

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS  
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

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In the Matter of \*

COMMONWEALTH OF \*  
MASSACHUSETTS, SECRETARY \*  
OF ADMINISTRATION AND FINANCE \*

and \*

SERVICE EMPLOYEES \*  
INTERNATIONAL UNION, \*  
LOCAL 509 \*

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Case No. SUP-12-1829

Date issued: January 16, 2015

CERB Members Participating:

Marjorie Wittner, Chair  
Elizabeth Neumeier, CERB Member  
Harris Freeman, CERB Member

Appearances:

Andrew Levrault, Esq. - Representing the Commonwealth of Massachusetts  
Katherine Shea, Esq. - Representing Service Employees International Union,  
James Hykel, Esq. Local 509

1 DECISION ON APPEAL OF HEARING OFFICER DECISION

2 SUMMARY

3 Local 509, Service Employees International Union (Union or Local 509) appeals  
4 from the remedy that a Department of Labor Relations (DLR) Hearing Officer ordered in  
5 a decision holding that the Commonwealth of Massachusetts (Commonwealth or  
6 Employer) violated Section 10(a)(1) of M.G.L. c. 150E (the Law) by interfering with,  
7 restraining, and coercing employees in the free exercise of their rights under Section 2  
8 of the Law. More specifically, the Union argues that the Hearing Officer erred by

1 ordering only a notice posting and declining to order a make-whole remedy (i.e,  
2 revoking the discipline and awarding backpay) when the Department of Children and  
3 Families (DCF) suspended Peter MacNeill (MacNeill), a DCF substance abuse  
4 coordinator, for statements he made at a grievance hearing. For the reasons set forth  
5 below, the Commonwealth Employment Relations Board (CERB) modifies the Order to  
6 include a make-whole remedy.

### 7 Facts

8 The parties entered into stipulations and the Hearing Officer made additional  
9 findings of fact based on the formal hearing record. Neither party disputes those  
10 findings on appeal, and we therefore adopt the stipulations and findings in their  
11 entirety.<sup>1</sup>

12 The only issue on appeal is remedy. Therefore, the salient facts for purposes of  
13 this appeal are that on October 17, 2011, MacNeill's direct supervisor suspended  
14 MacNeill for one day for engaging in unprofessional conduct. The Union filed a  
15 grievance on MacNeill's behalf and a grievance hearing was held on February 28, 2012.  
16 On March 14, 2012, DCF issued MacNeill a three-day suspension for his conduct during  
17 the grievance hearing.

### 18 Opinion<sup>2</sup>

19 The Hearing Officer concluded that the Commonwealth violated Section 10(a)(1)  
20 of the Law when it suspended MacNeill for his conduct during a grievance hearing. In

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<sup>1</sup> Further reference may be made to the facts set out in the Hearing Officer's decision, reported at 40 MLC 297 (April 2, 2014) and attached to this decision.

<sup>2</sup> The CERB's jurisdiction is not contested.

1 so holding, the Hearing Officer rejected the Commonwealth's argument that MacNeill's  
2 conduct had lost its protected status, and thus considered whether the suspension  
3 would chill a reasonable employee in the exercise of protected rights. The Hearing  
4 Officer concluded that it would, based on "clearly established" CERB precedent holding  
5 that issuing discipline for concerted, protected conduct during a grievance hearing chills  
6 reasonable employees in the exercise of their rights to engage in grievance  
7 proceedings. 40 MLC at 300 (citing Bristol County Sheriff's Department, 31 MLC 6, 18,  
8 MUP-2872 (July 15, 2004); City of Boston, 26 MLC 80, 83, MUP-1478 (January 6,  
9 2000)). The Commonwealth did not appeal from this conclusion. The Union, however,  
10 did file an appeal with the CERB claiming that the Hearing Officer incorrectly limited the  
11 remedy for the independent Section 10(a)(1) violation to a cease and desist order and  
12 notice posting, rather than also imposing the make-whole remedy that the Union  
13 requested in its post-hearing brief, i.e., removing the suspension and making MacNeill  
14 whole.

15 The Union's argument on appeal is straightforward: a make-whole remedy is not  
16 discretionary when there is a determination that an employer has unlawfully imposed  
17 discipline in violation of Section 10 of the Law. The Employer urges the CERB to  
18 uphold the Hearing Officer's more limited remedial order on the grounds that the scope  
19 of a remedial order is discretionary pursuant to Section 11(d) of the Law; the Union did  
20 not allege a Section 10(a)(3) violation; and a make-whole remedy is otherwise available  
21 pursuant to the grievance and arbitration provisions in the parties' collective bargaining  
22 agreement.

1           We begin our analysis by examining the remedy section of the underlying  
2 decision. The Hearing Officer, citing the CERB's decision in Salem School Committee,  
3 35 MLC 199, 219, MUP-04-4008 (April 14, 2009), stated that "[t]he traditional remedy in  
4 a Section 10(a)(1) case is limited to a cease and desist order and a posting." 40 MLC at  
5 300. The Hearing Officer's remedial analysis focused only on Salem School  
6 Committee. He therefore found "no reason to depart from the traditional remedy  
7 afforded to 10(a)(1) violations," and ordered only the posting of a notice containing a  
8 cease and desist order. The Hearing Officer's recitation of the CERB's language in  
9 Salem School Committee is accurate but does not address other relevant case law. As  
10 we explain below, neither the reasoning or facts in Salem School Committee, nor other  
11 precedent, provides support for the limited remedial order issued in the case now before  
12 us.

13           To begin, in fashioning appropriate remedies in cases involving a violation of  
14 Section 10 of the Law, the CERB attempts "in compliance with the provisions of c.  
15 150E, Section 11, to restore the situation as nearly as possible to that which would have  
16 existed but for the unfair labor practice." Newton School Committee v. Labor Relations  
17 Commission, 388 Mass. 557, 576 (1983) (quoting Labor Relations Commission v.  
18 Everett, 7 Mass. App. Ct. 826, 929 (1979) and citing School Committee of Boston v.  
19 Boston Teachers Local 66, 378 Mass. 65, 73 (1979)); Commonwealth of  
20 Massachusetts, 14 MLC 1322, 1327, SUP-2864 (November 19, 1987); City of Gardner,  
21 10 MLC 1218, 1222, MUP-4917 (September 14, 1983). Thus, as the Union points out  
22 in its supplementary statement, the CERB has issued orders revoking discipline and  
23 awarding backpay in cases alleging independent violations of Section 10(a)(1) of the

1 Law where the CERB has found that the discipline imposed may reasonably tend to  
2 restrain, coerce or interfere with employees in the exercise of rights protected under  
3 Section 2 of the Law. See Bristol County Sheriff's Dept., 33 MLC 107, MUP-03-3900  
4 (January 3, 2007); Whitman-Hanson Regional School Committee, 9 MLC 1615, MUP-  
5 4815 (January 18, 1983); Billerica School Committee, 8 MLC 1083, MUP-3922 (1981);  
6 Newton School Committee, 6 MLC 1701, MUP-3416 (January 9, 1980).

7 The policy and rationale for restoring the full status quo ante in such cases is  
8 clearly set forth in Whitman Hanson, 9 MLC 1615. In that case, the CERB explained  
9 that an employee who is disciplined for misconduct *ancillary to or in the course of*  
10 *protected activity*, but who is in fact innocent of the misconduct, suffers a violation of  
11 Section 10(a)(1) of the Law regardless of the employer's motive or good faith mistake of  
12 fact. Id. at 1618 (emphasis added). The CERB reasoned that because the employee's  
13 actions had not removed his conduct from the protection of Section 2, the employer  
14 independently violated Section 10(a)(1) of the Law by disciplining the employee  
15 because, discipline "may tend to inhibit employees from engaging in the protected  
16 activity which led to the discipline." Id. Accordingly, in Whitman-Hanson, the CERB,  
17 relying on both federal and CERB precedent, ordered a rescission of a reprimand  
18 issued to a school teacher who was wrongly disciplined for attending and testifying at an  
19 arbitration proceeding as a remedy for the Section 10(a)(1) violation. Id. at 1618-1619  
20 (citing Cusano v. NLRB, 190 F.2d 808 (3<sup>rd</sup> Cir. 1951), NLRB v. Burnup and Sims, Inc.,  
21 379 U.S. 21 (1964) and Billerica School Committee, 8 MLC 1083)).

22 The CERB has also ordered the restoration of the status quo ante in two other  
23 cases very similar to the one now before us. In Bristol County Sheriff's Department,

1 which the Union cited in its post-hearing brief, the CERB held that a correctional officer  
2 was improperly suspended for ten days in violation of Section 10(a)(1) when she  
3 impulsively called a superior officer a liar during an emotional grievance hearing. 33  
4 MLC at 109. The CERB's remedial order included a notice posting, a cease and desist  
5 order, and a requirement that the employer revoke and remove all references to the ten-  
6 day suspension, and award back pay to the affected employee. Id. at 109-110.

7 Similarly, in Newton School Committee, 6 MLC 1701, the CERB found that  
8 memoranda that the employer issued that were critical of an employee's behavior at a  
9 "grievance-type session," violated Section 10(a)(1) of the Law. The CERB issued a  
10 cease and desist order and ordered the School Committee to remove the memoranda  
11 from the employee's personnel file. Id. at 1706-1707. Notably, in discussing the  
12 appropriate remedy, the CERB considered whether to reinstate the employee with  
13 backpay because the employee resigned from his job before the close of the unfair  
14 labor practice hearing. Id. at 1706. The CERB declined to do so because the evidence  
15 did not show that the employee had been constructively discharged. Id. Nevertheless,  
16 the fact that the CERB even considered whether to order reinstatement demonstrates  
17 that, in fashioning remedies for independent Section 10(a)(1) violations, the CERB  
18 examines, on a case-by-case basis, whether restoration of the status quo ante, by  
19 revoking the discipline up to and including ordering reinstatement and backpay, is  
20 warranted to effectuate the purposes of the Law.

21 These cases persuade us that the limited remedy in Salem School Committee is  
22 not appropriate here. In that case, the CERB addressed whether the Section 2 rights of  
23 a teacher, Elizabeth Babcock (Babcock), were violated when, among other things, the

1 Salem School Committee made changes in who conducted the performance  
2 evaluations of four other teachers after those teachers engaged in protected, concerted  
3 activity. Id. at 200-201. Subsequently, the School Committee took various forms of  
4 adverse action against the four teachers, but not Babcock, the sole charging party. Id.

5 The CERB found in favor of Babcock on three counts alleging that her Section 2  
6 rights had been chilled as a result of the adverse employment actions experienced by  
7 three of the four teachers.<sup>3</sup> Id. at 213-219. The CERB, however, rejected Babcock's  
8 request that the CERB reinstate the three teachers with backpay, explaining that the  
9 "traditional" remedy in a Section 10(a)(1) case is a cease and desist order and a notice  
10 and posting. Id. at 219 (citing, as examples, Groton-Dunstable Regional School  
11 Committee, 15 MLC 1551, 1557, MUP-6748 (1993) and Town of Chelmsford, 8 MLC  
12 1913, 1919, MUP-4620 (March 12, 1982)). The CERB went on to state that "*more*  
13 *importantly*" Babcock lacked standing to request monetary and other damages on  
14 behalf of individuals who were not parties to the case. Id. (emphasis added). The  
15 CERB nevertheless acknowledged that make-whole remedies are authorized pursuant  
16 to Section 11 of the Law "for a discharge or layoff resulting from any prohibited practice  
17 described in Section 10 of the Law" and stated that if Babcock herself had suffered  
18 losses as a result of the violation, she may have been entitled to a make-whole remedy.  
19 35 MLC at 219-220 (citing Newton School Committee v. Labor Relations Commission,  
20 388 Mass. at 586 (emphasis added)). Accordingly, just as it did in Newton School  
21 Committee, 6 MLC at 1706, in Salem School Committee, the CERB considered, but

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<sup>3</sup> The CERB declined to find that one of the teacher's decision to resign was a Section 10(a)(1) violation. Id. at 219.

1 rejected, ordering a full status quo remedy due to the unique circumstances of the case.  
2 35 MLC at 219-220. Accord City of Lawrence, 39 MLC 291, 315, MUP-11-6161 (H.O.  
3 April 3, 2013) (citing Salem School Committee for the proposition that the traditional  
4 remedy in a Section 10(a)(1) case is a cease and desist order and notice posting but  
5 nevertheless declining to order that the City rescind an order that was found to have  
6 violated Section 10(a)(1) because the order was never implemented).

7 Based on these cases, we clarify that the phrase in Salem School Committee,  
8 stating that “the traditional remedy in a Section 10(a)(1) case is a cease and desist  
9 order and a notice and posting,” 35 MLC at 219, does not limit the authority of the  
10 CERB or a hearing officer to order a make-whole remedy when a disciplinary  
11 suspension or termination that is ancillary to, or occurs in the context of protected  
12 activity, is found to have a chilling effect on the rights guaranteed to employees under  
13 Section 2 of the Law. As the case citations to this quote indicate, the phrase refers to  
14 situations in which the chilling conduct consists of disparaging or threatening statements  
15 regarding unions or union-related activity. Id. at 219 (citing Groton-Dunstable Regional  
16 School Committee, 15 MLC at 1557 (School superintendent sent derogatory letter to  
17 employee because he filed a grievance); Town of Chelmsford, 8 MLC at 1916-1918,  
18 *aff'd sub nom.* Town of Chelmsford v. Labor Relations Commission, 15 Mass. App. Ct.  
19 1107 (1983) (various threats and promises made by Town's Highway Superintendent  
20 and by the Chair of Board of Selectmen to unit employees regarding consequences of  
21 filing a grievance and prohibited practice charge found to violate Section 10(a)(1) of  
22 Law). The chilling effect that such statements have on employees cannot be undone in  
23 the concrete manner that discipline can, i.e., by rescinding the discipline, removing all

1 record of it and awarding back pay. Thus, in situations where statements alone form  
2 the basis of the unfair labor practice, a posting that the employer has violated the Law  
3 coupled with assurances that the employer will not engage in such behavior in the  
4 future has been the “traditional” means by which the CERB attempts to restore the  
5 status quo “as *nearly as possible* to that which would have existed but for the unfair  
6 labor practice.” Newton School Committee v. Labor Relations Commission, 388 Mass.  
7 at 576 (emphasis added). However, where the chilling conduct consists of discipline,  
8 CERB precedent, including Bristol County Sheriff’s Department, Whitman-Hanson, and  
9 Salem School Committee, cited above, makes clear that the CERB has the authority to  
10 restore the full status quo ante to the extent warranted and feasible under the unique  
11 circumstances of each case.

12 The Employer does not directly challenge the CERB’s authority to order  
13 reinstatement for a discharge or discriminatory treatment resulting from any of the  
14 prohibited practices set forth in section 10 of the Law. Rather, the Employer argues that  
15 the Hearing Officer “understood that he had the ability to depart from the traditional  
16 remedy, but after reviewing all the evidence [ . . . ] exercised his broad discretion and  
17 declined to issue” a make-whole remedy. We are not persuaded by this argument  
18 because as we have discussed, the decision to order a make-whole remedy is fact-  
19 specific. Absent a discussion in the Hearing Officer’s decision distinguishing Bristol  
20 County Sheriff’s Department, which the Union cited in its post-hearing brief, and  
21 addressing why a make-whole remedy was improper, we reject the Employer’s  
22 argument that the decision should be upheld on the grounds that the Hearing Officer

1 considered and rejected a make-whole remedy.<sup>4</sup> Compare AFSCME, Local 851 and  
2 Donald Saucier, 13 MLC 1531, 1537-1538, MUPL-3010 (H.O. March 18, 1987)  
3 (explaining why it would not effectuate the purposes of Law to order union to reinstate  
4 member who was expelled from membership for filing a prohibited practice charge and  
5 for seeking to form a rival union).

6 The Employer's second argument, however, does implicitly question the  
7 appropriateness of a make-whole remedy for a Section 10(a)(1) charge. The  
8 Commonwealth contends that the Union is seeking a remedy for a Section 10(a)(3)  
9 violation in the absence of such a charge and a resulting finding of intentional  
10 discrimination, and, therefore, a make-whole remedy is beyond the scope of the  
11 complaint and the Hearing Officer's ruling. We disagree.

12 We first note that this is not a case where the employee has alleged that an  
13 "ostensibly neutral employer action," e.g., discipline pursuant to an existing workplace  
14 rule, "is, in reality, retaliation for protected activity." City of Boston, 8 MLC 1281, 1284,  
15 MUP-3891 (August 17, 1981). The CERB has made clear that such a case is  
16 appropriately analyzed as a Section 10(a)(3), not a Section 10(a)(1) violation, and,  
17 where the charging party fails to establish that the employer issued the discipline to  
18 retaliate against the employee for her protected activities, the charge must be dismissed  
19 and no remedy awarded. Id.

20 The instant case, however, arises in the limited and relatively infrequent situation  
21 where an employee is disciplined for engaging in conduct during a grievance or

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<sup>4</sup> Given our holding here, we need not decide the Union's argument on appeal that a make-whole remedy is always mandatory under Section 11(d) and DLR regulations whenever a prohibited practice results in a discharge or other adverse action.

1 arbitration hearing that falls within the permissible bounds of protected activity. Bristol  
2 County Sheriff's Department, 33 MLC 107. As described above, such cases are  
3 appropriately analyzed under Section 10(a)(1) of the Law because the issue is not  
4 whether the employer's actions were unlawfully motivated but whether the discipline  
5 would tend to inhibit employees from engaging in the protected activity that led to the  
6 discipline. Salem School Committee, 35 MLC at 213 (citing Whitman Hanson Regional  
7 School Committee, 9 MLC at 1618). Accord, Town of Chelmsford, 8 MLC at 1916  
8 (Section 10(a)(1) violation does not require showing of animus if employer violates the  
9 Law and if discharge or adverse action is taken while employee is engaged in protected  
10 activity). Indeed, in Whitman-Hanson, the Hearing Officer dismissed the Section  
11 10(a)(3) count because she found no evidence that the employer harbored ill will toward  
12 the employee for testifying at an arbitration hearing. 9 MLC 1238, 1241-42 (H.O.,  
13 August 25, 1982). On appeal, the CERB declined to reach the questions raised under  
14 Section 10(a)(3), because regardless of motive, it concluded that the employer's actions  
15 constituted an independent violation of Section 10(a)(1). Whitman-Hanson Regional  
16 School Committee, 9 MLC at 1618.

17 Based on this long-standing precedent, as well as the SJC's interpretation of  
18 Section 11 of the Law as authorizing make-whole remedies for *any* prohibited practice  
19 described in Section 10 of the Law, Newton School Committee, 388 Mass. at 575-576,  
20 we disagree with the Employer that the Union's failure to allege a Section 10(a)(3)  
21 violation precludes a make-whole remedy in situations where, as here, an employee is  
22 disciplined for alleged misconduct ancillary to or in the course of protected activity, e.g.,

1 statements made at grievance or arbitration hearings, and the conduct has not  
2 otherwise lost its protected status.

3 Finally, the Employer contends that the Hearing Officer’s remedial Order should  
4 be affirmed because the Union has an alternative remedial avenue for make-whole  
5 relief, i.e., a pending grievance. However, as we have previously observed, it is not  
6 uncommon for unions to file unfair labor practice charges while actively pursuing a  
7 related grievance through the parties’ negotiated grievance process. Wakefield School  
8 Committee, 27 MLC 9,10, MUP-2441 (August 16, 2000). The CERB has never held  
9 that simply because a make-whole remedy is potentially available under the grievance  
10 arbitration process, the CERB is precluded from ordering its own make-whole remedy,  
11 when, as in this case, it is required to effectuate the purposes of the Law. We decline to  
12 do so here.<sup>5</sup>

13 Conclusion

14 For the foregoing reasons, we modify the Hearing Officer’s remedy to include an  
15 order to rescind the suspension and to make MacNeill whole in accordance with the  
16 following order.

17 ORDER

18 WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the  
19 Commonwealth of Massachusetts shall:

20 1. Cease and desist from:

21 a. Interfering with, restraining and coercing MacNeill in the exercise of his  
22 rights protected under the Law; and

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<sup>5</sup> It does not appear from the record that either party sought to defer the charge to the grievance arbitration procedure.

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b. In any like or similar manner, interfering with, restraining or coercing any employees in the exercise of their rights guaranteed under the Law.

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

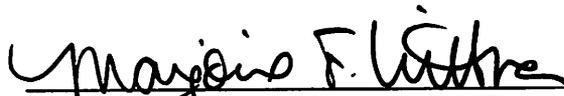
a. Remove any reference to the three-day suspension in MacNeill's personnel record and all other records maintained by the Commonwealth, and make MacNeill whole for any loss of wages he suffered as a result of the three-day suspension, plus interest on any sums owing at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly.

b. Post immediately in all conspicuous places where members of the Union usually congregate and where notices to these employees are usually posted, including but not limited to the Commonwealth's internal e-mail system, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and,

c. Notify the DLR within ten (10) days of receipt of this Decision and Order of the steps taken to comply with it.

26 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

  
MARJORIE F. WITTNER, CHAIR

  
ELIZABETH NEUMEIER, CERB MEMBER

  
HARRIS FREEMAN, CERB MEMBER

**APPEAL RIGHTS**

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c.150E, §11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision.** No Notice of Appeal need be filed with the Appeals Court.



THE COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
DEPARTMENT OF LABOR RELATIONS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD  
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A hearing officer of the Department of Labor Relations has determined that the Commonwealth of Massachusetts violated Massachusetts General Laws, Chapter 150E (the Law) by interfering with, restraining and coercing Peter MacNeill (MacNeill) in the exercise of his protected rights under Section 2 of the Law by issuing him a three-day suspension for his protected conduct during a grievance hearing. The Commonwealth of Massachusetts did not appeal from this decision. Local 509, Service Employees International Union filed an appeal with the Commonwealth Employment Relations Board (CERB) contesting the Hearing Officer's remedy. The CERB has determined that the appropriate remedy for this violation is for the Commonwealth of Massachusetts to cease and desist from engaging in this or similar conduct, post this notice and to take the affirmative action described below.

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.

The Commonwealth of Massachusetts assures its employees that:

**WE WILL NOT** interfere with, restrain or coerce Peter MacNeill or any employee in the exercise of their rights guaranteed under the Law.

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

Remove any reference to the three-day suspension in MacNeill's personnel record and all other records maintained by the Commonwealth, and make MacNeill whole for any loss of wages he suffered as a result of the three-day suspension, plus interest on any sums owing at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly.

\_\_\_\_\_  
Commonwealth of Massachusetts

\_\_\_\_\_  
Date

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, 1<sup>st</sup> Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132)





- 1           3. The Union is the exclusive bargaining representative for certain employees in  
2           statewide bargaining Unit 8, including Substance Abuse Coordinators  
3           employed by the Employer at the Department of Children and Families (DCF).  
4
  
- 5           4. At all relevant times, the Commonwealth and the Union were parties to a  
6           collective bargaining agreement (CBA), which by its terms expired on  
7           December 31, 2011. This agreement was extended by a Memorandum of  
8           Understanding through December 31, 2013. Article 23A of this agreement  
9           outlines the procedure to be followed by the parties for grieving disputes  
10          under the CBA, including the grievance of disciplinary actions.  
11
  
- 12          5. MacNeill is a Substance Abuse Coordinator with DCF and a member of the  
13          bargaining unit described in paragraph 3, above. MacNeill has been  
14          employed with DCF since June 1, 2007.  
15
  
- 16          6. Kristin Simone (Simone) has been the Northern Region Mental Health  
17          Specialist with DCF. Simone has been employed with DCF for the past four  
18          and one half (4 ½) years. Simone has been MacNeill's direct supervisor  
19          since approximately 2010.  
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- 21          7. Pamela Fitzpatrick (Fitzpatrick) is a Labor Relations Specialist with the  
22          Executive Office of Health and Human Services, and works predominantly  
23          with DCF. Fitzpatrick has held this position for the past seventeen (17) years.  
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- 25          8. Darrel Cole (Cole) is a Field Representative for the Union and has held this  
26          position for 20 years.  
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- 28          9. On or around October 17, 2011, DCF issued MacNeill a one-day suspension  
29          for unprofessional conduct.  
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- 31          10. The Union grieved the one-day suspension referenced in the preceding  
32          paragraph and a hearing for the grievance was scheduled for February 28,  
33          2012.  
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- 35          11. Fitzpatrick was designated as the hearing officer for the hearing referenced in  
36          paragraph 10.  
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1 12. Those present on February 28, 2012 for the scheduled hearing were  
2 MacNeill, Fitzpatrick, Cole, and Simone.  
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4 13. On March 14, 2012, DCF issued MacNeill a three (3) day suspension for his  
5 conduct on February 28, 2012.  
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7 14. There were prior disciplines issued to MacNeill, in the form of two (2) written  
8 warnings and one-day suspension. Therefore DCF asserts that this three day  
9 suspension was the next in a chain of progressive discipline. The Union has  
10 grieved and continues to grieve these disciplines.  
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### 12 Findings of Fact

#### 13 Background

14 DCF hired MacNeill as a social worker in June 2007. In October 2008, DCF  
15 promoted MacNeill to Substance Abuse Coordinator for the Metro Regional Office. As  
16 part of his duties, MacNeill is responsible for addressing substance abuse issues within  
17 the child welfare system, acting as a liaison between DCF and the community, and  
18 providing access to substance abuse providers in the community. MacNeill reports  
19 directly to Simone, the Northern Region Mental Health Specialist.

#### 20 February 28, 2012 Grievance Hearing

21 On October 17, 2011, Simone issued MacNeill a one-day suspension for alleged  
22 unprofessional conduct.<sup>7</sup> The Union grieved the suspension and a grievance hearing  
23 was scheduled for February 28, 2012. Fitzpatrick was the designated hearing officer for  
24 the grievance hearing. Cole represented MacNeill in the hearing. Simone also  
25 attended the hearing to testify for DCF.

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<sup>7</sup> DCF had issued MacNeill two prior written warnings. The Union is in the process of grieving these disciplines. In January 2012, MacNeill participated in a step 2 hearing for a prior discipline.

1           The parties held the hearing in a conference room in the Lawrence Office. Prior  
2 to the start of the hearing, MacNeill and Cole met in the conference room to discuss the  
3 grievance and potential settlement. Cole left the room to make a settlement offer to  
4 DCF. Cole returned to the room with Raymond Pillage (Pillage), the DCF Regional  
5 Director, and the three men had a brief cordial conversation. When Pillage left, Cole  
6 informed MacNeill that DCF had rejected the Union's settlement offer.

7           A few minutes later, the hearing began. Cole, MacNeill and Fitzpatrick sat  
8 around the conference table, and Simone entered and sat down shortly after.<sup>8</sup>  
9 Fitzpatrick took attendance and then began the hearing by introducing the parties and  
10 talking about the hearing process. During the recitation of Fitzpatrick's opening,  
11 MacNeill stated that he "wanted to be treated with respect" during the grievance  
12 hearing. Fitzpatrick responded that "no one said anything yet." MacNeill repeated he  
13 wanted to be treated with respect during the hearing.<sup>9</sup> At this time, Cole and MacNeill  
14 both testified at the November 1, 2013 unfair labor practice hearing that he did not raise  
15 his voice. Simone and Fitzpatrick testified that McNeill was loud and looked visibly  
16 upset. They further stated that he had his hands on the table, as if he was bracing

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<sup>8</sup> Fitzpatrick sat at the head of the table, with Simone to her left and Cole to her right. MacNeill sat on the other side of Cole. MacNeill was positioned approximately five to eight feet away from Fitzpatrick and four feet away from Simone, who sat diagonally across the table from him.

<sup>9</sup> Simone and Fitzgerald testified that MacNeill repeatedly stated "I want a fair shake," but MacNeill denied stating that and insisted that he only stated that he "wanted to be treated with respect" and that he wanted to have a "fair hearing." However, the slight difference in terminology used is not dispositive to the reasoning here.

1 himself, and that he was red-faced.<sup>10</sup> Conversely, Cole and MacNeill stated he had his  
2 hands both resting on the table in a relaxed manner and that he was speaking in a  
3 measured tone.

4 Fitzpatrick attempted to gain control of the hearing. In a firm voice, she asked  
5 him to quiet down, and assured him he would have a chance to speak. Fitzpatrick told  
6 MacNeill that she was the hearing officer and she was “running the show.” She  
7 informed MacNeill it was her hearing and that she would let him know when he was  
8 allowed to talk. MacNeill continued to state that he “wanted to be treated as equals.”

9 Shortly thereafter, Fitzpatrick continued introducing the hearing, and stated that it  
10 was a step 2 grievance hearing. MacNeill interjected that he believed they were there  
11 for a step 3 rather than a step 2 hearing. At this point, MacNeill and Fitzpatrick tried to  
12 speak over one another.<sup>11</sup> Eventually, Fitzpatrick told Cole that the hearing could be

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<sup>10</sup> Simone further testified that MacNeill was shouting and aggressive, and that she felt threatened by MacNeill’s behavior. However, when asked on direct examination how loud MacNeill was yelling, she responded that when she feels threatened “the room gets smaller” and “voices get louder,” and so “to [her]” he was loud. Further, when asked during re-direct whether she felt intimidated by MacNeill she stated that the “past and present are very mixed up in my mind right now, so I feel at this moment, yes.” Given Simone’s demeanor while testifying and her difficulty recalling and separating the February 28, 2012 hearing from prior and subsequent events with MacNeill, I do not credit Simone’s testimony.

<sup>11</sup> Cole, MacNeill, Simone and Fitzpatrick all agreed that MacNeill and Fitzpatrick were trying to speak over one another. Fitzpatrick and Simone testified that MacNeill was shouting while Fitzpatrick was speaking in a firm voice to regain control of the hearing and to tell MacNeill to stop speaking. Conversely, Cole and MacNeill testified that Fitzpatrick was yelling and disrespectful and that MacNeill never raised his voice higher than that of Fitzpatrick’s. Cole further testified that in his experience in working with Fitzpatrick over the past several years of working with one another, his perception of Fitzpatrick is that she is even-keeled, but during the grievance hearing she acted “on the unprofessional side.” I credit MacNeill and Cole’s testimony that MacNeill never raised his voice higher than that of Fitzpatrick, as it corroborates all witness’ testimony that they were both trying to speak over one another because MacNeill wanted to be

1 "waived" to step 3. Cole confirmed to MacNeill that they could waive step 2 and  
2 continue to step 3. MacNeill agreed. Because they agreed to no longer hold the step 2  
3 hearing as originally scheduled, Fitzpatrick began gathering her belongings and stood to  
4 leave the room. As she was about to leave, MacNeill told Fitzpatrick that he "wanted to  
5 go on the record" about his concerns with having Simone as his supervisor while he  
6 was challenging his grievance. Fitzpatrick stated the hearing was over, and that nothing  
7 else was on the record.

### 8 **Three-day Suspension Issued**

9 On March 14, 2012, DCF issued MacNeill a three-day suspension for his  
10 behavior on February 28, 2012 immediately before and during the step 2 hearing. The  
11 DCF cited the following reasons for the suspension in its suspension letter:

12 On February 28, 2012 you reported to a Step II grievance conference at which  
13 you were the grievant. Present at this meeting were you, SEIU Local 509 Field  
14 Representative Darrel Cole, Labor Relations Specialist Pam Fitzpatrick and me.  
15 Ms. Fitzpatrick was the designated hearing officer in this matter.

16  
17 Just after all participants were assembled for the conference, and before the  
18 hearing officer had an opportunity to begin the proceedings, you, in a loud tone of  
19 voice insisted that you be treated with respect and demanded that you "...get a  
20 fair shake". The hearing officer asked you to stop speaking to allow her to begin  
21 the conference. Despite her repeated requests, you continued to interrupt and  
22 speak over the hearing officer. After several requests from the hearing officer

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heard and Fitzpatrick wanted him to stop speaking. I do not find it credible, however,  
that MacNeill was shouting while Fitzpatrick never raised her voice.

1 and assurances that you would be given ample opportunity to speak, you allowed  
2 her to proceed with opening the conference. However, during her opening, you  
3 again yelled at her and challenged her about at which step the grievance had  
4 been filed. The conference did not proceed after you and your union  
5 representative agreed to waive the grievance to step III.

6  
7 On March 9, 2012, I met with you, along with Regional Administrative Manager  
8 David Foley about your behavior. Also present at this meeting were SEIU Local  
9 509 Director of Field Services Shanna Weston and Union Steward Linda Hollins.  
10 You rejected the Department's opinion that the conference had not yet started  
11 and indicated that your statements and actions at the conference were union  
12 protected activities. Ms. Weston added that because the February 28 meeting  
13 was for the purpose of a grievance conference that you should not be disciplined  
14 or spoken to about your behavior in the context of that meeting.

15  
16 The hearing officer had clearly not begun the grievance conference before  
17 you had begun to challenge her. Your demeanor was aggressive and  
18 intimidating towards her shortly after I entered the room. Whether or not the  
19 grievance conference had begun is not an acceptable excuse for your behavior.  
20 You are expected to comport yourself in a professional and respectful manner  
21 with others in any and all forums.

22

23 **MacNeill's Coworkers**

1 MacNeill then told a few of his coworkers about the suspension. Cole Around  
2 this time, DCF had denied a number of bargaining unit members' promotions. The  
3 bargaining unit members did not file grievances over the denials. Cole thought that the  
4 unit members' failure to challenge the denials was unusual.<sup>12</sup>

5 OPINION

6 Section 10(a)(1)

7 A public employer violates Section 10(a)(1) of the Law when it engages in  
8 conduct that may reasonably be said to tend to interfere with, restrain, or coerce  
9 employees in the exercise of their rights under Section 2 of the Law. Quincy School  
10 Committee, 27 MLC 83, 91 (2000). Pursuant to Section 2 of the Law, an employee has  
11 the right to "engage in lawful, concerted activities for the purpose of collective  
12 bargaining or other mutual aid or protection, free from interference, restraint, or  
13 coercion." Filing and processing grievances constitutes concerted, protected activity  
14 under Section 2. See Id.

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<sup>12</sup> I allow, in part, the Commonwealth's Motion to Strike Cole and MacNeill's hearsay testimony that Sara Welch (Welch), a Union steward who was not a witness at the present hearing, stated that members in the Lawrence Office were afraid to file grievances regarding their promotion as a result of MacNeill's suspension, as I sustained the Commonwealth's objection to a portion of this line of questioning during the hearing. Accordingly, Cole's testimony recounting Welch's understanding about members filing grievances is stricken from the record, and I do not consider it for the purposes of this decision. However, I deny the Commonwealth's Motion to Strike Cole's testimony that typically members filed grievances regarding a promotional bypass, but after six members were denied a promotion, after MacNeills' suspension, the six members did not file grievances. Regardless, I do not rely on this testimony since MacNeill works in the Metro Regional Office, rather than the Lawrence Office where the six members were involved. Further, Cole works out of the Union's Watertown Office and does not file all grievances himself. In addition, the evidence does not establish that Cole had any direct knowledge that members failed to file grievances because of MacNeill's discipline. Moreover, the focus of a Section 10(a)(1) allegation inquiry lies in the chilling effect on a reasonable person, not the actual or subjective impact on some employees.

1           However, activity protected by Section 2 of the Law can lose its protected status  
2 if it is unlawful, violent, disruptive or indefensibly disloyal to the employer. Bristol  
3 County Sheriff's Department, 31 MLC 6, 18 (2004). Similarly, conduct that is physically  
4 intimidating, egregious, or disruptive of the employer's business is beyond the pale of  
5 protection. See City of Boston, 6 MLC 1096 (1979). In order for conduct to be  
6 intimidating, an employee need not necessarily use profanity, physical gestures or  
7 explicit threats, as long as the ominous implication of the message is expressed. Town  
8 of Bolton, 32 MLC 13, 18 (2005).

9           When intemperate statements are made within the context of protected activity,  
10 the Commonwealth Employment Relations Board (Board) balances the rights of the  
11 employees to engage in concerted activities, and the rights of the employers not to be  
12 subjected to egregious, insubordinate, or profane remarks that disrupt the employer's  
13 business or demean workers or supervisors. Bristol County Sheriff's Department, 31  
14 MLC at 18. However, if an employer provokes an employee into acting in an  
15 intemperate manner while that employee is presenting a grievance, the employee's  
16 conduct remains within the ambit of protected activity. Newton School Committee, 6  
17 MLC 1701 (1980).

18           The focus of a Section 10(a)(1) inquiry is on the effect of the employer's conduct  
19 on a reasonable employee. Town of Winchester, 19 MLC 1591, 1596 (1992). The  
20 Board does not analyze the motivation behind the conduct, Id.; Town of Chelmsford, 8  
21 MLC 1913, 1916 (1982), aff'd sub nom. Town of Chelmsford v. Labor Relations  
22 Commission, 15 Mass. App. Ct. 1107 (1983), or whether the coercion succeeded or  
23 failed. Groton-Dunstable Regional School Committee, 15 MLC 1551, 1556 (1989). The

1 Board has previously found that issuing discipline for concerted, protected conduct  
2 during a grievance hearing chills reasonable employees in the exercise of their rights to  
3 engage in grievance proceedings. See Bristol County, 31 MLC at 18; City of Boston, 26  
4 MLC 80, 83 (2000).

5 **Protected Activity**

6 Participation in a grievance hearing is indisputably within the realm of protected  
7 activity. See Quincy School Committee, 27 MLC at 91. However, the Commonwealth  
8 argues that MacNeill's statements were largely made prior to the grievance hearing and  
9 thus, were outside the realm of conduct protected by Section 2. I disagree. By  
10 attending the grievance hearing, MacNeill was already engaged in processing his  
11 grievance, which is covered by Section 2 of the Law. See Id. Fitzpatrick began the  
12 opening to the grievance hearing before MacNeill made any remarks about the process  
13 and which step of the grievance process they were in. Their subsequent agreement to  
14 waive the hearing to step 3 does not change the fact that MacNeill was participating in a  
15 grievance hearing when he made the statements that prompted the suspension.

16 Second, the Commonwealth argues that MacNeill's behavior lost its protected  
17 status because it exceeded the permissible bounds of protected activity. The evidence  
18 demonstrated that MacNeill made statements at the start of the grievance hearing  
19 requesting a fair hearing process, after which both Fitzpatrick and MacNeill exchanged  
20 words, both raising their voices as high as the other. While Fitzpatrick and MacNeill's  
21 exchange may have created tension, there is no evidence indicating that MacNeill's  
22 words or actions were threatening or intimidating. Despite variations in testimony  
23 regarding how MacNeill was sitting, it is clear that he remained seated with his hands on

1 the table throughout the hearing. He did not ball his fists, raise his hands, or perform  
2 any other gestures that could be reasonably construed as intimidating. Although  
3 MacNeill made what can be construed as impulsive comments to clarify the hearing  
4 process and his rights, he did not make any threatening remarks or use any profane  
5 language to suggest that he intended to scare or intimidate Fitzpatrick or Simone.  
6 Therefore, his conduct did not lose its protected status.

7 **Interference with Protected Rights**

8 The Commonwealth does not deny that it disciplined MacNeill as a result of his  
9 conduct at the grievance hearing. The appropriate inquiry lies in whether the  
10 Commonwealth's conduct in disciplining MacNeill for statements made during the  
11 course of a grievance proceeding would chill a reasonable employee in the exercise of  
12 their protected rights. The Board has clearly established that issuing discipline for  
13 concerted, protected conduct during a grievance hearing chills reasonable employees in  
14 the exercise of their rights to engage in grievance proceedings. See Bristol County, 31  
15 MLC at 18; City of Boston, 26 MLC 80, 83 (2000). Therefore, I find that the  
16 Commonwealth unlawfully interfered and restrained MacNeill in the exercise of his  
17 protected rights in violation of Section 10(a)(1) of the Law.

18 **CONCLUSION**

19 Based on the record and for the reasons stated above, I conclude that the  
20 Commonwealth independently violated Section 10(a)(1) of the Law by issuing MacNeill  
21 a three day suspension for his conduct at a step 2 grievance hearing.

22

23



COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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TIMOTHY HATFIELD, ESQ., HEARING OFFICER