

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

BOSTON SCHOOL COMMITTEE

and

JAMES W. KELLEY

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Case No. MUP-11-1191

Date Issued: July 13, 2015

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Andrea L. Brown, Esq.¹ - Representing the Boston School Committee

Sheilah F. McCarthy, Esq. - Representing James W. Kelley

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the Boston School Committee (Employer or
2 School Committee) violated Section 10(a)(3), and, derivatively Section 10(a)(1) of
3 Massachusetts General Laws, Chapter 150E (the Law) by retaliating against James W.
4 Kelley (Kelley or Charging Party). I find that the Employer did not violate the Law in the
5 manner alleged.

¹ Andrea L. Brown succeeded Virginia Casey Goscinak as the Employer's counsel after the fourth day of hearing.

STATEMENT OF THE CASE

1 On September 1, 2011, Kelley filed a charge with the Department of Labor
2 Relations (DLR) alleging that the Employer had engaged in prohibited practices within
3 the meaning of Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law. A DLR
4 hearing officer conducted an investigation on November 29, 2011. On December 20,
5 2011, the investigator issued a complaint alleging that the City violated Section
6 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by failing in 2011 to appoint
7 Kelley to temporary area manager positions in retaliation for his engaging in concerted,
8 protected activity.² The School Committee filed its answer on January 13, 2012.

9 I conducted a hearing on February 28, 2013, April 10, 2013, May 2, 2013, June
10 17, 2013 and November 4, 2013. Both parties had the opportunity to be heard, to
11 examine witnesses and to introduce evidence. The School Committee submitted its
12 post-hearing brief on March 5, 2014, and Kelley submitted his post-hearing brief on
13 March 13, 2014.³ Upon review of the entire record, including my observation of the
14 demeanor of the witnesses, I make the following findings of fact and render the
15 following opinion.

² The investigator dismissed the allegations that the School Committee violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law when it: a) bypassed Kelley for promotion in 2004, 2007 and 2008; b) ruled against him in a December 9, 2004 grievance decision; c) delayed processing a grievance in 2008; and d) placed false and derogatory files in Kelley's personnel folder prior to December 2009. Kelley did not file a request for review pursuant to 456 CMR 15.04(3) of the portions of the charge that the investigator dismissed.

³ On March 17, 2014, the Employer filed a motion to strike Kelley's post-hearing brief on the grounds that the brief was not timely filed, and Kelley filed his opposition to the Employer's motion on March 21, 2014. In the absence of any showing of prejudice to the Employer by Kelley's late filing, I have denied the Employer's motion to strike.

FINDINGS OF FACT⁴

1 The Employer with an enrollment of approximately 57,000 students operates
2 schools at 135 sites, and the Office of Facilities Management (Facilities Management)
3 maintains the infrastructure and provides services to those schools. Facilities
4 Management, which is headed by a director, has three subdivisions, construction and
5 maintenance, design and development, and building services. An assistant director is
6 in charge of each of those subdivisions. Three-hundred and eighty-one custodians
7 work in the building services division, and one-hundred and sixty-five of those
8 custodians hold the position of senior custodian.⁵ There are eighty-eight part-time
9 custodians.⁶ Junior and senior custodians work day or evening shifts.⁷ Senior
10 custodians⁸ supervise the junior custodians who work in their buildings.⁹ Seven area

⁴ The DLR's jurisdiction in this matter is uncontested.

⁵ The International Union of Painters and Allied Trades, District Council No. 35, Local 1952 (Union) is the exclusive bargaining representative for junior and senior custodians.

⁶ The record does not reveal whether the part-time custodians are members of the Union's bargaining unit.

⁷ Certain schools only have custodians who work the day shift.

⁸ Senior custodians who are assigned to the day shift (day senior custodians) are in charge of the entire school building, while the senior custodians who are assigned to the evening shift (night senior custodians) are responsible for overseeing the night custodial crew, making sure that the building is secure at night and usually cleaning a certain section of the building. The day senior custodians meet regularly with the principal or headmaster. The day senior custodian with input from the night senior custodian creates the work schedule for the building.

⁹ Some schools have only junior custodians and other schools have junior custodians working as acting senior custodians.

1 managers oversee both junior and senior custodians.¹⁰ Four building service
 2 managers indirectly oversee the area managers as well as directly supervise junior and
 3 senior custodians.¹¹ The building service managers report directly to the assistant
 4 director in charge of building services (assistant director/building services). Paul Wood
 5 currently is the assistant director/building services.¹²

6 The Position of Area Manager

7 The Employer assigns each area manager to either the day shift or the night
 8 shift. Each area manager is responsible for a number of different schools. Their job
 9 duties include providing supervisory support, when requested, to senior and junior
 10 custodians regarding quality and quantity of services in the Employer's buildings.¹³
 11 Incumbents in the position also inspect all of their assigned schools, including toilet
 12 rooms, hallways, classrooms and outside grounds, on a monthly basis¹⁴ and more

¹⁰ Four area managers work the day shift, while three area managers work the evening shift.

¹¹ The Plant Administrators Association is the exclusive bargaining representative for the area managers and the building service managers.

¹² Wood began to work for the Employer in 1970. He worked as a permanent junior custodian from 1972 to 1978 and as a senior custodian from 1978 to 1993. He then worked as a night area manager from 1993 to 1999 and as building services manager from 2000 to 2009. In July 2009, the Employer appointed him as assistant director/building services.

As a senior custodian, Wood held various leadership positions in the Union, including vice-president from 1983 to 1987 and president from 1987 to 1992. During Wood's tenure as vice-president and president, the Union was known as the Boston Public School Custodians Association, but it subsequently affiliated with the International Union of Painters and Allied Trades, Local 1952.

¹³ Wood characterized this duty as making sure that custodians are doing their jobs.

¹⁴ Area managers do not conduct monthly inspections during the summer months.

1 frequently if needed to ensure cleanliness. They complete inspection reports with
2 recommended improvement plans. They review and/or make out building work
3 schedules as needed and review equipment and supplies assigned to the schools,
4 which includes providing custodians with any requested specialized equipment. Area
5 managers do troubleshooting, which includes responding to emergencies and
6 investigating and responding to complaints. Incumbents in the position also conduct
7 training sessions for custodians. Also, they act as liaisons between principals and
8 headmasters and Planning and Engineering. The required qualifications for the
9 position, as enumerated in job postings for the position, include: a) a Bachelor's
10 Degree or five years of experience in custodial service in a supervisory capacity or five
11 years in Facilities Management or three years of experience in a major cleaning
12 company; b) knowledge of, and demonstrated ability in the field of custodial services;
13 c) excellent communication skills; d) excellent interpersonal skills; e) basic knowledge
14 of heating, ventilation and air conditioning (HVAC) equipment and electrical systems;
15 and f) a broad scope of knowledge of Facilities Management.

16 The Employer appoints area managers on either a temporary or a permanent
17 basis,¹⁵ and Wood makes that determination. The Employer fills the positions on a
18 temporary basis if a permanent area manager is on leave, including when an area
19 manager has a long-term illness. Also, the Employer may fill a position on a temporary
20 basis, even if the incumbent in the position has left the job, if the Employer might not
21 fund the position in the next budget due to fiscal constraints. Area managers do not
22 need to have prior experience working as custodians for the Employer, although most

¹⁵ The pay scale is the same for both temporary and permanent area managers.

1 have such experience.¹⁶ Also, the Employer has never reassigned an employee from
2 a temporary area manager position back to a custodial position.

3 The Employer posts permanent area manager vacancies online and candidates
4 submit their applications and resumes online. A five-member screening committee that
5 typically consists of the assistant director/building services, one or more building
6 services managers and/or area managers and a principal or a headmaster reviews the
7 candidates' applications and resumes and decides which candidates the screening
8 committee will interview. During the interviews, the screening committee poses the
9 same questions to all candidates. The screening committee makes its decision by
10 consensus, and the opinions of all its members are given equal weight.

11 The Employer does not post temporary area manager positions, and employees
12 do not submit applications or resumes for the temporary positions. The process is
13 informal. Wood makes selections based upon employees' quality of work, their
14 supervisory experience and his familiarity with them.¹⁷ Wood relies upon verbal
15 recommendations from principals¹⁸ and other area managers that are made over an
16 extended period of time and during the normal course of business. Also, Wood
17 routinely has conversations with other area managers and building service managers
18 about which custodians, usually senior custodians, would be successful temporary

¹⁶ Eunice "Robbie" Robinson had not worked in Building Services before the Employer appointed him as an area manager, but had worked for the Office of Facilities Management in the former Planning and Engineering Department.

¹⁷ Wood compared the selection process to ordering an item from a menu in a restaurant.

¹⁸ Wood noted that a principal's comments about a custodian's job performance stick in his mind.

1 area managers if and when temporary vacancies occur.¹⁹ Wood does not usually
2 make a special effort to solicit the opinions of principals or headmasters before
3 appointing employees as temporary area managers. He mentally reviews a list of the
4 senior custodians by seniority and makes his selection.

5 When the Employer appoints a temporary area manager, it does not send out a
6 notice to its employees announcing the appointment. The Employer anticipates that
7 the new temporary area managers will announce their appointments when they visit
8 the schools for which they are responsible. Also, the Employer does not announce
9 when a temporary area manager becomes permanent in that position and does not
10 require the incumbent in the position to do so.

11 James Kelley's Background Information

12 In September 1976, Kelley began to work as a junior custodian at the
13 Employer's Mary E. Curley School. Kelley then worked at various schools as a junior
14 custodian from 1977 through 1980. In 1980, he transferred to the Jeremiah Burke High
15 School (Burke) as a junior custodian, a position which he held until 1986.²⁰ In 1986,
16 the Employer promoted him to the position of senior custodian on the night shift (night
17 senior) at the Burke.²¹ In 1988, Kelley transferred to the Lewis Middle School (Lewis)

¹⁹ Wood acknowledged that there have are custodians whom area managers or principals have recommended for promotion whom he has not selected for temporary area manager positions.

²⁰ On or about 1980, Kelley began working the night shift and continued to be assigned to the night shift for most of his career, except for short, intermittent periods. Kelley earned a shift differential for working the night shift.

²¹ On October 17, 1988, Albert Holland, the Burke's Headmaster, wrote a letter of commendation for Kelley to then Director of Facilities Management William McAfee in

1 as a night senior custodian and remained there for approximately fifteen years.²² In
2 2004, Kelley transferred to the Murphy Elementary School as the night senior
3 custodian, a position which he held for one year. Kelley subsequently transferred to
4 the Oliver Wendell Holmes Elementary School (Holmes), where he remained for four
5 years.²³ In 2009, Kelley transferred to the South Boston Educational Complex
6 (SBEC)²⁴ as a night senior custodian²⁵ and remained there at the time of the
7 hearing.²⁶

which he noted, in part, that Kelley “distinguished himself in not only the excellent condition of the building but for his professionalism and character”.

²² Custodians bid on positions based on seniority. In 1988, another senior custodian with greater seniority outbid Kelley for the night senior position at the Burke.

²³ While at the Holmes, Kelley received several letters and certificates awards praising his job performance. In 2005, Principal Catherine Constant (Principal Constant) wrote a letter of recommendation for Kelley in which she praised, in part, “his spirit of cooperation, flexibility and overall willingness to assist where and when the need arises.” In 2007, Karen Wood, a third grade teacher at the Holmes, wrote a letter extolling Kelley and another custodian Kazim Shavis. In 2008, Kelley received a certificate designated as an “Honorable Award” from Principal Constant and the Holmes staff and in 2009, he received a certificate of recognition. Also, in 2009, Principal Constant issued a letter of thanks to Kelley.

²⁴ The SBEC was composed of several different schools, including Excel High School and Odyssey High School.

²⁵ Because the SBEC was designated as a “challenge school”, the bidding process for the night senior custodian position was not determined solely by seniority. The principal interviewed the three most senior candidates for the position and selected Kelley for the position.

²⁶ On June 20, 2011, Rodney Peterson (Headmaster Peterson). Headmaster of Odyssey High School, wrote a letter of recommendation for Kelley. He noted that: a) the building at SBEC had improved dramatically inside and out since Kelley’s arrival, b) Kelley had saved thousands of dollars in the energy bill simply by turning off unnecessary lights, and c) Kelley and other custodians had brought calcium chloride rock salt at their own expense to ensure that the building looked satisfactory during the winter months.

1 During Kelley's seventeen years as a senior night custodian, he did not always
2 receive performance evaluations. When he did receive evaluations,²⁷ all of the
3 evaluations were favorable. He received evaluations at the Lewis in 1992, 1993, 1995,
4 1996, 1999, 2000, and 2001, in which Principal Brenda Jones (Principal Jones) either
5 rated him as excellent for all fifteen criteria or excellent except for one, two or three
6 criteria in which she rated him as good.²⁸ He also received evaluations at the Holmes
7 in 2006 and 2009, in which Principal Constant rated Kelley as excellent for all criteria,²⁹
8 and at Excel High School in 2012, in which Headmaster Stephanie Sibley rated Kelley
9 as excellent for all criteria.³⁰

10 November 1, 2004 Incident at the Murphy

11 In 2004, while Kelley worked as the night senior custodian at the Murphy,
12 Helene Ayre (Ayre) was the day senior custodian. On November 1, 2004, Ayre issued
13 the following memorandum to Kelley:

14 On November 1, 2004, Mr. Tarver³¹ came to the Murphy School bringing
15 complaints from the Mayor's Office.
16

²⁷ Evaluation forms for senior custodians contain fifteen criteria that are divided into four categories: quality, quantity, attitudes, dependability, attendance and supervisory skills. The rankings for each criterion are excellent, good, satisfactory and unsatisfactory.

²⁸ Jones also evaluated Kelley in 1989 but the rankings on the form were only satisfactory or unsatisfactory. Jones rated him as satisfactory for all fifteen criteria.

²⁹ When Principal Constant evaluated Kelley in 2006, she did not evaluate him for the six criteria under supervisory skills.

³⁰ At some point, Kelley began to regularly send copies of his performance evaluations to the Facilities Management Office, where Wood saw some of those evaluations.

³¹ Philip Tarver was a day area manager.

1 I tried to communicate these complaints to you and tell you specific areas of the
2 building needing attention. You immediately started hollering and using profane
3 language. I asked you in front of two witnesses to calm down and stop swearing
4 at me.

5
6 As I tried to continue again, you started to yell and swear to the point of telling
7 me to "SHUT THE F.K UP!"
8

9 This is not the first time I have had to listen to your tirades. Mr. Tarver came by
10 with requests and when I tried to relay them to you, I was met (unclear) again
11 with yelling and swearing in front of three witnesses with the vulgar remark:
12 "YOU COULDN'T HOLD MY F..G JOCK STRAP."
13

14 Lastly, I have spoken to you to no avail about your vulgarity during dismissal as
15 children, parents and teachers all walk by our office and can plainly hear you.³²

16 On November 4, 2004, Kelley responded by sending a letter to the Assistant
17 Director/Building Services Charles Cardillo (Cardillo) that stated:

18 I am writing this letter to request a full hearing regarding the matter presented in
19 the letter from Helene Ayre.
20

21 The first part of the letter claimed that someone from the mayor's office
22 complained that I was not working up to par. This accusation is suspect
23 because I did an outstanding job Friday night, a fact that can be supported by a
24 teacher who does the Saturday program.

25 When she claims that she was trying to "communicate these complaints," she
26 did so in a very unprofessional manner.
27

28 In the fourth paragraph, she completely distorts a remark made many months
29 ago.
30

31 It is also a lie when Ayre says that she tried to speak to me about my vulgarity
32 during dismissal. Up until the last two weeks, Ayer left the school before
33 dismissal, so how would she know?
34

35 I might add that during the days in question I was short-handed by three, and
36 once four people, which makes her tirade unjustifiable.
37

³² At hearing, Kelley denied using vulgarity at dismissal time and in proximity to children and parents. Ayre did not testify at the hearing. However, I need not determine whether Kelley made the comments as alleged, because Wood did not rely on those comments when he decided not to appoint Kelley as a temporary area manager.

1 P.S. I am thinking about seeking legal counsel because this could affect my
2 record and career.

3 On November 22, 2004, Cardillo sent a memorandum to Kelley stating:

4 A hearing will be held in the 2nd floor conference room, 26 Court Street, Boston
5 on Thursday, December 2, 2004, 11:00 AM to discuss your job performance and
6 the use of inappropriate language toward a Boston Public School employee, the
7 Day Senior Custodian Mrs. Helene Ayre.

8
9 Disciplinary action may be issued as a result of this hearing up to and including
10 a 5-day suspension and/or recommendation for termination.

11
12 A copy of G.L.c.31, Sec.41 through 45 is attached.³³

13
14 You have the right to Union representation at this hearing.

15 The hearing subsequently took place on December 2, 2004.³⁴ Kelley was present at
16 the hearing as well as representatives from his Union. On December 9, 2004, Cardillo
17 sued a memorandum (December 9, 2004 written warning) that was addressed to
18 Kelley stating.³⁵

19 A Hearing was held at 26 Court Street, Boston on December 2, 2004 to discuss
20 your job performance and your use of inappropriate language toward a Boston
21 Public School Employee, the Day Senior Ms. Helene Ayre. Attending the
22 hearing was Mr. Charles Cardillo, Mr. Paul Sordillo, Mr. Phil Tarver for Facilities
23 Management, Mr. Michael Lafferty, Mr. Donato Cuzzi III, and Mr. David Jelley for
24 the Union.

25
26 Results of the Hearing

27 As a result of the Hearing and your inability to justify your poor job performance
28 and your use of inappropriate language toward a Boston Public School

³³ The provisions of M.G.L. c.31 (Civil Service Law) applied to Kelley because he held permanent Civil Service status as a custodian.

³⁴ On that same date, Kelley executed a waiver and release that authorized Facilities Management to provide the Union with a copy of any disciplinary action that Kelley might receive.

³⁵ Cardillo copied Robert Roy, then Director of Facilities Management, on the December 9, 2004 memorandum.

1 employee, the Day Senior Ms. Helene Ayre, you are hereby issued a written
2 warning.

3
4 Improvement Plan

5 You must prioritize your work schedule when you are shorthanded to insure that
6 all the bathrooms are thoroughly sanitized daily.

7 You must behave in a professional manner when communicating with Ms.
8 Helene Ayre

9 You must make sure that your school is secure prior to leaving at the end of
10 your shift.

11
12 This document will be placed in your file.

13 Kelley never received a copy of the December 9, 2004 written warning from either the
14 City or the Union and never endorsed the signature line.³⁶ He did not inquire about the
15 outcome of the December 2, 2004 hearing because he believed that the facts
16 supported his position and that Ayre already had received a written warning.

17 Kelley's October 2008 Request to Review His Personnel File

18 On or about October 2008, Kelley requested a complete set of his personnel
19 files from Bill McNally (McNally), a day area manager who oversaw the custodians at
20 the Holmes.³⁷ McNally subsequently gave Kelley copies of the file that the Employer
21 maintained at its Court Street headquarters. When Kelley reviewed the file, he became
22 aware of the December 9, 2004 written warning as well as certain other documents
23 pertaining to the November 1, 2004 incident. Kelley subsequently requested that the
24 Union file a grievance on his behalf protesting the inclusion of those documents in his

³⁶ The signature line had the affirmation that Kelley had read and understood the document.

³⁷ The record does not reveal the reason, if any, why Kelley wanted to review his personnel file.

1 personnel file.³⁸ The Union submitted the grievance at Step II of the contractual
2 grievance procedure on December 8, 2008. On December 12, 2008, Kelley submitted
3 a letter (December 12, 2008 letter) to the Employer and requested that the Employer
4 include the letter in his personnel file as a response to the December 9, 2004 written
5 warning. The December 12, 2008 letter stated in pertinent part:

6 I entered work on Monday, November 1, 2004 and Helene Ayre and Eddie
7 Soto were still in the building, which was unusual. Helene immediately
8 started badgering me about my section not being clean[.] Taking me
9 upstairs and screaming that she had to walk through my "dirty, rotten
10 section" with people from the Mayor's office. I explained that I left my
11 section spotless and any complaints must be the result of the Saturday
12 program. (I also helped Jean with her trash, picked up Helen's trash while
13 in the area and cleaned the main offices and toilets for Eddie that night.)
14

15 I told her many times to stop yelling and twice to call Wallace Morant, our
16 area manager, but she continued to yell and accuse me of not doing my
17 job. She followed me all the way down from my section and into our
18 office, where Eddie seemed to be waiting and he shut the door. Helene
19 continued her rant, at one point standing over me screaming that I was
20 supposed to clean the cafeteria, I told her to call Wallace Morant, he made
21 the café the Saturday overtime person's responsibility (Eddie Soto). She
22 became even more upset and said, "I don't care what Wallace says" as
23 she shook the work schedule. She was so close to me that I could feel
24 her spitting on my face.

25 At this point, after intense harassment I told Helene to "shut the f**k up". I
26 then proceeded to the bathroom to wash my face, and she started kicking
27 the door so hard that it almost hit me. I decided it was best to remove
28 myself from the situation and walked towards the door, only to find that it
29 had been bolted shut by Eddie. I left and immediately called Wallace
30 Morant, but Helene and Eddie were already gone by the time he got to the
31 building.
32

33 I have since learned that no one from the Mayor's office was in that
34 building that day, and Michael Flaherty had complained about unclean
35 toilets in the area his children are in. However, Eddie got four hours of
36 overtime to do that section on Friday, and was in for nine hours on

³⁸ The record does not contain a copy of the grievance that the Union filed on Kelley's behalf.

1 Saturday as acting senior. In short, it was Eddie Soto's responsibility, not
2 mine.

3
4 Furthermore, the complaints were not in reference to my area, as Helene
5 was leading me to believe. There was certainly no immediate hollering or
6 use of profane language on my part, and I have included the one time
7 such language was used on my part. In short it was a setup, an ambush,
8 and all of it was fabricated.

9
10 In regards to Ms. Ayre's assertion that I used vulgar language when she
11 spoke of Phil Tarver's request, that is also untrue. I am unaware of any
12 requests from Mr. Tarver and had only heard compliments on the building.
13 Mary Russo, the principal of the Murphy School, personally told me that
14 the building had never looked so good, and they were not used [to] it. I
15 am also not guilty of using vulgar language during dismissal time, and it
16 was never mentioned to me by Ms. Ayer, who was rarely still in the
17 building during dismissal time.

18 On January 12, 2009, John Poto (Poto) from the Employer's Office of Labor
19 Relations conducted a Step II hearing on Kelley's grievance. Kelley and his Union
20 representatives were present at the hearing. On March 9, 2009, Poto sent a letter to
21 Union representative Michael Lafferty stating:

22 The grievance submitted at Step II, dated December 8, 2008 and
23 identified as CA-18-08 and filed on behalf of Mr. James Kelley, Senior
24 Custodian at the Holmes School, is hereby acknowledged.

25 Mr. Kelley is grieving the fact that documents were placed in his file
26 without his knowledge and, as remedy, is requesting the removal of
27 derogatory material from the same file.

28 At the January 12, 2009 grievance hearing, Kelley emphasized that the
29 documents he was referring to for removal are located in the personnel
30 files of Mr. Charles Cardillo, Assistant Director of Facilities Management
31 and were not identified as being located in Mr. Kelley's permanent
32 *personnel* file that is maintained and held by the Boston Public Schools in
33 the Office of Human Resources.

34
35 Following extensive research including those policies that are pertinent to
36 an employee's permanent *personnel* records, I have concluded that the
37 documents that Mr. Kelley identified for removal were items appropriately
38 placed in Mr. Cardillo's personal files and did not constitute a personnel
39 file and held, at his discretion, as the Assistant Director of Facilities

1 Management. As a result, I find no violation of the Collective Bargaining
2 Agreement. The grievance, therefore, is denied at Step II.

3
4 The School Department reserves the right to raise the arbitrability and/or
5 grievability of this grievance including any and all timeliness issues as well
6 as the failure to file the grievance at the correct step.

7 The Union subsequently submitted the grievance to arbitration. On December 10,
8 2009, the Employer,³⁹ the Union and Kelley⁴⁰ executed a settlement agreement
9 stating:⁴¹

10 **WHEREAS**, the Boston Public Schools (hereinafter "BPS"), the
11 International Union of Painters and Allied Trades District Council No. 35,
12 Local 1953 (hereinafter "Union"),⁴² and James W. Kelley (Mr. Kelley)
13 were parties to an arbitration AAA #11 300 00730 09.

14
15 **WHEREAS**, the parties do not wish to continue with the arbitration
16 process.

17
18 **THEREFORE**, BPS, the Union and Mr. Kelley agree to the following:

19
20 **Employee Discipline:** The parties acknowledge that BPS shall retain
21 documents submitted in connection with the discipline of a bargaining unit
22 member in a file maintained by the Office of Facilities Management. BPS
23 agrees that it will provide bargaining unit members involved in the disciplinary
24 process written notice that all documents submitted shall be so retained.

25
26 **Employee Records:** BPS agrees that no material derogatory to an employee's
27 conduct, service, character or personality shall be placed in his/her file, whether

³⁹ Wood executed the settlement agreement on behalf of the Employer. Wood previously had not been involved in the events leading up to the grievance or with the Step II hearing.

⁴⁰ Kelley subsequently expressed regret to representatives of the Union and the Employer that he had agreed to the settlement.

⁴¹ The settlement agreement bore the heading: "Between and Among the Boston Public Schools and the International Union of Painters and Allied Trades District Council No.35, Local 1952 (formerly "The Boston Public Schools Building Custodians' Association") and James W. Kelley."

⁴² Union president David Jelley executed the settlement agreement on behalf of the Union.

1 that file is maintained by the Office of Human Resources or Office of Facilities
2 Management, without providing the employee with an opportunity to review the
3 material.
4

5 **Employee Review:** No derogatory material referenced in paragraphs 1 or 2
6 above shall be placed in an employee's file unless the employee signs an
7 acknowledgment that he/she received the material or a BPS employee provides
8 written acknowledgement that the employee was offered the opportunity to
9 review and declined to do so.
10

11 **Mr. Kelley's Files:** BPS agrees to remove all items identified as "Exhibit A" from
12 Mr. Kelley's file maintained by the Office of Facilities Management.
13

14 **Withdrawal of Pending Arbitration:** The Union agrees to withdraw AAA#11
15 300 00730 09 with prejudice.
16

17 **Triplicate Agreements:** This Agreement and Release shall be executed in
18 triplicate counterparts, each of which shall constitute one and the same
19 instrument.
20

21 **Governing Law:** This Agreement and Release shall be interpreted, enforced,
22 governed and constructed, by, under and in accordance with the laws of the
23 Commonwealth of Massachusetts. All Parties have cooperated in the drafting
24 and preparation of this Agreement and Release and agree that, if any
25 construction is to be made of this Agreement and Release, it shall not be
26 construed against any of the parties.
27

28 **Modification or Amendment:** This Agreement and Release may not be
29 modified, altered or changed except by mutual agreement of the Parties
30 contained in a written instrument signed by the parties. [Emphasis in original]

31 Kelley's Applications for Permanent Area Manager Positions in 2005, 2007 and 2008

32 During the 2004 and 2005 school year, Kelley became interested in applying for
33 a permanent area manager position and asked two area managers Wallace Morant
34 and John McIntosh (McIntosh) about the application process. In 2005, Kelley
35 discovered a posting for a permanent area manager position online. He subsequently
36 traveled to Court Street and gave Cardillo his application, resume and cover letter.
37 However, Cardillo informed him that he needed to apply online, which Kelley
38 subsequently did. Thereafter, the Employer declined to interview Kelley and

1 subsequently notified him that he had not been selected for the position.⁴³ Kelley later
2 became aware that the Employer had appointed McNally⁴⁴ to the position.

3 In 2007, Kelley again saw a posting for a permanent area manager position
4 online. He subsequently applied for the position online. The Employer declined to
5 interview Kelley and subsequently notified him via email that he had not been selected
6 for the position. Kelley later became aware that the Employer had appointed Otis
7 Thompson (Thompson)⁴⁵ to the position.

8 On or about August 4, 2008, Kelley viewed another posting for a permanent
9 area manager position⁴⁶ online. The Employer declined to interview Kelley and
10 subsequently notified him via email that he had not been selected for the position.⁴⁷
11 Kelley later became aware that the Employer appointed Paul Meneely to the position.⁴⁸

12 Kelley's 2009 MCAD Complaint

⁴³ The collective bargaining agreement between the Union and the Employer does not address the promotional criteria for the non-unit position of area manager, and a Union representative informed Kelley that the Union would not file a grievance on his behalf challenging his non-selection.

⁴⁴ McNally previously had been a temporary area manager.

⁴⁵ Thompson previously had been a temporary area manager.

⁴⁶ The posting listed the position as #335133.

⁴⁷ In 2007 or 2008, Kelley asked Wood why he had not received an interview for the permanent area manager position despite his record and his years of service. Wood responded that the Employer did not make its selections based on tenure but on character.

⁴⁸ At some point in 2008 after his appointment to the area manager position, Meneely went out industrial injury leave, and the Employer appointed Danny Glavin (Glavin) to fill the position on a temporary basis.

1 On June 19, 2009, Kelley filed a complaint with the Massachusetts Commission
2 Against Discrimination (MCAD complaint) in which he alleged that the Employer
3 discriminated against him on the basis of age on multiple occasions, including when it
4 failed to promote him to area manager in 2008. On August 18, 2009, Andrea Alves
5 Thomas, Assistant Corporation Counsel for the Employer's Office of Legal Counsel,
6 filed a multi-page position statement (2009 Position Statement) in response to Kelley's
7 MCAD complaint.⁴⁹ In the Facts Section of its 2009 Position Statement, the Employer
8 noted that there were no concerns with Kelley's performance as a senior custodian and
9 that he was the only custodian at the Holmes Elementary School during his shift.
10 Further, the Employer described the process by which it filled the 2008 area manager
11 vacancy as follows:

12 A screening committee to review applicants was put together consisting of
13 five (5) individuals from Boston Public Schools: Charles Cardillo, Assistant
14 Director of Facilities Management, Khadeja[h] Brown, Assistant Director of
15 Facilities Management-Design, Development of character; John Cisco,
16 Chief of Safety Services, and Paul Wood, Building Services Manager.
17 The committee selected Paul Meneely (DOB ___) for the position.
18 Meneely went out on worker's compensation for the remainder of the year
19 and Daniel Glavin (DOB ___) was given the position to replace him.
20 Glavin had also applied for the Area Manager position and was the
21 second choice for the position after he had applied for the position. Gavin
22 was selected as an Area Manager to replace retiring Richard Stably. Both
23 Meneely and Glavin are in the same protected class as the Complainant
24 [Kelley] as they are over 40. There is NO [emphasis in original] record
25 that Complainant James Kelley applied for this or any other position in the
26 last several years. (footnote omitted).

27 In the discussion portion of the 2009 Position Statement, the Employer stated:

⁴⁹ The Employer attached a list dated July 2008 (July 2008 list) of the thirty applicants for the permanent area manager position, #335133, which Meneely received. The list also contained the birthdates and ID numbers for those applicants who were internal candidates. Kelley's name is on the list.

1 The legitimate non-discriminatory reason that Boston did not hire Mr.
2 Kelley is that a screening committee felt Daniel Glavin was a good fit for
3 the position of Area Manager having had supervision over a greater
4 number of employees than Kelley. Boston reiterates that this is a position
5 that candidates must apply for, it is not merely a promotion, and seniority
6 is not a factor in hire as the minimum requirement is five (5) years
7 experience in custodial services in a supervisory capacity or five (5) years
8 in Facilities Management.⁵⁰

9 On June 12, 2011, MCAD dismissed Kelley's complaint for lack of probable cause.
10 Kelley appealed, and the MCAD held a preliminary appeal hearing as a result of which
11 the MCAD requested certain information from the Employer. On August 18, 2011,
12 Thomas on behalf of the Employer submitted a three-page response (August 18, 2011
13 response) to the MCAD's request for information in which it acknowledged that Kelley
14 had applied for the 2008 Area Manager Opening. Specifically, Thomas noted:

15 Attached please find a list of applicants to the Area Manager's Position in
16 July 2008. It is of note that the Complainant James Kelley is on this list.
17 This is the first I have been made aware of this error.... My understanding
18 is that Mr. Kelley was not considered by the screening committee,
19 regardless of the fact he applied.

20 In a latter portion of the August 18, 2011 response, Thomas noted:

21 Daniel "Danny" Glavin is only referenced in the Respondent's Position
22 statement because he is mentioned in the Complaint. The screening
23 committee did not consider him more qualified than Kelley, that was a
24 comparison made for the purpos[e] of the position statement. As
25 requested, Paul Meneely was on worker's compensation from 12/31/2008
26 to 2/6/2009. During that time Daniel Glavin was appointed to that position.

27 On September 29, 2011, the MCAD affirmed its dismissal of Kelley's complaint. The
28 MCAD noted in its affirmation of the prior dismissal that:

29 All employment complaints where applicable, are dual filed with the U.S.
30 Equal Employment Opportunity Commission (EEOC). Our finding will be
31 forwarded to its Area Office, JFK Federal Building, Boston, MA 02203.

⁵⁰ Wood attested that the 2009 Position Statement was true to the best of his knowledge, information and belief.

1 The MCAD finding will be given substantial weight by the EEOC provided
2 that such finding [is] in accordance with the requirements of Title VII of the
3 Civil Rights Acts of 1964, the Age Discrimination in Employment Act of
4 1967, and/or The Americans with Disabilities Act of 1990.

5 Employer's March 2012 Filing at the EEOC

6 On March 20, 2012, Douglas Heim (Heim), Assistant Corporation Counsel in the
7 Employer's Office of Legal Advisor, submitted the following Position Statement (2012
8 Position Statement) to the EEOC on behalf of the Employer concerning Kelley's dual-
9 filed age discrimination complaint. In the portion of the 2012 Position Statement with
10 the sub-heading "Post-MCAD and EEOC Complaint", Heim states in part:

11 As noted in the Charge of Discrimination ("EEOC Charge") in the instant
12 matter, there were no postings for Area Manager positions within BPS
13 from the time Mr. Kelley filed his MCAD complaint in June of 2009 until
14 November and December of 2011.... In that time period and to date, Mr.
15 Kelley continues to work for BPS [Employer] as a Senior Custodian. His
16 duties and responsibilities have not significantly changed and his
17 performance in that capacity has been satisfactory. Accordingly, his
18 qualifications for an Area Manager position have not substantially changed
19 for better or worse.

20 Meanwhile, the three individuals Complainant identifies as being hired as
21 temporary Area Managers recently, Tom Hogan (DOB: _),⁵¹ Don Cuzzi
22 (DOB: _), and Dennis Concepcion (DOB: _), are all over age 40, including
23 Hogan who is 9 years older than Mr. Kell[e]y. Therefore they are all within
24 Complainant's [Kelley's] same protected class with respect to age.
25 Temporary Area Manager appointments are made within the BPS
26 Facilities Department on an ad hoc basis either when a permanent area
27 manager is not able to work (due to injury, illness, etc.) or when funding
28 for Area Manager positions is attenuated despite the need for new
29 managers immediately. Each of the aforementioned individuals appointed
30 to be a temporary Area Manager[s] had significant experience supervising
31 other workers and/or engaging in other management duties such as

⁵¹ On Page 7 of the 2012 Position Statement, Heim notes in pertinent part:

Mr. Kelley's MCAD complaint was filed nearly two years before the ...
appointment of a temporary Area Manager (Tom Hogan in March of
2011). As such, any inference that he was not interviewed or hired solely
because one event preceded the other is unavailing.

1 heading up BPS Facilities grounds crew or serving a[s] a Crew Chief for
2 other BPS Facilities Projects.

3
4 In November and December of 2011, postings for two (2) permanent Area
5 Manager positions were issued. After the applications had been received,
6 a five-member screening committee was formed to examine applicants
7 Complainant was interviewed by the screening committee earlier this
8 month, before Facilities personnel were advised of the instant EEOC
9 Charge. To date, Don Cuzzi, who possess[es] significant management
10 and supervision experience as a BPS Facilities Crew Chief, has been
11 hired to fill one of the two permanent Area Manager positions. A decision
12 regarding the second position has not yet been made....

13 The EEOC subsequently dismissed Kelley's complaint.⁵²

14 Temporary Area Manager Appointments between February 14, 2011 and September 1,
15 2011

16 Wood made three temporary area manager appointments⁵³ in the period
17 between February 14, 2011 and September 1, 2011.⁵⁴ First, on February 14, 2011,
18 Wood appointed Thomas Hogan (Hogan)⁵⁵ as a temporary area manager. Kelley did
19 not become aware of Hogan's appointment until March 2011.⁵⁶ Next, on May 9, 2011,

⁵² The record does not contain the date that the EEOC dismissed Kelley's complaint.

⁵³ Wood confirmed that at least as of 2011, he knew that Kelley wanted to be an area manager.

⁵⁴ I previously informed the parties that the Employer's alleged adverse actions in this case are the temporary appointments that the Employer made in the six months prior to September 1, 2011, when Kelley filed his prohibited practice charge. I have included facts about Hogan's temporary appointment because it is a mixed question of fact and law as to whether Kelley timely filed the allegations concerning Hogan's temporary appointment. I will address the timeliness of that allegation as part of my decision.

⁵⁵ On February 14, 2011, the Employer completed a Personnel Action Request Form transferring Hogan from his position as a day senior custodian at the Condon Elementary School to a night area manager position.

⁵⁶ The facts before me do not show the exact date in March 2011 when Kelley became aware of Hogan's temporary appointment as an area manager.

1 Wood appointed Donato Cuzzi III (Cuzzi)⁵⁷ as a temporary area manager.⁵⁸ On July
2 18, 2011, the Employer⁵⁹ also appointed Dennis Concepcion (Concepcion)⁶⁰ as a
3 temporary area manager.⁶¹

4 Wood did not consider Kelley⁶² for any of those temporary area manager
5 positions, even though he acknowledged that: he had no issues with Kelley's
6 performance as a senior custodian,⁶³ Kelley had excellent evaluations, and Kelley had

⁵⁷ Cuzzi's father previously held the position of area manager.

⁵⁸ On May 9, 2011, the Employer completed a Personnel Action Request Form transferring Cuzzi from the position of senior custodian to area manager.

⁵⁹ On July 18, 2011, the Employer completed a Personnel Action Request Form transferring Concepcion from the position of night senior custodian at the Holland School to night area manager.

⁶⁰ Kelley opined at hearing that he undoubtedly was more qualified for the temporary area manager positions than Hogan, Cuzzi and Concepcion.

⁶¹ Wood spoke with McIntosh and Paul Sordillo (Sordillo), a building services manager, about whether various employees would make good temporary area managers. McIntosh did not testify in the present case. Sordillo confirmed that he spoke with Wood at various unspecified times about Concepcion, Naughton and another employee, R.G, before Concepcion's and Naughton's appointments as temporary area managers. Sordillo advocated for Naughton and R.G, but Wood expressed concerns that R.G. would not be a good fit with the other area managers.

⁶² Wood also spoke with Sordillo and McIntosh about Kelley at various times. Sordillo indicated that he never recommended Kelley for a temporary area manager position but never advocated against him either. I decline to make any other findings about the contents of any alleged conversations that Wood had with Sordillo because Wood did not provide specific details about the conversations and although Sordillo did provide details about three conversations that he had with Wood, it is unclear whether any of the conversations took place before Wood made the 2011 temporary appointments.

⁶³ At various times, Wood had spoken about Kelley to McNally and Thompson, who both described him as a good custodian.

1 done a good job supervising the custodians in his buildings.⁶⁴ Wood did not consider
2 Kelley because he believed that Kelley was not a “good fit” for the area manager
3 position.⁶⁵ When first asked on cross-examination for precise details, Wood replied
4 that it was thirty years of knowing Kelley⁶⁶ and that his knowledge was “more
5 historical than specific.” Wood subsequently expanded upon his response by
6 referencing Kelley’s temperament,⁶⁷ especially that Kelley sometimes got “a little high-
7 strung.” Wood noted that when he visited the Lewis School as an area manager,
8 Kelley became high-strung when Wood inquired about the whereabouts of the night

⁶⁴ Wood did not review the personnel files of Cuzzi or Concepcion before he appointed them to the temporary area manager positions, and he also did not review Kelley’s personnel file. The record contains no information as to whether or not Wood reviewed Hogan’s personnel file before he appointed him to the temporary area manager position.

⁶⁵ Wood acknowledged that he had neither solicited nor received input from principals about Kelley’s performance as a senior custodian.

⁶⁶ Wood and Kelley first worked together at the Burke in approximately 1980 and 1981. Wood was a day senior custodian and Kelley was a junior night custodian. Wood also was the night area manager who was responsible for the Lewis, when Kelley was the night senior custodian there during the period from 1993 to 1999. Wood described his relationship with Kelley as “good”, while Kelley described the relationship as “pretty good.”

Separate from their employment relationship, Wood and Kelley also knew each other from their service in the Massachusetts National Guard (National Guard) in which Wood served twenty-four years and Kelley served six years. Wood was Kelley’s Company Commander in C Company in Braintree. When Kelley left the National Guard, he held the rank of sergeant.

⁶⁷ Kelley contended that previously he had never heard any complaints about his temperament.

1 junior custodian Kevin Manning (Manning),⁶⁸ who was not present at the school but
2 had not signed out.⁶⁹

3 Wood also noted that the other reason that Kelley was not a good fit to be a
4 temporary area manager was that Kelley had a “tendency” to cover for Manning when
5 Manning was not present at the work site.⁷⁰ Wood claimed it happened on multiple
6 occasions when he visited the Lewis School as an area manager.⁷¹ Wood deduced
7 that at times Kelley allowed Manning to take longer than a thirty-minute lunch hour
8 without accounting for the additional time, because Manning arrived back at the Lewis
9 more than thirty minutes later after Wood arrived.⁷² As an area manager, Wood
10 informed the senior custodians at the sixty-five schools that he oversaw⁷³ that they
11 must ensure that they and their junior custodians sign out when they leave a school’s
12 premises.⁷⁴ When Wood went to inspect a school, he usually counted the number of

⁶⁸ Manning worked with Kelley for fifteen years at the Lewis and for less than one year at the Murphy.

⁶⁹ Although junior and senior custodians receive thirty minutes per day for a meal break, the Employer requires them to sign out if they leave the work site.

⁷⁰ Kelley informed Wood that Manning had left the building for coffee or a meal.

⁷¹ Wood stressed that on other occasions when he visited the Lewis both Kelley and Manning were present.

⁷² Wood claimed that he had waited longer than thirty minutes for Manning to return and thus, was sure that Manning had exceeded his thirty-minute break.

⁷³ At that time, Wood was the only night area manager for the sixty-five schools that had night shifts for custodians.

⁷⁴ Wood acknowledged that the problem was not unique to Kelley and that it may still go on to this day at certain schools on certain instances.

1 custodians present and compared that number with the information on the sign in and
2 out sheet.

3 Wood also explained his appointments of Cuzzi and Concepcion as temporary
4 area managers by stating that they were more qualified and a better fit than Kelley for
5 those positions.⁷⁵ Wood referenced the quality of Cuzzi's and Concepcion's work, their
6 supervisory experience, and his knowledge of them as the reasons for their
7 appointments.⁷⁶ Wood opined that Cuzzi and Concepcion had more significant
8 supervisory experience than Kelley.

9 In particular, Wood cited Cuzzi's work history as the supervisor of the
10 Employer's floor refinishing crews,⁷⁷ a position that Cuzzi held for approximately ten
11 years.⁷⁸ As the supervisor, Cuzzi was in charge of approximately 140 employees,
12 including the crew chiefs and their individual crew members. He decided where the

⁷⁵ Because the Employer asserted that the allegation involving Hogan's temporary appointment was untimely, the Employer did not provide a detailed explanation as to why Wood selected Hogan as a temporary area manager.

⁷⁶ Wood did not review the personnel files of any employees before he made the temporary area manager appointments that are the subject of the present case.

⁷⁷ Each April or May, the Employer solicits junior and senior custodians to apply for positions on the floor refinishing crews, an assignment which is in addition to the custodians' regular work assignments. Members of the floor refinishing crews do not earn overtime but instead earn a special pay rate. Custodians can also submit resumes if they want to apply for crew chief positions.

⁷⁸ Wood testified that Cuzzi also was Union vice-president and previously had filed grievances, although he was unaware whether Cuzzi filed those grievances on behalf of bargaining unit members or on his own behalf. Kelley testified that he has attended every Union meeting since 2008 and has never heard any references at those meetings to grievances that Cuzzi filed. However, I credit Wood's testimony on this point because Cuzzi could have filed grievances even if those grievances were not referenced at Union meetings.

1 crews were going to be assigned, ensured that the necessary equipment and tools
2 were delivered to the schools where the crews were working; and arranged for
3 equipment to be repaired, if needed.⁷⁹ Cuzzi also was the senior day custodian at the
4 Mattahunt (Mattahunt) Elementary School, and Wood had interacted with Cuzzi in that
5 role six or seven years prior to the hearing when Wood was a building services
6 manager. While the Mattahunt had construction taking place in certain parts of the
7 school, Cuzzi and Wood discussed how to improve the appearance of other parts of
8 the school, which included polishing the floors.

9 Regarding Concepcion, Wood pointed to his work history as a grounds crew
10 chief for one of the Employer's grounds crew, a position which he held for ten to twelve
11 years.⁸⁰ The duties of grounds crew chief are extra duties that in addition to
12 Concepcion's duties as a night senior custodian at the Holland.⁸¹ Members of the
13 grounds crew worked outside maintaining the grounds at the Employer's various
14 schools, which included trimming trees, using weedwackers and other power
15 equipment. As a crew chief,⁸² Concepcion worked independently at the various sites

⁷⁹ Cuzzi was no longer eligible to work as the supervisor of the floor refinishing crews after his appointment as temporary area manager.

⁸⁰ Wood was unaware that Concepcion had filed any grievances while he was a member of the Union's bargaining unit.

⁸¹ Similar to the floor refinishing assignment, the Employer also posts and seeks volunteers for the grounds crew assignments in April or May of each year. The Employer also pays the grounds crew members a special rate of pay, but not the overtime rate.

⁸² There were other grounds crew chiefs besides Concepcion.

1 with the crew members that he trained and supervised.⁸³ He also ensured that
2 materials were delivered to the work sites, if needed. Concepcion reported to
3 McIntosh.⁸⁴ McIntosh had spoken positively to Wood about Concepcion describing
4 him as focused and a good worker. Concepcion was fluent in Spanish,⁸⁵ which Wood
5 characterized as a consideration in his appointment but not a requirement. Because
6 Concepcion was bilingual, the Employer often relied upon him when communication
7 problems arose with custodians, whose first language was Spanish. When Wood was
8 a night area manager overseeing the Holland School, he also supervised
9 Concepcion.⁸⁶

10 March and May 2012 Permanent Appointments of Cuzzi and Hogan as Area
11 Managers⁸⁷

⁸³ Concepcion was no longer eligible to work as a crew chief on the grounds crew after his appointment as a temporary area manager.

⁸⁴ McIntosh previously had been a grounds crew chief.

⁸⁵ Kelley noted that he had successfully supervised custodians at the SBEC, whose first language was Spanish, even though he did not speak Spanish. Kelley used a mobile app on his cellphone as a translation device when he needed to communicate with those custodians.

⁸⁶ The record is unclear as to whether Concepcion was a night junior custodian or a night senior custodian at the Holland during the period when Wood supervised him as an area manager.

⁸⁷ I informed the parties at hearing that Cuzzi's and Hogan's 2012 permanent appointments were not the subject of the Complaint before me because those appointments took place six and eight months after Kelley's prohibited practice charge. However, I accepted evidence about those appointments and make findings about them because the Charging Party contends that it sheds light on the possible remedy in the case, i.e. whether any possible liability for the temporary appointments ended when Cuzzi and Hogan received their permanent appointments as area managers.

1 In early December 2011, Kelley saw two online postings for permanent area
2 manager positions, #341894 and #341895, and submitted applications and resumes
3 for those positions via email. On December 5, 2011, Kelley received confirmation via
4 email of his applications for the positions. On January 25, 2012, the Employer sent
5 Kelley identical email messages for Posting #341894 and Posting #341895 informing
6 him that he had not been selected for the positions. Kelley subsequently spoke with
7 McIntosh, who informed him that the Employer had sent out the letters in error.⁸⁸
8 Approximately, fourteen or fifteen candidates applied for each position. The Employer
9 subsequently convened a screening committee to select the candidates for both
10 postings. The members of the Screening Committee (the members) were: Khadijah
11 Brown, Director of Facilities Management, Jose Duarte, Principal of the Dearborn
12 School, Dorian Howard, retired building services manager, Sordillo and Wood.⁸⁹
13 Several weeks before March 1, 2012, Sordillo, at Wood's direction, prepared packets
14 for the members that included the resumes and applications of each candidate. On or
15 about that time, the members reviewed the packets for approximately one hour in the
16 conference room at the Dearborn (Dearborn) Middle School. The members ultimately
17 decided by consensus to select six candidates who would receive interviews, including
18 the Charging Party.⁹⁰ The members selected Kelley for an interview because he

⁸⁸ All of the applicants for the two positions received the same email messages informing them that they had not been selected for the positions.

⁸⁹ As a building services manager, Wood previously had been a member of three or four screening for permanent area manager positions, including for the 2008 posting to which Kelley applied.

⁹⁰ The Employer did not check any references that the candidates may have listed on their applications or resumes.

1 previously had applied for other permanent area positions and they wanted to see how
2 he would do during an interview.⁹¹ The interviews were for both postings, even though
3 the Employer did not inform the applicants of that fact. On February 23, 2012, Wood
4 sent a letter to Kelley stating:

5 You have been selected for an interview for the Area Manager's position.
6 The interview will be on Thursday, March 1, 2012 at 10:30 AM in the 2nd
7 Floor Conference Room at the Henry Dearborn Middle School, 35
8 Greenville Street, Roxbury.

9 On March 1, 2012, the members conducted interviews with the candidates at
10 the Dearborn. Only four candidates attended the interviews. P.K, one of the six
11 candidates, who was selected for an interview, did not show up.⁹² Another candidate
12 Hogan was in the hospital on March 1, 2012 and unable to attend the interview. The
13 members interviewed the four candidates separately and kept their own notes of the
14 candidates' answers. The members asked all four candidates the same six questions.
15 Each member asked one question of the candidates, except Wood who asked two
16 questions. Wood could not recall the questions that the members asked the
17 candidates, but Sordillo recalled certain questions and/or answers that occurred during
18 the interview.⁹³ He noted that a member asked candidates about their relationships
19 with principals or headmasters, but Sordillo did not give the candidates' answers to the

⁹¹ Wood indicated that he agreed with the consensus decision of the members to offer Kelley an interview.

⁹² P.K. was an outside candidate, who did not already work for the Employer.

⁹³ With one exception, Kelley did not provide detailed information about the questions that he was asked at the interview or his responses.

1 questions.⁹⁴ Sordillo also explained how Kelley's answer to another question was that
2 his job would be easier if he had better equipment.⁹⁵ He also related how a member
3 asked several candidates about their attendance records. Kelley was not asked that
4 question, and Sordillo confirmed that there were no issues with Kelley's attendance
5 record. Finally, Sordillo stated that he asked the candidates whether they would have
6 trouble disciplining a custodian⁹⁶ with whom they currently or previously worked.⁹⁷

7 After the Screening Committee completed its interviews with the four
8 candidates, the members reviewed and discussed the candidates' answers, including
9 whether the answers were consistent with policies and procedures. They also talked
10 about the candidates' applications and resumes. Wood brought up and the other
11 members agreed that they liked how Cuzzi responded to their questions in a decisive,
12 frank and straightforward manner. Cuzzi responded to Sordillo's question about
13 disciplining other custodians by noting that he knew a lot of custodians as Union vice-
14 president but it would not stop him from disciplining them. The members ultimately
15 decided by consensus that of the four candidates, Cuzzi was the most qualified,

⁹⁴ Sordillo did not identify the member who asked the question.

⁹⁵ The record does not contain the question that prompted Kelley's answer or the identity of the member who posed the question.

⁹⁶ Kelley described Sordillo's question as "how would you feel about writing somebody up." However, because the two versions of the questions are substantially similar in content, I need not reconcile the differences in the content.

⁹⁷ Sordillo testified that Kelley answered his question by stating that it depended on who the custodian was. However, Kelley testified that he responded by stating that the last thing that he wanted to do was write somebody up but knowing the job that it was inevitable. I need not reconcile the differences in Sordillo's and Kelley's testimony because it is not material to the outcome of the issue before me, i.e. the 2011 temporary appointments.

1 especially in light of his supervision of 140 employees as supervisor of the floor
2 refinishing crew. In a March 9, 2012 memorandum to Assistant Superintendent of
3 Human Resources Ann Chan regarding Job Opening 341894, Wood stated:

4 Interviews for the Area Manager's job were conducted on Thursday,
5 March 1, 2012.

6
7 Interviewees:⁹⁸

8 R.B.⁹⁹

9 Dennis Concepcion

10 Donato Cuzzi

11 Thomas Hogan (hospitalized unable to interview)

12 James Kelley

13 P.K. (No call/no show)

14 The Screening Interview Committee consists of the following individuals:

15

16 Khadijah Brown, Director of Facilities Management

17 Paul M. Wood, Assistant Director of Facilities Management

18 Jose Duarte, Principal of the Dearborn Middle School

19 Paul Sordillo, Building Service Manager for Facilities Management

20 Dorian Howard, Building Services Manager for Facilities Management-
21 Retiree

22

23 As a result of the Interview the Committee has selected Donato Cuzzi as
24 the Area Manager. On or about that date, the Employer appointed Cuzzi
25 to the permanent area manager position.

26 Shortly thereafter, the Employer formally appointed Cuzzi as a permanent area
27 manager.

28 A week to ten days later, the Screening Committee met again at the Dearborn.

29 The members conducted an interview via Skype with Hogan, who was home from the

30 hospital. The Screening Committee asked Hogan the same six questions that they had

31 asked the other candidates at the March 1, 2012 interviews. The members then

⁹⁸ The interviewees had initials next to their names identifying their race/ethnicity.

⁹⁹ R.B. was chief of a floor refinishing crew.

1 considered Hogan's responses¹⁰⁰ and qualifications along with the responses and
2 qualifications of the remaining three candidates from the March 1, 2012 interviews.
3 The Screening Committee decided by consensus that Hogan was the most qualified of
4 the remaining candidates. The Employer subsequently appointed him in March or April
5 2012 as a permanent area manager.

6 After the Employer appointed Cuzzi and Hogan to the permanent area manager
7 positions, Concepcion continued to remain as a temporary area manager, and
8 Naughton became a temporary area manager on May 31, 2012. In late April, early
9 May 2013, the Employer posted openings for two permanent area manager positions,
10 the positions Concepcion and Naughton previously had filled on a temporary basis.

11 Opinion

12 Timeliness

13 As a preliminary matter, I must determine whether Kelley timely filed the portion
14 of his prohibited practice charge alleging that the Employer retaliated against him by
15 failing to appoint him as a temporary area manager in February 2011, an appointment
16 that Hogan received. Section 15.03 of the Department's regulations, 456 CMR 15.03,
17 provides that: "Except for good cause shown, no charge shall be entertained by the
18 Department based upon any prohibited practice occurring more than six months prior
19 to the filing of the charge with the Department." The time period is measured from the
20 date when the charging party "knew or should have known" of the event(s) that are the
21 basis of the charge. Felton v. Labor Relations Commission, 33 Mass. App. Ct. 926
22 (1992). Here, the Employer contends that this portion of Kelley's charge is untimely

¹⁰⁰ The record contains no information describing Hogan's responses to the questions.

1 because it appointed Hogan as a temporary area manager on February 14, 2011.
2 However, Kelley did not file his prohibited practice charge until September 1, 2011,
3 which is approximately six months and two weeks later. Conversely, Kelley contends
4 that he did not become aware of Hogan's appointment until on or after March 1, 2011,
5 which is within six months of the filing of the charge. Because a challenge to the timely
6 filing of a charge is an affirmative defense, the School Committee bears the burden of
7 showing that Kelley knew or should have known of Hogan's appointment prior to March
8 1, 2011. See City of Boston, 26 MLC 177, 181, MUP-1431 (March 23, 2000); Town of
9 Wayland, 5 MLC 1738, 1741, MUP-2294 (March 29, 1979). Based on the facts before
10 me, the School Committee does not satisfy its burden. When the Employer appoints a
11 new temporary area manager, it does not notify its other employees about the
12 appointment. Thus, Kelley did not have actual notice from the Employer of Hogan's
13 temporary appointment. Instead, the Employer anticipates that newly appointed area
14 managers will introduce themselves to the custodians at the schools where they
15 supervise. However, the facts before me do not show that Hogan told Kelley of his
16 appointment or that as a temporary manager, Hogan supervised Kelley. Also, there is
17 no other information in the record showing that Kelley should have known of Hogan's
18 appointment prior to March 1, 2011. Accordingly, Kelley's allegations concerning the
19 February 14, 2011 temporary area manager appointment are timely.

20 Prima Facie Case

21 A public employer that retaliates or discriminates against an employee for
22 engaging in activity protected by Section 2 of the Law violates Section 10(a)(3) of the
23 Law. Southern Reg. Voc. School District v. Labor Relations Commission, 38 Mass. 414

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

8 Protected Activity and Employer Knowledge

9 Here, Kelley engaged in concerted activity protected by Section 2 of the Law
10 when: he requested that the Union file a grievance on his behalf in the Fall of 2008,
11 and when the Union subsequently filed a written grievance on his behalf on December
12 8, 2008. See Boston City Hospital, 11 MLC 1065, 1072, MUP-4893 (July 25, 1984)
13 (pursuing a complaint through the contractual grievance procedure constitutes
14 concerted, protected activity). The Employer was aware of Kelley's concerted,
15 protected activity, because its agent Wood, the assistant director of facilities
16 management/building services, executed a settlement agreement on December 10,
17 2009 resolving the grievance. See Town of Dracut, 25 MLC 131, 133, MUP-1397
18 (February 17, 1999). (finding knowledge of concerted, protected activity of filing a
19 grievance when employer executed a settlement agreement resolving that grievance).

20 Adverse Action

21 The CERB has consistently defined adverse action as an adverse personnel
22 action, such as a suspension, discharge, involuntary transfer or reduction in
23 supervisory authority. City of Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009).

1 Kelley contends that his failure in 2011 to be appointed to three temporary area
2 manager positions, positions to which the Employer appointed Hogan, Cuzzi and
3 Concepcion respectively, constitutes adverse actions. Conversely, the Employer
4 contends that Kelley suffered no adverse impact because his terms and conditions of
5 employment remained the same, he received no discipline, and the appointments were
6 only temporary.

7 An adverse employment action must materially disadvantage the affected
8 employee in some way. City of Boston, 35 MLC at 291. Material disadvantage arises
9 when objective aspects of the work environment are affected. See King v. City of
10 Boston, 71 Mass. App. Ct. 460, 468 (2008) (failing to provide female superior officers
11 with rank-specific locker rooms rises to the level of an adverse action). Because there
12 must be real harm, subjective feelings of disappointment and disillusionment will not
13 suffice. See MacCormack v. Boston Edison Co., 423 Mass. 652, 663-664 (1996)
14 (former employee's claims of adverse action were based upon subjective feelings of
15 disappointment and disillusionment rather than objective evidence that he had been
16 disadvantaged in terms and conditions of employment); see also City of Holyoke, 35
17 MLC 153, 156, MUP-05-4503 (January 9, 2009) (co-workers' subjective opinions and
18 office banter do not render as adverse a previously requested transfer). Here, it is
19 undisputed that the area manager position is a promotional opportunity for Kelley.
20 Further, the possibility of promotion to a position in another bargaining unit is a term
21 and condition of employment, where it constitutes a step in an established career
22 ladder. See Boston School Committee, 3 MLC 1603, 1610 MUP-2503, 2528, 2541
23 (April 15, 1977). Even in the absence of discipline and other changes to Kelley's terms

1 and conditions of employment, a failure to promote him to the three temporary area
2 manager positions in 2011 adversely affected his employment. See Town of Mashpee,
3 36 MLC 163, 171, MUP-02-3653 (April 15, 2010) (failing to promote a patrol officer to
4 the rank of sergeant was an adverse action). Contrary to the Employer's claims, the
5 temporary nature of the positions is not pertinent to whether or not the Employer's
6 failure to appoint Kelley to those positions constitutes an adverse action. See Town of
7 Burlington, 17 Mass. App. Ct. 402 (1984) (failing to promote a deputy chief to the
8 temporary management position of acting chief was an adverse action).

9 Animus

10 A charging party may proffer direct or indirect evidence of discrimination in
11 support of its claim. See Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1,
12 2002), aff'd sub nom., Town of Brookfield v. Labor Relations Commission, 443 Mass.
13 315 (2005). Direct evidence is evidence that, "if believed, results in an inescapable or
14 at least highly probable inference that a forbidden bias was present in the workplace."
15 Wynn v. Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass.
16 655, 667 (2000) (citing Johansen v. NCR Comten, Inc. (Johansen), 30 Mass. App. Ct.
17 294, 300 (1991). Stray remarks in the workplace, statements by people without the
18 power to make employment decisions, and statements made by decision makers
19 unrelated to the decisional process itself do not suffice to satisfy a charging party's
20 threshold burden. Id. at 667 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 277
21 (1989). Here, Kelley asserts that Wood's comments that he did not believe that Kelley
22 was a good fit because he was "high-strung" and that his opinion came from "thirty
23 years of knowing Jimmy Kelley" (thirty-year comment) are code words and direct

1 evidence of anti-union animus. Kelley reasons that Wood described him as high-
2 strung because Kelley vigorously exercised his rights under the Law and that Wood's
3 thirty-year comment is an admission that Wood based his decision not to appoint
4 Kelley to the three temporary area manager appointments in 2011 because of the
5 entirety of Kelley's activities, including his protected activity. However, Wood's
6 comments are not code words because Wood provided details in support of his
7 opinion. In the absence of a showing that other facts support an inference of direct
8 evidence of animus, Wood's comments standing alone are not sufficient to support that
9 inference. Cf. Tardanico v. Atena Life & Casualty Company, 41 Mass. App. Ct. 443,
10 450 (1996) (finding that ambiguous remarks alone are insufficient to establish direct
11 evidence of age discrimination). Thus, I have treated Kelley's allegations as an indirect
12 evidence case. The burden of proof in indirect evidence cases is set forth in Trustees
13 of Forbes Library v. Labor Relations Commission (Trustees of Forbes Library), 384
14 Mass. 559 (1981).

15 Absent direct evidence of unlawful motivation, unlawful motivation may be
16 established through circumstantial evidence and reasonable inferences drawn from
17 that evidence. Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498
18 (June 4, 2001). Circumstantial factors may include: shifting and inconsistent reasons
19 for an employer's action, Everett Housing Authority, 13 MLC 1001, 1006, MUP-5656
20 (June 4, 1986); the insubstantiality of the reasons given for the adverse action,
21 Commonwealth of Massachusetts, 14 MLC 1743, 1749, SUP-3081 (May 19, 1988); the
22 timing of the adverse action in relation to the protected activity. Town of Somerset, 15
23 MLC 1523, 1529, MUP-6404 (March 9, 1989); and the employer's divergence from

1 longstanding practices, Town of Mashpee, 36 MLC 163, 171, MUP-02-3653 (April 15,
2 2010).

3 Insubstantiality of Reasons

4 Kelley argues that Wood only provided vague generalities in support of his claim
5 that Kelley's temperament was the reason that Wood did not select Kelley for the 2011
6 temporary area manager positions. Although Wood could not provide exact dates and
7 times for his opinion about Kelley's temperament, he did provide details in support of
8 his opinion. As the night area manager, Wood had visited the Lewis on several
9 occasions, and Kelley became agitated when Wood asked where the Manning, the
10 night junior custodian, was. At times, Manning had not signed out but was not present
11 in the building. Other times, Manning had signed out, but was late returning back from
12 his thirty-minute meal break, a fact that Wood verified because he waited for Manning
13 to return. Wood stressed to Kelley that Manning needed to sign out before he left the
14 building and could not exceed his thirty-minute meal break unless he used other leave
15 time.

16 Kelley also argues that Wood's testimony about the events at the Lewis is
17 inconsistent with Wood's other statements that Kelley as a senior custodian did a good
18 job supervising his junior custodians. However, viewed in its entirety, Wood's
19 testimony is not inconsistent because the comments about the Lewis concern specific
20 incidents that caused Wood to conclude that Kelley was not a good fit to be an area
21 manager, while the comments about Kelley doing a good job supervising his junior
22 custodians pertain to Kelley's overall competence as a senior custodian, competence

1 which the Employer has not challenged. Also, Wood noted that he did not promote
2 every good senior custodian to the position of area manager.

3 Finally, Kelley points to a portion of Wood's testimony where he notes that
4 individuals whom the Employer previously did not select for area manager positions
5 were subsequently promoted to those positions. Kelley argues that Wood's statement
6 demonstrates that he believes in the human capacity for change. However, Wood's
7 reliance upon stale events at the Lewis as the basis for his opinion about Kelley's
8 temperament contradicts Wood's belief in the capacity for change. First, contrary to
9 Kelley's argument, Wood never specifically testified about the human capacity for
10 change, and Kelley's inferences on that issue are too tenuous. Further, the fact that
11 the events that Wood referred to at the Lewis occurred somewhere between 1993 and
12 1999 does not mean that he cannot cite them as the basis for his opinion about Kelley.

13 Shifting and Inconsistent Reasons

14 Kelley argues that Wood provided shifting and inconsistent reasons for his non-
15 selection of Kelley for the 2011 temporary area manager appointments. In particular,
16 Kelley points out that Wood described Kelley as not a good fit for the 2011 temporary
17 area manager positions but also characterized him as qualified for the positions.
18 However, Wood clarified his response that Kelley was qualified by noting that Kelley
19 satisfied the requirements in the area manager job description, i.e. that he had five
20 years of experience in custodial services in a supervisory capacity and that he had
21 experience in a supervisory capacity in Facilities Management, but he still did not
22 consider Kelley a good fit for the position. Also, Kelley maintains that Wood's
23 statement that the employees whom he selected for the temporary area manager

1 positions were more qualified than Kelley throws into doubt Wood's statement that he
2 did not consider Kelley for the two temporary area manager positions. I disagree as
3 Wood's statement about the other candidate's qualification does not override Wood's
4 explicit statement that he did not consider Kelley for the 2011 temporary area manager
5 positions. Further, the record contains no affirmative evidence showing that, despite
6 Wood's denial, he actually considered Kelley for the positions.

7 Also, Kelley points to the Employer's August 18, 2011 Response to MCAD as
8 proof of the Employer's shifting and inconsistent reasons. In its August 18, 2011
9 Response, the Employer corrects an earlier assertion that it had made in its 2009
10 Position Statement in which it claimed that Kelley had not applied for the 2008
11 permanent area manager position. Instead, the Employer in the August 18, 2011
12 Response noted that although Kelley applied, he was not considered by the Screening
13 Committee. The Employer made no reference to Kelley's temperament in its August
14 18, 2011 Response. However, the Employer's stated reasons for a 2008 promotion
15 bypass are not pertinent to the present case because the events in dispute here
16 occurred three years later, and the selection process for the 2008 permanent
17 appointment and the 2011 temporary appointments was different. In 2008, the
18 Employer posted the permanent area manager position, and a screening committee
19 selected applicants for interviews and chose the successful candidate. In 2011, the
20 Employer did not post the temporary area manager positions, and Wood alone made
21 the appointments.

22 Timing

1 Here, the Union filed a grievance on Kelley's behalf on December 8, 2008 to
2 challenge the Employer's inclusion of certain documents in Kelley's personnel file. The
3 grievance was scheduled to be heard at arbitration on December 10, 2009, when the
4 Union, the Employer and Kelley executed a settlement agreement resolving the matter.
5 Approximately fourteen months later, on February 14, 2011, Wood did not consider
6 Kelley for a temporary area manager position to which Wood appointed Hogan. Kelley
7 contends that the fourteen months is sufficiently close in time because it was the first
8 instance in which Wood made a temporary area manager appointment and had the
9 opportunity to retaliate against Kelley. However, timing alone is insufficient to find
10 unlawful employer motivation. See City of Holyoke, 35 MLC 153, 157, MUP-05-4503
11 (January 9, 2009). For the reasons discussed above, Kelley has failed to establish any
12 circumstantial evidence coupled with timing that would allow me to reasonably
13 conclude that Wood's failure to appoint Kelley to the three 2011 temporary area
14 manager positions was motivated by animus. Compare Town of Carver, 35 MLC 29,
15 48-49, MUP-03-3894 (June 30, 2008) (drawing reasonable inference of animus based
16 on timing and deviation from past practice as well as certain other factors). Thus,
17 Kelley has failed to establish the fourth element of his prima facie case.

18 However, even assuming that I were to infer animus, Kelley has failed to
19 establish that but for his protected activity Wood would have appointed him in 2011 to
20 the three temporary area manager positions.

21 Employer's Burden of Production

22 Under the three part Trustees of Forbes Library analysis, once a charging party
23 establishes a prima facie case of retaliation, it is the employer's burden to produce a

1 legitimate, non-discriminatory motive for taking the adverse action. The employer's
2 burden to produce legitimate, non-discriminatory reasons for taking the adverse action
3 is more than simply stating an unsubstantiated allegation. Commonwealth of
4 Massachusetts, 25 MLC 44, 46, SUP-4128 (August 24, 1998). The employer must
5 state a lawful reason for its decision and produce supporting facts indicating that the
6 preferred reason was actually a motive in the decision. Trustees of Forbes Library, 384
7 Mass. at 566; Quincy School Committee, 27 MLC at 92; Commonwealth of
8 Massachusetts, 25 MLC at 46. Here, Wood indicated that he selected individuals to be
9 temporary area managers based upon: the quality of their work, their supervisory
10 experience and from knowing them. Focusing specifically on Kelley, Wood stated that
11 he did not consider him for the 2011 area manager appointments because he did not
12 consider him to be a "good fit" for the area manager position, even though he did not
13 have an issue with Kelley's performance as a senior custodian. Wood stated that his
14 conclusion was based upon thirty years of knowing Kelley, and that it was more
15 historical than specific, which is consistent with one of Wood's stated criterion of using
16 his knowledge of the area managers as a basis for selection and his comment to Kelley
17 in 2008, before Wood became the decision-maker, that character rather than tenure
18 was the basis for selection of area managers. When pressed on cross-examination,
19 Wood then referenced Kelley's temperament and described Kelley as high-strung,
20 including that Kelley would become high-strung when Wood as an area manager
21 visited the Lewis and inquired where the night junior custodian Manning was. He also
22 noted that Kelley had a tendency to cover for Manning when Manning and Kelley
23 worked together at the Lewis. Wood then detailed instances, without giving exact

1 dates and times, when as an area manager he arrived at the Lewis, and Manning was
2 not present and had not signed out for his thirty-minute meal break or returned late
3 from that break. He also stated that he spoke to Kelley and emphasized that
4 employees needed to sign in and out when they left the building. Kelley never denied
5 that Wood had raised concerns with him about Kelley's oversight of Manning while they
6 both worked at the Lewis, although he claimed that the first time that he heard his
7 temperament was an issue was at the hearing. Here, the Employer has met its burden
8 of production because Wood presented reasons why he did not consider Kelley for
9 appointment to the disputed positions and the facts to support it.

10 "But For" Analysis

11 Once an employer produces evidence of a legitimate, non-discriminatory reason
12 for taking the adverse action, the case becomes one of "mixed motives." Under the
13 Trustees of Forbes Library analysis, the CERB considers whether the employer would
14 have taken the adverse action but for the employee's protected activities. Suffolk
15 County Sheriff's Department, 27 MLC at 160; Quincy School Committee, 27 MLC at
16 92. The charging party bears the burden of proving that, but for the protected activity,
17 the employer would not have taken the adverse action. Athol-Royalston Regional
18 School Committee, 28 MLC 204, 214, MUP-2279 (January 14, 2002); Town of Athol,
19 25 MLC 208, 211, MUP-1448 (June 11, 1999). Turning first to the February 14, 2011
20 temporary area manager appointment, Kelley insists that he must prevail on the "but
21 for' test for this appointment because the record contains no facts about Hogan's
22 credentials and the reasons why Wood appointed him to the position. However, the
23 situation before me is not a traditional challenge to a promotional bypass where an

1 unsuccessful candidate in a pool of candidates claims to have superior qualifications to
2 the successful candidate. Here, there were no applicants for the opening because the
3 Employer does not post openings for temporary area manager positions. Also, the
4 collective bargaining agreement between the Union and the Employer provides no
5 selection criteria for appointment as a temporary area manager, a position which is
6 included in another bargaining unit. The pool of possible appointees to the temporary
7 area manager positions included any employee with the requisite five years of
8 supervisory custodial experience, although most likely it would be a senior custodian.
9 Although Kelley made the bald assertion that he was more qualified than Hogan as
10 well as Cuzzi and Concepcion, the other employees who also received 2011 temporary
11 area manager appointments, the proper analysis is not Kelley versus Hogan, Cuzzi or
12 Concepcion. Instead, the focus must be whether Kelley provided sufficient facts to
13 show that Wood would have considered him for one of the three 2011 temporary area
14 manager appointments if Kelley had not engaged in concerted, protected activity.
15 Upon review of the facts before me, Kelley has failed to establish by preponderance of
16 the evidence that Wood would have considered him but for his concerted, protected
17 activity. See Southbridge School Committee, 41 MLC 199, 201, MUP-06-4762, MUP-
18 07-5010 (January 30, 2015); Bristol County Sheriff's Dep't, 26 MLC 105, 109, MUP-
19 2100 (January 28, 2000).

20 CONCLUSION

21 Based on the record and for the reasons stated above, I conclude that the

- 1 Employer did not retaliate against Kelley for engaging in concerted, protected activity in
- 2 violation of Section 10(a)(3) of the Law.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

MARGARET M. SULLIVAN
HEARING OFFICER

APPEAL RIGHTS

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