal Keney's February 14, 2012 email, but viewed it as a personal favor to a friend from Keney, rather than an official notification to the district inspector. This argument is implausible because the record demonstrates that Pineyro was very knowledgeable about virtually every aspect of his job, the laws and regulations he enforced, and the practices of the industry. Other inspectors looked to him to expand their knowledge in these areas. The breadth of Pineyro's knowledge and experience belies the Union's contention that he did not know that he should report the February 14,

2012 email to his supervisor due to the seriousness of the alleged violation or the possible conflict of interest. [12]

Secondly, the Union claims that if DPS truly believed that Pineyro's conduct constituted a serious ethics violation, as it claimed, then it should have referred the matter to the State Ethics Commission immediately instead of waiting until a week after the Department terminated Pineyro to do so. As mentioned earlier, the evidence demonstrated that DPS acted expeditiously once it obtained the information regarding Anthony Pineyro and Pineyro's conflict of interest. I cannot find fault with the timing of the Ethics Commission referral as it was not a necessary step in the process to discipline Pineyro.

Finally, the Union contends the fact that the Ethics Commission declined to take action somehow demonstrates that Pineyro's alleged violation was not serious. The response of the Ethics Commission indicated that no action was taken since the Department had already moved to terminate Pineyro, so that argument must fail as well.

Consequently I find that the Commonwealth met its burden of producing evidence that it terminated Pineyro for his wrongful actions following his son's misconduct on February 11-12, 2012 and I next consider whether the Union has established that the Employer would not have terminated Pineyro but for his Union activity.

[12] Pineyro also contended that (1) the Department had no jurisdiction over licenses once they were issued, which was belied both by a plain reading of M.G.L. Ch. 146, Sec. 59 and by emails he sent acknowledging that fact: (2) once an individual was terminated from employment, the Department would not pursue license action; which was contradicted by a recommendation Pineyro himself issued in a prior licensee discipline case and (3) that he was unaware of a Chief Engineer's duty to inform the district inspector of unsafe practices which took place under his license, which given Pineyro's lengthy tenure as a licensee even prior to joining the Department, was not credible.

The But-for Test

Once the employer produces evidence of a legitimate, non-discriminatory reason for taking the adverse action, the case becomes one of "mixed motives" and the Board shifts the burden to the charging party to demonstrate that "but for" the protected activity, the employer would not have taken the adverse action. Trustees of Forbes Library, 384 at 565-566; Suffolk County Sheriff's Department, 27 MLC 155, 160 MUP-1498 (June 4, 2001); Quincy School Committee, 27 MLC at 92.

The Union contends that but for engaging in protected activity, Pineyro would not have been terminated in April, 2012. I do not agree. While Pineyro's protected activity concerning the redistricting caused difficulty to the employer No evidence was presented that there was a nexus between those actions and Pineyro's termination. The evidence points to only one conclusion, that the Employer terminated Pineyro because of his wrongful actions following his son's misconduct at the Seaman Paper Company. Thus, the Union did not meet its burden to prove that but for Pineyro's protected activity he would not have been terminated.

CONCLUSION

For the aforementioned reasons, I conclude that the Employer did not discriminate against Pineyro in violation of Section 10(a)(3) of the Law. Accordingly, the Complaint is dismissed.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

BRIAN K. HARRINGTON, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 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 the ten days, this decision shall become final and binding on the parties.