

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

In the Matter of *
*
SOMERSET SCHOOL COMMITTEE *
*
and *
*
LORRIE PIERCE *
*

Case No.: MUP-13-3085
Date Issued: May 21, 2015

Board Members Participating:
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Appearances:

Lorrie Pierce - Pro Se
Andrew Waugh, Esq. - Representing the Somerset School Committee

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

SUMMARY

1 On May 23, 2014, a Department of Labor Relations (DLR) Hearing Officer issued
2 a decision in this case holding that the Somerset School Committee (Employer or
3 School Committee) violated Section 10(a)(4) and, derivatively, Section 10(a)(1) of the
4 Law by taking certain adverse actions against Lorrie Pierce (Pierce) in retaliation for
5 participating in a DLR arbitration proceeding. The School Committee filed a timely
6 notice of appeal and a supplementary statement challenging certain of the Hearing

1 Officer's findings and all of the conclusions of law. Pierce filed a timely response. Upon
2 consideration of the record and the parties' statements on appeal, we affirm the Hearing
3 Officer's conclusion that the School Committee retaliated against Pierce for participating
4 in a DLR arbitration hearing by adding a new job qualification on a posting for Pierce's
5 former Wilbur School Paraprofessional assignment that they knew that she did not
6 possess. However, we reverse the Hearing Officer's conclusion that deleting Pierce's
7 email account and removing Pierce from a faculty list were adverse actions that could
8 give rise to a Section 10(a)(4) violation. We modify the remedy accordingly.

9 FACTS

10 The Hearing Officer made numerous and detailed findings, which we do not
11 repeat herein. Further reference may be made to the facts set out in the Hearing
12 Officer's decision, reported at 40 MLC 333, May 22, 2014, and attached to the slip
13 opinion of this decision. We briefly summarize the facts below and adopt them, except
14 as noted. Because the School Committee's challenges to the facts are, in fact,
15 challenges to the conclusions or inferences drawn from the findings, we address those
16 issues in the body of our opinion.

17 At all relevant times, Pierce was a member of the bargaining unit represented by
18 AFSCME, Council 93, Local 1701 (Union). The Union is the exclusive bargaining
19 representative for paraprofessionals employed by the Town of Somerset (Town) at the
20 Somerset School District (District) and the Somerset Berkley Regional School District.

21 Pierce was first employed as a paraprofessional in the District in 2001. When
22 Pierce was hired, the School Committee did not require the incumbent to "have a
23 preference in working with special needs students." Pierce served as a kindergarten

1 paraprofessional at the Wilbur School from 2001-2002 and then, after briefly working in
2 the first grade, returned to the kindergarten setting in 2004. In May 2010, Pierce took a
3 medical leave of absence until the end of the 2009-2010 school year. She returned in
4 August 2010 to the Wilbur School, but then took another medical leave of absence
5 beginning in October 2010, which the School Committee extended, to the end of the
6 2010-2011 school year. In April 2011, the School Committee posted a vacancy for a
7 long-term substitute to fill Pierce's position and hired Tanya Silva (Silva) to fill the
8 position shortly thereafter.

9 Pierce notified the School Committee that she was ready to return to work on
10 August 27, 2012 and asked to be reinstated to her former position as a kindergarten
11 paraprofessional at the Wilbur School. On September 24, 2012, after providing certain
12 required medical information from her physician, who cleared her to return to work,
13 Pierce met with the School Committee to discuss her reinstatement. At that meeting,
14 she was offered a position for the 2012-2013 academic year as a Special Education
15 (SPED) paraprofessional at the Chace Street School. That position had been posted in
16 July 2012. The same day, the School Committee memorialized its offer with a letter
17 stating:

18 This letter is to inform you that your assignment in the Somerset Public
19 Schools for the 2012-2013 academic year will be as a Paraprofessional at
20 the Chace Street School. Please forward your acceptance of this
21 assignment by Monday, October 1, 2012.

22 The bottom of the letter contained the words "Accepted by" followed by a line for Pierce
23 to sign and date her acceptance.

24 Pierce did not accept the offer. Instead, on September 24, 2012, she filed a
25 grievance with the Union protesting her non-assignment to the Wilbur School. On

1 September 28, 2012, Pierce returned the offer letter with the words "Accepted by:"
2 crossed out, followed by the handwritten words, "I decline the position." She signed and
3 dated the form. Pierce performed no work for the Somerset Public Schools and
4 received no compensation from the school system after September 28, 2012. She did
5 not, however, submit a resignation letter nor did the School Committee send her any
6 notification indicating that she had been terminated or that she was not otherwise
7 employed by the District. On or about September 28, 2012, Medeiros changed Pierce's
8 employment status as having voluntarily resigned due to her declination of the Chace
9 School Assignment but did not tell Pierce that it had done so. During the period in
10 which her grievance was awaiting arbitration and through the date of the arbitration
11 award, Pierce considered herself to still be employed by the District.¹ The School
12 Committee denied Pierce's grievance on October 30, 2012 and, on November 16, 2012,
13 the Union filed a petition for arbitration with the DLR alleging that the failure to assign
14 Pierce to the Wilbur School violated various provisions of the collective bargaining
15 agreement between the School Committee and the Union. An arbitration hearing on
16 Pierce's grievance was held on June 28, 2013. Both Pierce and Superintendent
17 Richard Medeiros (Medeiros) participated in the arbitration hearing. During the

¹ Most of the School Committee's brief is devoted to disputing the Hearing Officer's conclusion that Pierce remained employed by the School District after she declined the position at the Chace School in September 2012 through the date of the arbitration award. We do not reach this issue for reasons explained below. It is nevertheless evident from the record and the pleadings that, at a minimum, Pierce believed that she was still employed by the School District while her grievance was pending.

1 arbitration hearing, Pierce stated that, due to an anxiety disorder, she preferred not to
2 work with special needs children.²

3 On September 12, 2013, the arbitrator issued a decision holding that the
4 Committee did not violate the parties' Agreement when it offered Pierce a
5 paraprofessional assignment at the Chace School on September 24, 2012.

6 **User Directory Email Account**

7 The Hearing Officer found that when there is a change in an employee's
8 employment status, the Superintendent asks the "User Directory Administrator" to
9 deactivate, delete or modify the employee's email account. Deleting (as opposed to
10 deactivating) a District email account means that the employee is no longer able to
11 access their email and removes the account from the User Directory. The User
12 Directory is an electronic folder that contains the personal contact information and email
13 addresses for all District Employees. Raymond Nekrasz (Nekrasz) is the District's

² The Hearing Officer did not make a specific finding of fact that Pierce indicated during her arbitration hearing that she preferred not to work in a special education position. Instead, in the Opinion portion of her decision, the Hearing Officer stated that "the Employer changed the job qualification criteria for [the Wilbur School] kindergarten assignment during the pendency of Ms. Pierce's arbitration despite her stated non-preference against working in a SPED setting." Under the Mixed Motives section of her analysis, Pierce's participation in the grievance proceeding, the Hearing Officer also stated that "After [Pierce] declined the Committee's September 24, 2012 offer to take the Chace School assignment, the Committee posted a job vacancy . . . that it knew – from interviewing Ms. Pierce for the Chace School Assignment – that she did not possess." The CERB has reviewed the record and finds no basis for the Hearing Officer's conclusion that the School Committee knew from interviewing Pierce for the Chace School assignment that she preferred not to work in a SPED position and we therefore do not rely on this statement. Pierce testified at this proceeding, however, that during her arbitration hearing she made clear that she had chosen not to take a special needs position due to an anxiety disorder. Medeiros, who was a witness in the instant proceeding and was present at the arbitration hearing, did not refute this aspect of Pierce's testimony, nor does the School Committee argue that it was unaware of Pierce's stated preference. We have supplemented the findings accordingly.

1 Director of Technology, who also serves as the User Directory Administrator. Nekrasz
2 typically does not delete, deactivate or modify email accounts until the end of the school
3 year.

4 At some point between June 28 and July 1, 2013, Medeiros provided Nekrasz
5 with a list of names and instructed Nekrasz to delete, deactivate or modify their District
6 email accounts. In addition to providing the list of names, Medeiros specifically
7 instructed Nekrasz to delete Pierce's email account. Nekrasz did so on July 2, 2013.
8 Until that point, Pierce had had access to her District email account and her name
9 appeared in the User Directory. Pierce sent an email to Nekrasz the same day asking
10 why she could not access her account and noting that when she tried to send an email
11 from her home account to her school email address, it did not go through. On July 10,
12 2013, Nekrasz sent an email to Medeiros confirming that, as per his instructions, he had
13 deleted Pierce's email account. Nekrasz confirmed this to Pierce on July 15, 2013. As
14 of July 16, 2013, however, Nekrasz had failed to deactivate or delete the User Directory
15 e-mail accounts of six employees who retired or resigned during the 2012-2013 school
16 year and at no point did Medeiros instruct Nekrasz to do so.

17 **Faculty List**

18 In or around the beginning of July 2013, Medeiros removed Pierce's name from
19 the faculty list. Also, at the end of the 2012-2013 school year, someone in the
20 Employer's central office created a list of 32 individuals who had "retired, resigned, etc."
21 from their employment during that school year. Pierce's name was on that list. Next to
22 her name was the date September 28, 2012 and the words "Declined Position."

23 **Paraprofessional Job Descriptions and Postings, 2012-2013 School Year**

1 The Superintendent posts notices of District vacancies on the SchoolSpring.com
2 website and by internal vacancy notice. The School Committee does not have a formal
3 job description for the paraprofessional position. Upon hire, paraprofessionals are given
4 assignments that may include general education, transitional/SPED, Title I (grant-
5 funded), long-term substitute, etc.

6 Sometime in the spring of 2013, the principal of the Wilbur School became aware
7 that the School Committee wanted to transform Silva's current assignment from a long-
8 term substitute at the Wilbur School to a permanent paraprofessional assignment.

9 Between April 2013, six months after Pierce declined the Chace School position,
10 and October 31, 2013, the School Committee posted notices of five vacancies for
11 paraprofessional positions. In April 2013, the School Committee posted a job vacancy
12 announcement for a "Paraprofessional Long-Range Substitute" assignment at the
13 Wilbur School, with an application deadline of April 17, 2013 and a starting date of May
14 4, 2013. The posting included the following job requirements: two years of college
15 work...; ability to work effectively with adults and students; effective interpersonal
16 communication skills; and United States citizenship, resident or work visa. The posting
17 did not include a "preference in working with special needs students." Pierce did not
18 apply for this position.

19 On June 13, 2013, the Committee posted a vacancy for a "Paraprofessional
20 Special Education (SPED)" assignment at North Elementary School. The posting listed
21 the following job requirements: (1) two years of College course work/AS Degree
22 required..., (2) ability to work effectively with adults and students; (3) effective

1 interpersonal communication skills; and (4) Preference - experience in working with
2 ASD students.³

3 On July 1, 2013, the School Committee posted a vacancy notice for
4 "Paraprofessionals (2)" at the Wilbur School where Pierce had been employed. The
5 application deadline was July 12, 2013. The stated job goal for this position was "To
6 work with elementary school students assisting them with all academic assignments
7 and daily routines, data collection, positive behavior supports - supports students in
8 general education environment." Next to the heading "Positions Available," was the
9 numeral "1." Under the heading, Job Requirements, it stated:

10 TITLE: PARAPROFESSIONAL

11 QUALIFICATIONS:

- 12 1. Two years of College course work (48 credits)/AS Degree required or
13 passing score (464) on the ParaPro Assessment.
- 14 2. Ability to work effectively with adults and students;
- 15 3. Effective interpersonal communications skills;
- 16 4. Preference in working with special needs students.

17 Pierce was unable to access this posting through her school email account
18 because her account had been deleted. The vacancy was posted both internally and on
19 the SchoolSpring.com website, and the Hearing Officer found that Pierce was able to
20 view the job posting by alternative means.⁴ Pierce was confused over whether the
21 posting was for one or two paraprofessionals and whether it was for a general education

³ The record does not indicate what "ASD" stands for. It is reasonable to presume however that, in the special education context, it refers to "Autism Spectrum Disorder." See, e.g., <http://www.cdc.gov/ncbddd/autism/index.html> (last accessed May 15, 2015)

⁴ Pierce testified that she viewed and printed out the announcement on July 3, 2013.

1 kindergarten classroom, a SPED kindergarten classroom or both.⁵ She sought
2 clarification of the posting from the Union but ultimately missed the deadline and did not
3 apply. The Committee eventually hired two paraprofessionals: one for a SPED
4 kindergarten assignment and the other for a general education kindergarten
5 assignment, the position that Pierce held at the Wilbur School before she left for
6 medical leave and which was the subject of her non-assignment grievance and
7 arbitration hearing.

8 On July 3, 2013, the Committee posted another vacancy for a “Paraprofessional-
9 Special Education” assignment at the Somerset Middle School, which had identical
10 qualifications as the Paraprofessional (2) position at the Wilbur School, including the
11 “preference in working with special needs students.” The application deadline was July
12 11, 2013. Pierce did not apply for the position and could not access it through her
13 deleted e-mail account. Her testimony indicates, however, that she viewed the posting
14 on the SchoolSpring.com website around the time that she was attempting to verify
15 whether the Wilbur School posting, which had the identical requirements, was also a
16 special education position.⁶

17 On September 23, 2013, Medeiros filled a Title I position at the Wilbur School.
18 He did not post the vacancy. On September 27, 2013, the Union filed a grievance

⁵ Pierce testified that her confusion about the Wilbur School paraprofessional (2) posting was based in part on the undisputed fact that it had an identical job description and job qualifications as the July 3, 2013 Somerset Middle School SPED paraprofessional posting discussed infra. The only difference was that the Somerset Middle School posting was listing as a SPED posting and the Wilbur School posting did not have SPED in the title.

⁶ The CERB has added this finding for the sake of completeness.

1 protesting the failure to post. On October 31, 2013, the School Committee agreed that
2 the contract had been violated and posted a notice of the "Paraprofessional"⁷ vacancy
3 on SchoolSpring.com. The listed qualifications for this position were the same as those
4 listed on the July 1, 2013 Wilbur School posting, including "preference in working with
5 special needs students." There is no evidence that Pierce applied for this position.

6 Opinion⁸

7 The Hearing Officer concluded that the School Committee retaliated against
8 Pierce in violation of Section 10(a)(4) of the Law by deleting her User Directory email
9 account, removing her name from the faculty list, and posting the July 1, 2013 Wilbur
10 School Paraprofessional (2) posting and filling the position with a new job qualification
11 while her arbitration was pending. In so holding, the Hearing Officer rejected all of the
12 School Committee's arguments, most of which it reasserts in this appeal.

13 We begin our analysis of these arguments by reciting the applicable legal
14 standards. The same elements of proof apply to alleged violations of both Section
15 10(a)(3) and Section 10(a)(4) of the Law. City of Boston, 35 MLC 289, 290, MUP-04-
16 4077 (May 20, 2009). Allocating the burden of proof for these allegations, the CERB
17 applies the three-step analysis articulated in Trustees of Forbes Library v. Labor
18 Relations Commission, 384 Mass. 559 (1981). See Town of Brookfield, 28 MLC 320,
19 327-328, MUP-2538 (May 1, 2002), *aff'd sub. nom.* Town of Brookfield v. Labor
20 Relations Commission, 443 Mass. 315 (2005). First, the CERB determines whether the

⁷ Unlike the June 13, 2013 and July 3, 2013 postings, the posting did not include the words "Special Education" in the title.

⁸ The CERB's jurisdiction is not contested.

1 charging party has established a prima facie case of discrimination by producing
2 evidence in support of four elements: 1) that the employee engaged in protected
3 activity; 2) that the employer knew of the protected activity; 3) that the employer took
4 adverse action against the employee; and 4) that the employer's conduct was motivated
5 by a desire to penalize or discourage the protected activity. Town of Brookfield, 28 MLC
6 at 328. To satisfy the first prong in a Section 10(a)(4) case, the charging party must
7 establish that the employee signed or filed an affidavit, petition or complaint or gave
8 information or testimony as part of a DLR proceeding. Commonwealth of
9 Massachusetts, 25 MLC 44, SUP-4128 (August 14, 1998). If the charging party
10 establishes a prima facie case through circumstantial evidence, the employer has the
11 burden of producing evidence in support of one or more lawful reasons for taking the
12 adverse action. Town of Brookfield, 28 MLC at 329. If the employer satisfies this
13 burden, the charging party must prove by a preponderance of the evidence that "but for"
14 the protected activity, the employer would not have taken the unlawful action. Id. (citing
15 Trustees of Forbes Library, 384 Mass. at 564-566 (additional citations omitted)).

16 Employee Status and Section 10(a)(4)

17 The School Committee first challenges the Hearing Officer's conclusion that
18 Pierce remained a School Committee employee at all relevant times in this case,
19 including, significantly, after September 28, 2012, when she declined the Committee's
20 assignment as a SPED paraprofessional at the Chace School.⁹ The School Committee
21 had urged the Hearing Officer to find otherwise based on its claim that Pierce's rejection

⁹ Before the Hearing Officer, the School Committee did not dispute that Pierce had satisfied the first two elements of her prima facie case because she testified at a DLR arbitration hearing on June 28, 2013 and the School District, as the opposing party, knew that she was testifying.

1 of the Chace position was the equivalent of a resignation that severed the employment
2 relationship. The School Committee further argued that since Pierce was not an
3 employee, the District could not engage in adverse action against her. The School
4 Committee expands upon those arguments on appeal, claiming that, "once it is
5 determined that Ms. Pierce was no longer an employee of the school district, the
6 entirety of the Hearing Officer's conclusions that the Committee violated the Law with
7 respect to Ms. Pierce must be overturned."

8 We disagree because the complaint in this case alleges a violation of Section
9 10(a)(4) of the Law. A discriminatee does not need to be an employee under Section 1
10 of the Law to find a violation of Section 10(a)(4) of the Law. Michael J. Curley, 4 MLC
11 1124, 1126 & n. 3, MUP-2939 (1977) (purposes of the Law are served by preventing
12 intimidation of individuals who present information to DLR, whether or not they are
13 employees as defined in Section 1 of the Law). The CERB's ruling in Curley, which held
14 that it was unlawful to retaliate against a jury-pool officer who was not a public
15 employee under the Law when he testified at a DLR proceeding, relied on federal cases
16 applying Section 8(a)(4) of the National Labor Relations Act (NLRA). Those cases hold
17 that it is unlawful to retaliate against persons not employed by an employer for engaging
18 in concerted activity or testifying in an NLRB proceeding. In particular, the CERB relied
19 on General Services, Inc., 229 NLRB 940, 942 (1977), in which the NLRB broadly
20 interpreted the discrimination encompassed in Section 8(a)(4) as including a refusal to
21 hire a job applicant.

22 Accordingly, our determination that the Employer violated Section 10(a)(4) does
23 not turn on Pierce's employment status as of the date she declined the Chace

1 assignment through the date of the arbitration award.¹⁰ Likewise, employment status is
2 not required to establish a violation of Section 10(a)(3) of the Law, which specifically
3 prohibits discrimination “in regard to hiring” and does not limit its proscription to
4 employees only.¹¹ Because the adverse actions at issue here allegedly impacted
5 Pierce’s ability to be hired by the School Committee, i.e., by restricting her access to
6 information about posted positions and including a new job requirement for posted
7 positions, we conclude that Pierce did not have to be an employee to establish a claim
8 of unlawful retaliation. Therefore, we address the substance of the Section 10(a)(4)
9 violation without deciding whether Pierce was an employee within the meaning of
10 Section 1 of the Law. See Michael J. Curley, 4 MLC at 1127.

11 Adverse Action

12 The Employer alternatively argues, that even if the CERB were to find that Pierce
13 were an employee, the complaint should be dismissed because the Hearing Officer
14 erred by finding that Pierce met her burden of proving that the School Committee took
15 adverse actions against her by removing her from the faculty list and email system and
16 posting and filing the July 1, 2013 vacancies at the Wilbur School.

¹⁰ The Hearing Officer found that Pierce became employed by the School Committee beginning in 2001 and remained an employee “*throughout the life of her grievance-arbitration.*” While we need not decide whether Pierce was an employee between September 28, 2012, when she declined the Chace position and September 12, 2013, when the arbitration award issued, we nevertheless agree that Pierce was no longer an employee after September 12, 2013, when the arbitration award issued.

¹¹The original charge alleged violations of both Section 10(a)(3) and 10(a)(4) of the Law. Although the complaint alleged that the School Committee’s actions violated Section 10(a)(4), the Investigator explained that she found the Section 10(a)(3) allegation was “properly subsumed” into her probable cause finding of a Section 10(a)(4) violation because “the bases for the alleged violations of both Sections 10(a)(3) and 10(a)(4) of the Law were the same.”

1 Removal from Faculty List and Email Account

2 The School Committee argues that removing Pierce's name from the faculty list
3 and email system were not adverse actions because there was no evidence that Pierce
4 was negatively affected by them in any way.

5 We agree. An adverse employment action is an employment action that
6 materially disadvantages the affected individual in some way. City of Boston, 35 MLC
7 at 291 (citing MacCormack v. Boston Edison Co., 423 Mass. 652, 662 (1996) (plaintiff
8 failed to demonstrate adverse action element of a prima facie case of unlawful
9 retaliation where there was no evidence that he had been disadvantaged with respect
10 to salary, grade or other objective terms and conditions of employment); accord City of
11 Holyoke, 35 MLC 153, 156, MUP-05-4503 (January 9, 2009).

12 Applying this standard, we review the grounds for finding adverse action stated in
13 the Hearing Officer's ruling. She stated that:

14 [T]he Committee's decision to change Ms. Pierce's employment status
15 without written notification, remove her name from the faculty list and
16 delete her user directory e-mail, amounted to adverse actions because
17 they:

- 18
- 19 1) affected Pierce's ability to bid on job vacancies posted after
20 July 1, 2013;
 - 21 2) prevented her from communicating via the User Directory
22 with other District employees and unit members about those
23 postings;
 - 24 3) prevented her from receiving notifications and messages
25 from the District, including any job vacancy alerts posted to
26 School Spring about the disputed Wilbur School positions;
27 and
 - 28 4) negatively affected her ability to apply for or grieve the
29 Committee's decision to post the assignment.

30 We first note that from the time Pierce declined the School Committee's offer to
31 return to work at the Chace School in September 2012, she neither reported to work nor

1 sought or obtained another leave of absence. Thus, the elimination of her email
2 account/deletion of her name did not and could not have materially disadvantaged her
3 in terms of traditional terms and conditions of employment, e.g., by reducing her pay or
4 benefits or otherwise changing her terms and conditions of employment. Rather, the
5 only potential impact it could have had was on her ability to view and/or apply for vacant
6 positions. The Hearing Officer properly focused on these impacts. There is, however,
7 no support in the record for a finding that the deletion of the email account or removal of
8 Pierce's name from the faculty list adversely affected Pierce in the four ways described
9 above.

10 Pierce's ability to view and apply for the job was not affected by the Employer's
11 actions because District vacancies are posted both via internal vacancy notice, and
12 externally on the SchoolSpring.com website. The Hearing Officer specifically found that
13 Pierce was able to view the July 1st Wilbur School posting "by alternative means" and
14 Pierce's testimony shows that she became aware of the July 3, 2013 Somerset School
15 SPED posting on SchoolSpring.com around the time she was trying to verify whether
16 the July 1 Wilbur School posting was for a SPED position. Nor is there evidence that
17 Pierce was unable to view or become aware of any other job vacancies posted after
18 July 1 due to the deletion of her email account. There also is no evidence that the
19 deletion of her account affected Pierce's ability to apply for these positions through the
20 SchoolSpring.com website or that her decision not to apply was otherwise related to the
21 deletion of her email account or removal of her name from the faculty list.¹² To the

¹² We note that one of the parties' joint exhibits (Joint Exhibit 1A) is a printout of the July 1, 2013 School Spring Wilbur School posting on the School Spring.com website. The

1 contrary, as further explained below, Pierce's decision not to submit an application for
2 the July 1 Wilbur School paraprofessional (2) posting seems to have resulted from her
3 confusion over whether the posting was for one position or two and, due to the
4 additional SPED requirement, discussed below, whether one or both of the positions
5 were for SPED titles. There is also no evidence that the elimination of Pierce's email
6 account or removal of her name from the faculty list affected her ability to communicate
7 with others in the District or to file grievances. Instead, the record shows that Pierce
8 sent an email to Nekrasz as soon as she realized that her email account was deleted. It
9 also shows that the Union filed a grievance on Pierce's behalf in September 27, 2013 to
10 protest the hiring of a person for a paraprofessional vacancy at the Wilbur School that
11 had not been posted.

12 In sum, the evidence presented in this case does not support the conclusion that
13 the either Pierce's removal from the faculty list or from the email system materially
14 disadvantaged Pierce in the manner required to show adverse action under applicable
15 case law. Accordingly, we reverse the Hearing Officer's determination that these two
16 actions amounted to adverse employment actions for purposes of establishing a prima
17 facie case under Section 10(a)(4) of the Law and dismiss the portion of Pierce's charge
18 alleging that the School Committee retaliated against her by removing her name from
19

exhibits reflects that it was printed out on July 3, 2013 and states at the bottom "Apply for this job on-line at <http://www.schoolspring.com/job?373602>."

1 the faculty list and deleting her User Directory email account.¹³

2 Additional SPED requirement

3 Regarding this aspect of the complaint, the School Committee argues that its
4 posting and filling of the Wilbur School vacancies on July 1 could not have been
5 adverse actions because Pierce was no longer employed by the School Committee
6 when these actions took place. As we explain above, however, Pierce did not have to
7 be an employee in order to bring a Section 10(a)(4) claim. We therefore reject this
8 argument.

9 The School Committee does not otherwise address the Hearing Officer's
10 conclusion that "its decision to post and permanently fill the Wilbur School
11 Paraprofessional (2) job vacancy with a new job qualification, i.e., a preference for
12 working with SPED students, amounted to an adverse action because the School
13 Committee changed the requirement for the assignment during the pendency of
14 Pierce's arbitration despite her stated non-preference for working in a SPED setting."

¹³ We limit our holding to the unique circumstances of this case. It is not intended to be and should not be construed as holding that deleting an employee's internal email account, removing an employee's name from an employee list, or analogous actions that restrict employee's access to work-related information or other employees are not adverse employment actions in circumstances where such actions materially disadvantage the affected individual.

1 We agree with the Hearing Officer that, in this context, the additional SPED
2 requirement constitutes an adverse action.¹⁴ Unlike removing Pierce from the faculty
3 list and email system, we find that this was an adverse action because it affected her in
4 the hiring context, by both impacting her eligibility for the posted assignment and
5 deterring her from applying for the job. Thus, we turn to the School Committee's
6 arguments concerning the fourth prong of the prima facie case, that the Hearing Officer
7 made errors of law and fact when she found that the School Committee added the
8 "preference for working with special needs students" requirement to retaliate against
9 Pierce for participating in a DLR arbitration hearing.

10 Unlawful Motivation

11 There is no dispute that there is no direct evidence of unlawful motivation in this
12 case. Thus, in reviewing this aspect of the Hearing Officer's decision, we analyze
13 whether there is sufficient circumstantial evidence in the record from which the Hearing
14 Officer could draw a reasonable inference that the School Committee's actions were
15 unlawfully motivated. Town of Brookfield, 28 MLC at 329 (absent direct evidence of
16 improper motivation, unlawful motivation may be established by circumstantial evidence

¹⁴ To the extent the Hearing Officer's decision suggests in any way that, standing alone, the School Committee's decision to either post or fill Pierce's former position in July and August 2013 was discriminatory, we reject that interpretation. The Hearing Officer found, and, as discussed below, we agree, that the School Committee met its burden of showing that it usually posts and fills paraprofessional positions in July and August and there is no evidence that it would not have either posted or filled Pierce's former position had Pierce not participated in the arbitration hearing. Indeed, the evidence shows that the School Committee told the Wilbur School principal in the spring, before Pierce's DLR arbitration hearing, that it wanted to transform Silva's long-term substitute paraprofessional assignment into a permanent one. Our analysis of the adverse action here therefore, is limited to the addition of the new SPED requirement on a posting for Silva's former position.

1 and reasonable inferences drawn from that evidence). The School Committee makes
2 several arguments in this regard.

3 The School Committee first urges the CERB to find that Pierce did not establish a
4 prima facie case because the "Hearing Officer relied upon the same actions and
5 reasons, [i.e., the timing of the posting], to find that [it] engaged in acts of discriminatory
6 animus, and used those same actions to declare that [it] had produced legitimate and
7 non-discriminatory reasons for its actions."

8 In analyzing this argument, we focus on the evidence that the Hearing Officer
9 relied on to conclude that Pierce had established this critical element of her prima facie
10 case. It may be true that the Hearing Officer used timing both to establish that the new
11 posting was unlawfully motivated and then to establish that the Employer had met its
12 burden of production of demonstrating a valid basis for its actions by claiming that the
13 School Committee usually posts and fills paraprofessional vacancies at this time of
14 year. However, the Hearing Officer did not find that circumstantial evidence supported
15 a finding that the posting was discriminatory merely because of *when* it was posted and
16 filled; rather she found that Pierce had established her prima facie case with respect to
17 the aspect of the charge because, in addition to suspicious timing, the posting contained
18 a new SPED requirement for Pierce's former job that the School Committee knew
19 Pierce did not have. Thus, we reject the Employer's argument because it rests on a
20 misstatement of the factual basis for the Hearing Officer's conclusion that Pierce had
21 established a prima facie case.

22 The School Committee next argues that the finding of discriminatory animus was
23 improper because no evidence was presented that the new job qualification was in any

1 way related to Pierce. The School Committee points to the evidence presented at
2 hearing showing that all paraprofessionals are subject to varying assignments, including
3 SPED assignments. This is certainly true and the Hearing Officer so found. However,
4 although it may have been reasonable for the School Committee to seek
5 paraprofessionals who themselves had a preference for working with special needs
6 children, there is no evidence that it ever included this requirement until it posted the
7 July 1, 2013 vacancy at the Wilbur School where Pierce had been employed and where
8 she sought to return.

9 This is significant for several reasons that relate directly to Pierce. First, the new
10 SPED requirement appeared for the first time on a job posting that resulted in the hiring
11 of a paraprofessional to fill Pierce's former general education position at the Wilbur
12 School. Pierce filed and arbitrated a grievance over the School Committee's failure to
13 assign her to that position. Medeiros attended the arbitration hearing, and thus, at the
14 time the vacancy was posted, Medeiros was aware both that Pierce sought this position
15 and that she preferred not to work with special needs students. Further, it is significant
16 that this requirement did not appear in the April 10, 2013 posting for a long-range
17 substitute paraprofessional position at the Wilbur School or even in the June 13, 2013
18 posting for a *SPED* position at the North Elementary School that was posted just two
19 weeks before the arbitration hearing. While the June 13 posting contained a SPED
20 requirement, i.e., a "preference for prior *ASD experience*," it contained no requirement
21 that the applicants *themselves* prefer to work with special needs students. Given that
22 this new requirement appeared just three days after Pierce's statement at arbitration
23 that she preferred not to work with SPED students, its sudden and unexplained

1 appearance provides ample circumstantial evidence of unlawful motivation based on
2 disparate treatment and timing, and belies the School Committee's claim that there was
3 no evidence showing that the new job qualification was related to Pierce.

4 We therefore affirm the Hearing Officer's conclusion that Pierce has met the
5 fourth and final element of her prima facie case.

6 Employer's Burden of Production

7 Next, under the three-part Forbes Library test, the burden shifted to the School
8 Committee to produce evidence in support of one or more lawful reasons for taking the
9 adverse action. See Commonwealth of Massachusetts, 25 MLC 44, 46, SUP-4128
10 (August 24, 1998) (employer's burden is more than simply stating an unsubstantiated
11 allegation). An employer that fails to sustain its burden of production at this stage of the
12 test fails to rebut the presumption of discrimination created by the charging party's
13 prima facie case. Higher Education Coordinating Council, 24 MLC 97, 103, SUP-4095,
14 4096, 4098-4099 (April 27, 1998). Here, the School Committee's explanation for its
15 action is that it posts vacancies for paraprofessional positions in early July, which was
16 consistent with its practice of seeking paraprofessional applicants and interviewing
17 candidates in August, after filling teacher positions. The School Committee also asserts
18 that requiring a preference for working with SPED students was reasonable because
19 evidence presented at the hearing showed that paraprofessionals are subject to varying
20 assignments, including SPED assignments. Both of these assertions may be true.
21 However, they utterly fail to explain why this particular requirement appeared on this
22 particular posting at this particular time. In the absence of such information, a finding
23 that School Committee had failed to meet its burden of production with respect to why it

1 posted the July 1 Wilbur School Paraprofessionals (2) position with a new SPED
2 requirement is warranted and the analysis could end here. Id. However, even finding
3 as the Hearing Officer did, that the Employer had met its burden of production, at least
4 with respect why the posting was made in July, given the absence of any reason for
5 changing the paraprofessional job description, Pierce easily meets her ultimate burden
6 of proving that the new SPED requirement was discriminatorily added under the final
7 stage of the Trustee of Forbes Library test.

8 But For Analysis

9 As the Hearing Officer explained, once an employer produces evidence of a
10 legitimate, non-discriminatory reason for taking the adverse action, the case becomes
11 one of “mixed motives” and the burden shifts back to the charging party to demonstrate
12 that “but for” the protected activity, the employer would not have taken the adverse
13 action. We agree with the Hearing Officer’s finding that Pierce met her burden based
14 on the circumstantial evidence that the School Committee included a brand new SPED
15 preference requirement on a posting for Pierce’s former, non-SPED paraprofessional
16 assignment three days after her arbitration hearing where it had learned that she did not
17 possess that requirement. In other words, it is the timing and the disparate nature of the
18 requirement, not the new requirement standing alone, that is discriminatory. We
19 therefore affirm the Hearing Officer’s conclusion that, but for Pierce’s protected activity,
20 the School Committee would not have added the SPED preference requirement to the
21 posting for Pierce’s former job position.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

Conclusion

For the foregoing reasons, we conclude that the School Committee violated Section 10(a)(4) and, derivatively, Section 10(a)(1) of the Law in the manner described above. We dismiss that portion of the complaint alleging that the School Committee discriminated against Pierce by deleting her User Directory e-mail account and removing her name from the faculty list.

Remedy

The Hearing Officer ordered the School Committee to: a) Restore Pierce's name to the faculty list; b) Restore her access to the User Directory email account; and c) Rescind the July 1, 2013 Wilbur School Paraprofessionals (2) job posting, and repost a new job posting for that assignment in accordance with the parties' collective bargaining agreement that excluded the SPED preference and allows Pierce to apply for that assignment.

Based on our partial dismissal of the complaint, we modify the remedy by deleting parts a) and b). We retain that portion of the remedy ordering the School Committee to rescind the July 1, 2013 Wilbur School Paraprofessional job posting, and to repost a new job posting for that assignment in accordance with the parties' collective bargaining agreement, excluding the SPED preference, and allowing Pierce to apply for that assignment.¹⁵

¹⁵ In her supplementary statement, Pierce requested that the remedy be amended to include a District-wide job posting and not just a posting at the Wilbur School. She claims that as of July 1 2014, the Wilbur School is no longer being utilized as an elementary school and all paraprofessionals that had assignments there have since been reassigned. However, the hearing record contains no information regarding this issue. We will therefore not consider it. Any issues regarding complying with this Order

1 **ORDER**

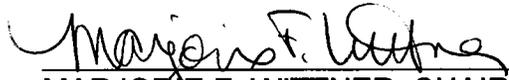
2 WHEREFORE, based on the foregoing, it is hereby ordered that the School
3 Committee shall:

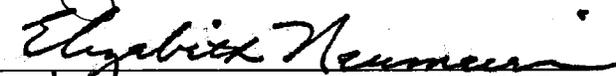
- 4
- 5 1. Cease and desist from:
- 6
- 7 a. Retaliating against Lorrie Pierce for engaging in the protected,
8 concerted activity of filing a petition for arbitration at the DLR and for
9 participating in proceedings related to that petition under G.L. c. 150E.
- 10
- 11 b. In any like manner, interfering with, restraining and coercing its
12 employees in any right guaranteed under the Law.
- 13
- 14 2. Take the following affirmative action that will effectuate the purpose of the
15 Law:
- 16
- 17 a. Rescind the July 1, 2013 Wilbur School Paraprofessionals (2) job
18 posting, and repost a new job posting that excludes a preference for
19 working with special needs students and allow Pierce to apply for that
20 assignment, in accordance with the parties' collective bargaining
21 agreement.
- 22
- 23 b. Sign and post immediately in conspicuous places where employees
24 usually congregate or where notices to employees are usually posted,
25 including electronically, if the Employer customarily communicates to
26 its employees via intranet or e-mail, and maintain for a period of thirty
27 (30) consecutive days thereafter signed copies of the attached Notice
28 to Employees;
- 29
- 30 c. Notify the DLR in writing of the steps taken to comply with this decision
31 within thirty (30) of the steps taken by the Committee to comply with
32 the Order.

may be resolved by the parties themselves or through compliance proceedings. See
DLR Rule 16.08, 456 CMR 16.08.

1 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 M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. 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 COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (CERB) has held that the Somerset School Committee (Committee) has violated Section 10(a)(4) and, derivatively, Section 10(a)(1) of G.L. Chapter 150E (the Law) by retaliating against Lorrie Pierce (Pierce) for engaging in concerted, protected activities. The Committee posts this Notice to Employees in compliance with the CERB's order.

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

WE WILL NOT discriminate against Pierce for engaging in the protected, concerted activity of filing a petition for arbitration at the DLR and for participating in proceedings related to that petition under G.L. c. 150E;

WE WILL rescind the July 1, 2013 Wilbur School Paraprofessionals (2) job posting, and, repost a new job posting that excludes a preference for working with special needs students and allow Pierce to apply for that assignment, in accordance with the parties' collective bargaining agreement.

Somerset School Committee

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

HEARING OFFICER DECISION
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

*

*

Case No.: MUP-13-3085

SOMERSET SCHOOL COMMITTEE

*

*

Date Issued: May 22, 2014

and

*

*

LORRIE PIERCE

*

*

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Lorrie Pierce - Pro Se

Andrew Waugh, Esq. - Representing the Somerset School Committee

HEARING OFFICER'S DECISION

SUMMARY

1 The issue is whether the Somerset School Committee (Committee or Employer),
2 discriminated against Lorrie Pierce (Ms. Pierce) for engaging in concerted, protected
3 activity in violation of Section 10(a)(4) and derivatively Section 10(a)(1) of
4 Massachusetts General Laws, Chapter 150E (the Law) when it deleted Ms. Pierce's
5 User Directory e-mail account, removed her name from the Wilbur Elementary School
6 (Wilbur School) faculty list, and posted and permanently filled a job vacancy for a her
7 former Wilbur School Paraprofessional assignment that included a new job qualification

1 while Ms. Pierce's arbitration was pending. Based on the record, and for the reasons
2 explained below, I find that the Committee violated the Law when it deleted Ms. Pierce's
3 User Directory e-mail account, removed her name from the Wilbur School faculty list,
4 and posted and permanently filled a job vacancy for her former Wilbur School
5 Paraprofessional assignment that included a new job qualification while Ms. Pierce's
6 arbitration was pending, in retaliation for her protected, concerted activity.

7 STATEMENT OF THE CASE

8 On September 3, 2013, Ms. Pierce filed a Charge of Prohibited Practice (Charge)
9 with the Department of Labor Relations (DLR) alleging that the Committee had engaged
10 in prohibited practices within the meaning of the Law. On October 30, 2013, a DLR
11 Investigator issued a Complaint of Prohibited Practice (Complaint), alleging that the
12 Committee had violated Section 10(a)(4)¹⁶ and, derivatively, 10(a)(1) of the Law by
13 retaliating against Pierce by deactivating her school e-mail account, removing her from
14 the faculty list and permanently filling her former position as a paraprofessional at the
15 Wilbur School while her arbitration was pending at the DLR in case number ARB-12-
16 2455. On November 8, 2013, the Committee filed its Answer.

17 I conducted a hearing on March 18, 2014, at which both parties had the
18 opportunity to be heard, to examine and cross-examine witnesses and introduce

¹⁶ The Investigator subsumed Ms. Pierce's 10(a)(3) allegations into the 10(a)(4) allegations.

1 evidence.¹⁷ On April 18, 2014, both parties filed their post-hearing briefs. On the entire
2 record, I make the following findings and render the following decision.

3 ADMISSIONS OF FACT¹⁸

4 The Committee admitted to the following facts:

- 5 1. The Committee is the collective bargaining representative for the Town of
6 Somerset (Town) for purposes of dealing with school employees.
7
- 8 2. The American Federation of State, County and Municipal Employees,
9 Council 93, Local 1701 (Union or AFSCME) is an employee organization
10 within the meaning of Section 1 of the Law.
11
- 12 3. The Union is the exclusive bargaining representative for paraprofessionals
13 employed by the Town at the Somerset School District and the Somerset
14 Berkley Regional School District (School Districts).
15
- 16 4. On September 24, 2012, Ms. Pierce grieved her non-assignment to the
17 Wilbur School, and filed a petition for arbitration with the DLR in case
18 number ARB-12-2455 on November 6, 2012.
19
- 20 5. Ms. Pierce participated in the arbitration hearing for case number ARB-12-
21 2455 on June 28, 2013.
22
- 23 6. The Committee knew of Ms. Pierce's participation in the DLR proceeding
24 referred to in paragraphs 4 and 5.
25

26 FINDINGS OF FACT

27 **The Collective Bargaining Agreement**

28 The Union and the Committee are parties to a collective bargaining agreement
29 (Agreement), effective from September 1, 2011 – August 31, 2014. The Agreement's

¹⁷ At the end of Ms. Pierce's case-in-chief, the Committee made a Motion to Dismiss the Complaint (Motion), which I denied. At the end of its case-in-chief, the Committee renewed its Motion, which I took under advisement. For the reasons discussed below, I deny the Motion.

¹⁸ In its Answer, the Committee made full and partial admissions of fact. This portion of my decision reflects only the Committee's full admissions of fact.

1 Article XVI Seniority provision states in full, "The length of continued and uninterrupted
2 service of the employee in the bargaining unit shall determine the seniority of the
3 employee." Article XV New Positions and Vacancies states, in pertinent part:

4 When a position covered by this Agreement is created or a current
5 position becomes vacant, such position shall be posted in a conspicuous
6 place listing the pay, duties and qualifications. ...The applicable Employer
7 will award the position to the most qualified applicant, qualifications to be
8 determined in the sole discretion of the Employer. In cases where the
9 qualifications of all candidates from within and outside the system are
10 equal, the employee with the most seniority within the bargaining unit shall
11 be awarded the job.

12

13 **Ms. Pierce's Leave of Absence and 2012 Return to Work**

14

15 Beginning in 2001, the Committee employed Ms. Pierce as a kindergarten
16 paraprofessional at the Wilbur School.¹⁹ In the fall of 2002, the Committee hired Ms.
17 Pierce as a paraprofessional in a first grade classroom at the Wilbur School, but
18 returned her to the kindergarten setting in or about 2004.

19 In or around May of 2010, the Committee granted Ms. Pierce a medical leave of
20 absence, which lasted through the end of the 2009-2010 school year. Ms. Pierce
21 returned to work in August of 2010 but took another medical leave of absence in
22 October of 2010, which the Committee extended until the end of the 2010-2011 school
23 year. In April of 2011, the Committee sought to temporarily fill Ms. Pierce's position
24 during her leave and posted a vacancy for a paraprofessional long-term substitute
25 assignment at the Wilbur School. Shortly after posting that vacancy announcement, the

¹⁹ The Committee does not have a formal job description for the paraprofessional position. Instead, it assigns employees to different paraprofessional assignments depending on their work location and the needs of the building principal. Those assignments vary from: general education, transitional/special education (SPED), Title I (funded by grant), long-term substitute, etc. Superintendent Richard Medeiros (Medeiros) testified to this fact and Ms. Pierce did not rebut that portion of his testimony.

1 Committee appointed Tanya Silva (Silva) to that assignment, in which she remained
2 through August of 2013.

3 On July 2, 2012, the Committee posted another job vacancy for a
4 paraprofessional SPED assignment at the Chace Street School (Chace School). By
5 facsimile on August 24, 2012, Ms. Pierce notified the Committee that she wished to
6 return from her medical leave and be reinstated to her kindergarten paraprofessional
7 assignment at the Wilbur School. The Committee received Ms. Pierce's request to
8 return on August 27, 2012 and sought additional information from her physician. On
9 September 5, 2012, Ms. Pierce provided the Committee with the requested information
10 and met with the Committee on September 24, 2012 to discuss her reinstatement. At
11 that meeting, the Committee offered Ms. Pierce the paraprofessional SPED assignment
12 at the Chace School and memorialized that offer by letter dated the same day.²⁰ That
13 letter stated, in full, "This letter is to inform you that your assignment in the Somerset
14 Public Schools for the 2012-2013 academic year will be as a Paraprofessional at Chace
15 Street School. Please forward your acceptance of this assignment by Monday, October
16 1, 2012."

17 The Committee asked Ms. Pierce to accept the new assignment and sign the
18 letter by October 1, 2012. Immediately after the meeting, Ms. Pierce filed a grievance
19 with the Union, protesting her non-assignment to the Wilbur School and, four days later,
20 on September 28, 2012, she formally declined the Chace School assignment. Since
21 September 28, 2012 and throughout her grievance-arbitration, Ms. Pierce has not

²⁰ The Chace School transitional K-1 paraprofessional assignment was a special education (SPED) assignment that required the paraprofessional to assist kindergarten students with their transition to a general education classroom.

1 reported to work at the School District.

2 On October 30, 2012, the Committee denied her grievance and, on November
3 16, 2012, the Union filed a petition for arbitration with the DLR in case number ARB-12-
4 2455. Both Ms. Pierce and Superintendent Medeiros participated in the arbitration
5 hearing at the DLR on June 28, 2013. On September 12 2013, the arbitrator issued a
6 decision, finding that the Committee did not violate the parties' Agreement when it
7 offered Ms. Pierce a paraprofessional assignment at the Chace School on September
8 24, 2012.

9 **The 2012-2013 Employment Status Changes**

10 When an individual separates from their employment with the Somerset School
11 District (District), someone in Central Office usually documents the reason for their
12 separation, confirming the effective separation date. Separation can occur by
13 resignation, retirement, termination, etc. On or about September 28, 2012,
14 Superintendent Medeiros changed Ms. Pierce's employment status as having
15 voluntarily resigned due to her declination of the Chace School assignment. Sometime
16 between September 28, 2012 and July of 2013, Medeiros also removed Ms. Pierce's
17 name from the faculty list and placed it on a list of employees who had left the District's
18 employment during the 2012-2013 school year.

19 The Committee did not inform Ms. Pierce that it had terminated her employment
20 and never provided written notice of her effective termination date. Conversely, Ms.
21 Pierce never provided the Committee with a written letter of resignation and still
22 considered herself employed by the District while her arbitration was pending. Ms.
23 Pierce first became aware that the Committee had changed her employment status on

1 July 15, 2013 after speaking with Director of Technology Raymond Nekrasz (Nekrasz),
 2 who informed her that Superintendent Medeiros no longer recognized her as a School
 3 District employee. By e-mail on August 27, 2013, Union attorney Scott Taveira
 4 (Taveira) informed Ms. Pierce that the Committee never notified the Union about her
 5 termination and that without an official letter from the Committee, the Union still
 6 considered her to be a School District employee.

7 At the end of the 2012-2013 school year, a Central Office Assistant (Michelle or
 8 LuAnn²¹) created a list of 32 individuals who had “retired, resigned, etc.” from their
 9 employment with the School Districts:

10	Kenneth Day	June 30, 2012	Retired
11	Joan DeAngelis	August 24, 2012	Resigned
12	Sharon Babb	August 31, 2012	Resigned
13	Catharine Gagnon	August 31, 2012	Resigned
14	Kelly O'Halloran	August 31, 2012	Resigned
15	Stacy Rezendes	August 31, 2012	Resigned
16	Kerin Royds	September 5, 2012	Resigned
17	John Wright	September 10, 2012	Retired
18	Rochelle Desmarais	September 28, 2012	Retired
19	Lorrie Pierce	September 28, 2012	Declined Position ²²
20	Susan Von Itter-Doe	October 16, 2012	Resigned
21	Leanne Beard	October 18, 2012	Resigned
22	Ellen Lavallee	December 21, 2012	Retired
23	David Rego	March 13, 2013	Retired
24	Irene Rauner	March 16, 2013	Resigned
25	Susan McCune	March 29, 2013	Resigned
26	Sheila Perry	April 12, 2013	Resigned

²¹ The parties did not identify the last names of Michelle or LuAnn.

²² On September 28, 2012, Ms. Pierce declined a paraprofessional assignment to Chace School but there is no evidence in the record that she declined a paraprofessional position. While Superintendent Medeiros testified that while there can be many paraprofessional assignments but only one paraprofessional position, he was unable to reconcile why he categorized Ms. Pierce as having “declined position” in September of 2012. Neither Ms. Pierce nor the Committee presented evidence of other employees whose employment was terminated due to a declined position.

1	Barbara Janelle	May 29, 2013	Retired
2	Ann Marie Silvestre	June 26, 2013	Retired
3	Brittany Vasquez	June 26, 2013	Resigned
4	Lori Anderson	June 30, 2013	Retired
5	Crystal Carreiro	June 30, 2013	Resig to sub teach
6	Deborah Cimo	June 30, 2013	Resigned
7	Kristen Lord	June 30, 2013	Resigned
8	Barbara Urban	June 30, 2013	Resigned
9	Maureen Donnelly	July 29, 2013	Retired
10	Erin Taylor	August 15, 2013	Resigned
11	Marisha Wildrick	August 24, 2013	Resigned
12	Jennifer Mello	August 27, 2013	Resigned
13	Judith Patnaude	August 31, 2013	Retired
14	Vanessa Vigna	August 31, 2013	Resigned

15
 16 Contemporaneous with that list, the Committee publicly announced the
 17 retirement of Kenneth Day (Day) on or about March 15, 2012, and of Lori Anderson
 18 (Anderson), Ellen Lavallee (Lavallee), Barbara Janelle (Janelle), Barbara Urban
 19 (Urban), Judith Patnaude (Patnaude) and Maureen Donnelly (Donnelly) on or about
 20 June 3, 2013. The Committee never publicly announced the change to Ms. Pierce's
 21 employment status.

22 **The User Directory E-Mail Accounts**

23 The Committee maintains the Districts' e-mail accounts via the User Directory.
 24 The User Directory is an electronic folder that contains the personal contact information
 25 and e-mail addresses for all individuals employed with the District. When an employee
 26 changes their employment status, the Superintendent will instruct the User Directory
 27 Administrator to deactivate, delete or modify their e-mail account. At all relevant times,
 28 Nekrasz was the User Directory Administrator and the only person authorized to modify,
 29 deactivate or delete e-mail accounts. Deactivating an e-mail account entails disabling
 30 the user's access while keeping the account active within the User Directory database.
 31 Deleting an e-mail account entails disabling the user's access and completely removing

1 their account from the User Directory. When an employee has retired or resigned but
2 continues to perform District-related activities (e.g., chaperoning field trips, taking
3 minutes at Committee meetings, substitute teaching, etc.), Nekrasz will modify their e-
4 mail accounts, which entails enabling their User Directory access for the duration of
5 their post-employment, school-related activity.

6 As Administrator, Nekrasz considers e-mail account maintenance to be a low-
7 priority job duty. Typically, he does not deactivate, delete or modify any e-mail accounts
8 until the end of a given school year. At some point between June 28 and July 1, 2013,
9 Superintendent Medeiros provided Nekrasz with a list of employees, instructing him to
10 delete, deactivate or modify their User Directory e-mail accounts. Per Medeiros'
11 instructions, Nekrasz modified the e-mail accounts of five retirees: Anderson, Janelle,
12 Rochelle Desmarais (Desmarais), Crystal Carreiro (Carreiro) and Day because they had
13 retained a post-employment relationship with the District. Medeiros also gave Nekrasz
14 specific instructions to delete Ms. Pierce's e-mail account, which he did on or about July
15 1, 2013.²³ On or about July 2, 2013, Ms. Pierce was unable to access her User
16 Directory e-mail account and contacted Nekrasz by e-mail on July 9, 2013, stating, in
17 pertinent part:

18 Hi Ray,
19

20 I am just inquiring as to why I cannot access my school based email. For
21 some reason when I attempted to [log] in on July 2, 2013 I was unable to.
22 Just to be sure it was working properly, I tried to send an email from my
23 own home email account to my Somerset Public School email address.
24 The email would not go through. I rec[eived] a message on my home

²³ Nekrasz testified that Superintendent Medeiros gave him a "fresh list" of names for e-mail deletion but he could not identify the names on the list or recall when Medeiros gave it to him.

1 email account stating the address is not valid. I had previously logged on
2 to my school based email the last week of June 2013 and didn't run into
3 any problems at all.

4
5 If possible, would you please let me know why I can't log on[?] You can
6 email me back at this address or you can call my cell phone....

7
8 By e-mail on July 10, 2013, Nekrasz confirmed to Superintendent Medeiros that
9 he had deleted Ms. Pierce's e-mail account per his instructions. Specifically, Nekrasz's
10 e-mail stated, in pertinent part, "Rick. As per your directions I deactivated and deleted
11 Ms. Pierce's Somerset email account." By telephone on July 15, 2013, Nekrasz
12 contacted Ms. Pierce, informing her that the Committee had terminated her e-mail
13 account, effective July 1, 2013.

14 As of July 16, 2013, Nekrasz had failed to deactivate or delete the User Directory
15 e-mail accounts of six employees who had retired or resigned during the 2012-2013
16 school: Urban, Brittany Vasquez (Vasquez), Lavallee, Kelly O'Halloran (O'Halloran),
17 Kerin Royds (Royds) and Donnelly. At no point did Superintendent Medeiros instruct
18 Nekrasz to deactivate, delete or modify those six e-mail accounts; nor did he instruct
19 Nekrasz to restore Ms. Pierce's e-mail account.

20 **The Five Paraprofessional Job Postings**

21 In January of 2013, the Committee hired Zachary Waddicor (Waddicor) as
22 Principal of the Wilbur School. In that capacity, Waddicor is responsible for providing
23 Superintendent Medeiros with input about job vacancy postings. The Superintendent
24 will post notices of those vacancies on the Districts' SchoolSpring.com (School Spring)
25 website and by internal vacancy notice. Waddicor also conducts job interviews and
26 supervises Wilbur School staff, including paraprofessionals. In the spring of 2013,
27 Waddicor became aware that Janelle was going to retire from her Title I

1 paraprofessional assignment at the Wilbur School in or around September of 2013.
2 Around that time, he also became aware that the Committee wanted to transform Silva's
3 current assignment from long-term substitute to a permanent paraprofessional
4 assignment.

5 Between April and October of 2013, Waddicor assisted Superintendent Medeiros
6 in posting job vacancies and appointing applicants to five paraprofessional positions
7 within the District.

8 **1. Wilbur School Paraprofessional Long-Range Substitute**

9 On April 10, 2013, the Committee posted a job vacancy announcement for a
10 "Paraprofessional Long-Range Substitute" assignment at the Wilbur School, with an
11 application deadline of April 17, 2013 and a starting date of May 4, 2013. That posting
12 listed the following job requirements: (1) two years of College course work (48 credits)
13 /AS Degree required or passing score (464) on the Para Pro Assessment; (2) ability to
14 work effectively with adults and students; (3) effective interpersonal communication
15 skills; and (4) citizenship, residency or United States work visa. The job requirements
16 for the position did not include having a preference for working with special needs or
17 special education (SPED) students.

18 After conducting interviews for that assignment, Waddicor submitted his
19 recommendation to Superintendent Medeiros, who later appointed Carreiro.²⁴

20 **2. North Elementary School Paraprofessional Special Education (SPED)**

²⁴ Ms. Pierce did not apply for this assignment but she was able to access the Committee's job posting on School Spring via her User Directory e-mail account.

1 On June 13, 2013, the Committee posted a job vacancy for a “Paraprofessional
2 Special Education (SPED)” assignment at the North Elementary School, with an
3 application deadline of June 19, 2013 and a starting date of August 28, 2013. The
4 posting listed the following job requirements: (1) two years of College course work (48
5 credits) /AS Degree required or (2) ability to work effectively with adults and students;
6 (3) effective interpersonal communication skills; and (4) preference for experience in
7 working with ASD students.

8 Waddicor interviewed candidates for the position and submitted his
9 recommendation to Superintendent Medeiros sometime in late-August of 2013.²⁵

10 **3. Wilbur School Paraprofessionals (2)**

11 On Monday July 1, 2013, the Committee posted job vacancies for a
12 “Paraprofessionals (2)” assignment at the Wilbur School, with an application deadline of
13 July 12, 2013 and a starting date of August 28, 2013.²⁶ Although the job posting was
14 silent about the specific assignment, the Committee eventually hired one
15 paraprofessional for a general education kindergarten assignment and another for a
16 SPED kindergarten assignment. Prior to September 28, 2012, Ms. Pierce was
17 employed in the paraprofessional general education kindergarten assignment at the
18 Wilbur School.

²⁵ Ms. Pierce did not apply for this position but she was able to access the posting on School Spring via her User Directory e-mail account.

²⁶ At the top of the job posting, the description stated that the Committee was seeking two paraprofessionals; however, toward the middle of the posting, it stated that only one position was available. Waddicor testified that he could not reconcile this discrepancy and did not know why Superintendent Medeiros had posted that information in the job description.

1 On School Spring, the Committee listed the following job qualifications for that
2 position: (1) two years of College course work (48 credits) /AS Degree required or (2)
3 ability to work effectively with adults and students; (3) effective interpersonal
4 communication skills; and (4) preference in working with special needs students. The
5 fourth qualification for that position was new because prior to hiring Ms. Pierce in 2001,
6 the Committee did not require the incumbent to “have a preference in working with
7 special needs students.”

8 84 individuals applied for the Paraprofessionals (2) vacancies and Waddicor
9 offered 10-15 applicants an interview, of which seven accepted. At some point during
10 the middle of August of 2013, Waddicor, along with transitional SPED teacher Kristin
11 Gahan (Gahan) and another District teacher Heather Kela (Kela),²⁷ conducted group
12 interviews with four or five applicants. Also around that time, Waddicor conducted a solo
13 interview²⁸ with Silva and recommended her candidacy to Superintendent Medeiros who
14 notified Silva of her appointment to the general education kindergarten assignment by
15 letter on August 27, 2013. Waddicor also conducted a solo interview and
16 recommended Amy Canuel (Canuel) for the SPED paraprofessional assignment but she
17 withdrew her candidacy on August 20, 2013. On August 29, 2013, Waddicor conducted

²⁷ Waddicor selected Gahan to participate in the interviews because she was the K-2 transitional SPED teacher where Janelle was currently working and he wanted her input regarding the best applicant to replace Janelle.

²⁸ Waddicor testified that it is not uncommon to conduct solo interviews even though team interviews are preferable when circumstances permit them. He also testified that he interviewed Silva without Gahan’s and Kela’s assistance because they were unavailable at the time of the interview. Waddicor stated that he felt comfortable interviewing Silva based his knowledge of having worked with her for six months prior as the long-range kindergarten substitute at the Wilbur School.

1 a final solo interview and recommended Megan Nascimento (Nascimento) for the Wilbur
2 School SPED assignment. Five days later, Superintendent Medeiros notified
3 Nascimento of her appointment by letter dated September 3, 2013.

4 Ms. Pierce was unable to utilize her e-mail account to access the job posting for
5 the Wilbur School Paraprofessionals (2) assignment; however, she was able to view the
6 job posting by alternative means. Ms. Pierce was confused about whether the
7 Committee was seeking to hire one or two paraprofessionals for that assignment. She
8 was also confused about whether the assignment would be for a general education
9 kindergarten classroom, a SPED kindergarten classroom or both. Ms. Pierce sought
10 Union counsel but ultimately missed the application deadline.

11 By e-mail on August 27, 2013, she contacted Taveira, complaining that the
12 Committee had failed to post notice of the paraprofessional job vacancies at the Wilbur
13 School. By reply e-mail on August 28, 2013, Taveira notified Ms. Pierce that he had
14 spoken with Superintendent Medeiros about four Wilbur School paraprofessional
15 assignments and that the Committee had hired Silva, White,²⁹ Michelle D. and Liz D.³⁰
16 to fill those vacancies. Specifically, Superintendent Medeiros had assigned Michelle D.
17 and Liz D. to two of the positions because they were already employed at the Wilbur
18 School and did not consider their appointment to those positions as "true vacancies."³¹

²⁹ Superintendent Medeiros did not notify White of her appointment to the Title I paraprofessional assignment until September 23, 2013, which was effective on October 1, 2013.

³⁰ The parties did not identify "Michelle D." or "Liz D."

³¹ The record is not clear about whether the Committee appointed Michelle D. and Liz D. to paraprofessional assignments or SPED paraprofessional assignments at the Wilbur School.

1 By that same e-mail Superintendent Medeiros also informed Taveira that once Barbara
2 G.³² officially retired, it would post that position and permit Ms. Pierce to “bid on any job
3 in the district.” By letter dated September 3, 2013, the Committee notified Nascimento
4 that Superintendent Medeiros had appointed her to a paraprofessional assignment at
5 the Wilbur School, effective September 12, 2013.

6 By letter on August 21, 2013, Waddicor sent a letter to the Wilbur School staff,
7 informing them that Superintendent Medeiros had appointed Silva to the
8 Paraprofessionals (2) general education assignment, stating, in pertinent part:

9 Many new faces will be seen at Wilbur School this fall....Crystal Carreiro
10 has been appointed as the fifth grade long-term substitute for the 2013-
11 2014 school year and I am extremely happy to announce that Tanya Silva
12 has been formally appointed as a paraprofessional at Wilbur and she will
13 continue in her role in our Kindergarten classrooms....Paraprofessional[s]
14 should report to Wilbur on Wednesday, August 28 to participate in
15 mandatory trainings and our district meeting at Somerset Middle School.³³
16

17 **4. Somerset Middle School Paraprofessional SPED**

18 On July 3, 2013, the Committee posted another job vacancy for a SPED
19 paraprofessional assignment at the Somerset Middle School, which required the same
20 qualifications as the Paraprofessionals (2) position at the Wilbur School.³⁴ Ms. Pierce
21 did not apply for this position and was unable to access the electronic job posting via
22 her deleted User Directory e-mail account.

23 **5. Wilbur School Title I Paraprofessional**

³² The parties did not identify “Barbara G.”

³³ Waddicor testified that he announced Silva’s appointment in this letter “in error.”

³⁴ The record is unclear about who the Superintendent appointed to this assignment.

1 By letter on September 23, 2013, Superintendent Medeiros notified Jocelyn
2 White (White) that he had appointed her to the Title I paraprofessional assignment
3 effective, October 1, 2013. However, Superintendent Medeiros failed to post that job
4 vacancy announcement on School Spring or elsewhere.

5 On September 27, 2013, the Union filed a grievance on behalf of Ms. Pierce,
6 alleging that the Committee had hired White for the Title I paraprofessional assignment
7 at the Wilbur School without first posting the job vacancy. On or about October 31,
8 2013, the Committee agreed that a contractual violation had occurred and, on
9 November 4, 2013, posted a notice of vacancy for the Wilbur School Title I
10 paraprofessional assignment on School Spring. The job qualifications for that
11 assignment included: (1) two years of College course work (48 credits) /AS Degree
12 required or passing score (464) on the Para Pro Assessment; (2) ability to work
13 effectively with adults and students; (3) effective interpersonal communication skills; and
14 (4) preference in working with special needs students. 20 persons applied for that
15 position, including White.³⁵

16 OPINION

17 To establish a prima facie case of a Section 10(a)(4) retaliation violation, a
18 charging party must show that: (1) the employee engaged in concerted activity
19 protected by Section 2 of the Law by signing or filing an affidavit, petition or complaint or
20 giving information or testimony as part of a DLR proceeding; (2) the employer knew of
21 the concerted, protected activity; (3) the employer took adverse action against the
22 employee; and, (4) the employer's action was motivated by a desire to penalize or

³⁵ There is no evidence that Ms. Pierce applied for the Title I paraprofessional assignment.

1 discourage the protected activity. Commonwealth of Massachusetts, 25 MLC 44, SUP-
2 4128 (Aug. 14, 1998). If the charging party establishes a prima facie case, the
3 employer may offer evidence of one or more lawful reasons for taking the adverse
4 action. Finally, if the employer produces that evidence, the employee must establish
5 that, "but for the protected activity, the employer would not have taken the adverse
6 action." City of Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009) (citing
7 Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 565-66
8 (1981); Bristol County, 26 MLC 105, 109, MUP-2100 (Jan. 28, 2000)). The first two
9 elements of Ms. Pierce's prima facie case are undisputed. However, the Committee
10 argues that there is no violation because Ms. Pierce is unable to show adverse action or
11 unlawful motivation.

12 **Adverse Action**

13 First, the Committee argues that adverse action requires the individual affected
14 to be an employee of the employer. It asserts that Ms. Pierce was not an employee of
15 the Committee because she had voluntarily resigned from her employment when she
16 declined the Chace School paraprofessional assignment on September 28, 2012.
17 Thus, the Committee contends that Ms. Pierce was not employed by the District at any
18 subsequent point.

19 Relying on City of Boston, 35 MLC at 291 (citing MacCormack v. Boston Edison
20 Co., 423 Mass. 652, 662 (1996)) and LaRou v. Ridlon, 98 F.3d 659, 663 (1st Cir. 1996),
21 the Committee next argues that removing Ms. Pierce's name from the faculty list and
22 deleting her e-mail account were not adverse actions because she was not materially
23 disadvantaged by those actions. It also asserts that the July 1, 2013 job vacancy

1 announcement for the Paraprofessionals (2) assignment, which required the applicant
2 to have a preference for working with special needs students, was not adverse
3 because Ms. Pierce was aware of the job posting but waited until after the application
4 deadline to inquire about the assignment. For these reasons, the Committee contends
5 that Ms. Pierce has failed to show an adverse action because there is no evidence that
6 she was disadvantaged with respect to salary, grade, or other objective terms and
7 condition of employment. City of Boston, 35 MLC at 291 (citing MacCormack v. Boston
8 Edison Co., 423 Mass. at 662); LaRou v. Ridlon, 98 F.3d at 663.

9 I disagree with the Committee's contentions. The record shows that, at all
10 relevant times, Ms. Pierce was an employee of the District even though declined the
11 Chace School assignment on September 28, 2012. First, she had filed a grievance four
12 days earlier on September 24, 2012, protesting that assignment, and, after the
13 Committee denied that grievance on October 30, 2012, the Union filed a petition for
14 arbitration at the DLR on November 16, 2012. There is no evidence that Ms. Pierce
15 voluntarily resigned from her employment with the District, nor is there any evidence
16 that the Committee provided her with written notification of any changed employment
17 status. Based on the record, Ms. Pierce became employed by the District beginning in
18 2001 and remained an employee throughout the life of her grievance-arbitration.
19 Further, on or about August 27, 2013, Superintendent Medeiros informed the Union that
20 Ms. Pierce could "bid" on any job in the District, implying that he still recognized her
21 contractual seniority bidding rights under Agreement Articles XVI and XV while the
22 arbitration decision was pending.

1 The Board has consistently defined adverse action as an adverse personnel
2 action that materially disadvantages the plaintiff in some way. City of Boston, 35 MLC
3 at 291 (citing City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (Jan. 9, 2009)). Here,
4 the Committee's decisions to change Ms. Pierce's employment status without written
5 notification, remove her name from the faculty list and delete her User Directory e-mail
6 account, amount to adverse actions because they: (1) affected Ms. Pierce's ability to bid
7 on job vacancies posted on or after July 1, 2013; (2) prevented her from communicating
8 via the User Directory with other District employees and unit members about those job
9 postings; (3) prevented her from receiving notifications and messages from the District,
10 including any job vacancy alerts posted to School Spring about the disputed Wilbur
11 School Paraprofessionals (2) assignment; and (4) negatively affected her ability to apply
12 for and/or grieve the Committee's decision to post the assignment. Commonwealth of
13 Massachusetts, 25 MLC at 48; City of Boston, 35 MLC at 291.

14 The Committee's decision to post and permanently fill the Wilbur School
15 Paraprofessionals (2) job vacancy, which included a new job qualification (a preference
16 for working with SPED students), also amounted to an adverse action because the
17 Employer changed the job qualification criteria for that assignment during the pendency
18 of Ms. Pierce's arbitration despite her stated non-preference against working in a SPED
19 setting.

20 **Unlawful Motivation**

21 **1. Circumstantial Evidence**

22 A charging party can prove unlawful employer motivation with direct or indirect
23 evidence of discrimination. Lawrence School Committee, 33 MLC 90, 97, MUP-02-

1 3631 (Dec. 13, 2006). Direct evidence is evidence that, "if believed, results in an
2 inescapable, or at least a highly probable inference that a forbidden bias was present in
3 the workplace." Wynn & Wynn, P.C. v. Massachusetts Commission Against
4 Discrimination, 431 Mass. 655, 667 (2000), (quoting Johansen v. NCR Comten, Inc., 30
5 Mass. App. Ct., 294, 300 (1991)). Unlawful motivation may also be established through
6 circumstantial evidence and reasonable inferences drawn from that evidence. See
7 Town of Carver, 35 MLC 29, 48, MUP-03-3894 (June 30, 2008) (citing Town of
8 Brookfield, 28 MLC 320, 327-28, MUP-2538 (May 1, 2002); see also Southern
9 Worcester County Regional Vocational School District, 386 Mass. at 418-19 (citing
10 Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951)).
11 Several factors may suggest unlawful employer motivation, including timing of the
12 alleged discriminatory act, triviality of reasons given by the employer, an employer's
13 deviation from past practices, or expressions of hostility toward a union or the protected
14 activity. Town of Carver, 35 MLC at 48; Cape Cod Regional Technical High School
15 District Committee, 28 MLC 332, 335, MUP-2541 (May 15, 2002); Bristol County, 26
16 MLC at 109; Town of Andover, 14 MLC 1582, MUP-6443 (H.O. March 3, 1988), aff'd 17
17 MLC 1475, 1482, MUP-6443 (Feb. 6, 1991). Timing alone is insufficient to establish
18 unlawful employer motivation. City of Malden, 5 MLC 1752, 1764, MUP-3017 (March
19 20, 1979).

20 Ms. Pierce argues that the Committee was unlawfully motivated when it removed
21 her name from the faculty list, deleted her e-mail account and posted a job vacancy for
22 her paraprofessional position at the Wilbur School in July of 2013. Based on the timing
23 of those actions, the inadequate reasons given by the Committee for those actions and

1 the deviation from established past practices, she contends that this circumstantial
2 evidence supports her prima facie case.

3 The Committee argues that its actions were lawful and appropriate. Regarding
4 its removal of Ms. Pierce's name from the faculty list, it argues that because she had
5 voluntarily resigned from her employment with the School District on September 28,
6 2012, Superintendent Medeiros was permitted to remove her name from the list.
7 Regarding, its deletion of Ms. Pierce's e-mail account, the Committee argues that
8 Nekrasz permissibly deleted her account at the end of the school year as part of his
9 regular routine. Further, the Committee maintains that its practice has always been to
10 compile a list at the end of the year of all employees who had left employment during
11 the school year, and forward that list to Nekrasz during the summer months for e-mail
12 deactivation, deletion or modification. Concerning the July 1, 2013 job posting, the
13 Committee contends that it usually posts vacancies for the start of the school year in
14 July and usually conducts paraprofessional interviews in August. Thus, it asserts that it
15 did not treat Ms. Pierce differently from other employees who had retired, resigned or
16 otherwise quit their employment with the District. Finally, it notes that Ms. Pierce was
17 aware of the July 1, 2013 job posting but failed to apply.

18 **A. Timing**

19 I agree with Ms. Pierce and find that the timing of the adverse actions points to
20 circumstantial evidence of unlawful employer motivation. First, the Committee asserts
21 that it changed her employment status on September 28, 2012, after she declined its
22 offer to work as a SPED paraprofessional at the Chace School. However, that alleged
23 change took place four days after Ms. Pierce had filed a grievance with the Union, and

1 did not include notice that the Committee had changed her employment status and
2 removed her name from the faculty list. Throughout the grievance-arbitration process,
3 the Committee never notified Ms. Pierce that she was no longer an employee of the
4 District, and only indirectly informed her about that change by a telephone conversation
5 with Nekrasz on July 15, 2013. Second, the Committee deleted Ms. Pierce's User
6 Directory e-mail account less than three days after her DLR arbitration hearing. On that
7 same day, it posted a job vacancy for Paraprofessionals (2) kindergarten assignment at
8 the Wilbur School, which included a new job qualification that was not required during
9 Ms. Pierce's tenure as a Wilbur School paraprofessional.

10 Based on the timing of these events, I find that Superintendent Medeiros
11 harbored unlawful animus against Ms. Pierce when the Committee changed her
12 employment status, removed her name from the faculty list, deleted her User Directory
13 e-mail account and posted and permanently filled a job vacancy for the Wilbur School
14 Paraprofessionals (2) assignment that included a new SPED qualification. See Labor
15 Relations Commission v. Blue Hills Spring Water Co., 11 Mass. App. Ct. 50 (1981);
16 Town of Somerset, 15 MLC 1523, 1529, MUP-6404 (March 9, 1989)).

17 **B. Inadequate Reasons**

18 The record shows that after receiving notice that Ms. Pierce declined the Chace
19 School assignment on September 28, 2012, the Committee changed her employment
20 status based on her having "declined position" and, ten months later, removed her
21 name from the faculty list. However, the Committee never notified Ms. Pierce (or the
22 Union) that it had changed her employment status and, in August of 2013,
23 Superintendent Medeiros informed the Union that Ms. Pierce was still eligible "to bid on

1 any job in the district.” Regarding Ms. Pierce’s User Directory e-mail account, Nekrasz
2 had allegedly deleted her account in accordance with customary practice; however,
3 neither he nor Superintendent Medeiros could explain why, as of July 16, 2013, six
4 2012-2013 retirees/resignees who did not possess post-employment relationships with
5 the District, continued to have access to their active User Directory e-mail accounts.
6 Regarding the Title I assignment, the Committee does not dispute that it failed to
7 properly post that assignment prior to appointing White; and, it settled Ms. Pierce’s
8 grievance by agreeing to post the assignment pursuant to the Agreement.

9 Based on this evidence, I find that the reasons given by the Committee
10 explaining: (1) Ms. Pierce’s employment status change; (2) her removal from the faculty
11 list; (3) the deletion of her User Directory e-mail account; and (4) the discrepancies on
12 the July 1, 2013 Paraprofessionals (2) job posting were insubstantial and trivial,
13 revealing an inference of unlawful animus against Ms. Pierce. See Commonwealth of
14 Massachusetts, 14 MLC 1743, 1748, SUP-3081 (May 19, 1988); Town of West
15 Springfield, 8 MLC 1041, MUP-3914 (June 4, 1981).

16 **C. Departure from Established Procedures**

17 The Committee claims that when Ms. Pierce declined its offer of assignment to
18 work as a paraprofessional at Chace School on September 28, 2012, that declination
19 effectively terminated her employment with the School District. However, the evidence
20 shows that the Committee never notified Ms. Pierce that it had changed her
21 employment status in September of 2012. Instead, it continued to process and
22 participate in her grievance-arbitration through June 28, 2013 and, in August of 2013, it
23 informed the Union that Ms. Pierce still possessed contractual bidding rights.

1 Concerning the User Directory e-mail accounts, the Committee also deviated from its
2 established practice of not prioritizing the deletion, deactivation or modification of those
3 accounts. It is undisputed that the Administrator's maintenance of the User Directory is
4 a low priority job duty. However, when Superintendent Medeiros instructed Nekrasz to
5 specifically delete Ms. Pierce's account while ignoring the accounts of at least six other
6 non-employees, the Committee effectively changed a long-standing practice to
7 unlawfully single out Ms. Pierce. While I agree that Nekrasz's deletion of Ms. Pierce's
8 e-mail account was within the customary routine of making User Directory e-mail
9 account changes at the end of the school year, the prioritization of that deletion
10 effectively treated her differently from other non-employees, including Urban, Vasquez,
11 Lavalley, O'Halloran, Royds and Donnelly.

12 Consequently, I find that the Committee's failure to provide Ms. Pierce with
13 written notice about her changed employment status, its removal of her name from the
14 faculty list and its deletion of her e-mail account were inconsistent and irregular from its
15 established practices. See Town of Andover, 14 MLC at 1582, aff'd 17 MLC at 1482.

16 Based on the totality of the circumstantial evidence presented, I find that the
17 Committee's conduct in removing Ms. Pierce's name from the faculty list after receiving
18 her September 24, 2012 grievance, deleting her User Directory e-mail account after
19 participating in her June 28, 2013 DLR arbitration, combined with the July 1, 2013
20 Paraprofessionals (2) job posting was motivated by an unlawful desire to penalize or
21 discourage her protected activity. Accordingly, I find that Ms. Pierce has successfully
22 established her *prima facie* case of discrimination.

23 **IV. Employer's Burden of Production**

1 Once the charging party establishes a prima facie case of retaliation, the Board
2 applies the three-step analysis pursuant to Trustees of Forbes Library, which shifts the
3 burden to the employer to produce a legitimate, non-discriminatory motive for taking the
4 adverse action. 384 Mass. at 566. The employer's burden to produce legitimate, non-
5 discriminatory reasons for taking the adverse action is more than simply stating an
6 unsubstantiated allegation. Commonwealth of Massachusetts, 25 MLC at 46. The
7 employer must state a lawful reason for its decision and produce supporting facts
8 indicating that the proffered reason was actually a motive in the decision. Trustees of
9 Forbes Library, 384 Mass. at 566; Quincy School Committee, 27 MLC 83, 92, MUP-
10 1986 (Dec. 29, 2000); Commonwealth of Massachusetts, 25 MLC at 46.

11 The Committee presented evidence showing that it had removed Ms. Pierce's
12 name from the faculty list and deleted her e-mail at the end of the school year, which
13 corresponded to Nekrasz's customary practice of deactivating, deleting or modifying
14 User Directory e-mail accounts during the summer months. The Committee also
15 showed that it posted the Wilbur School Paraprofessionals (2) job vacancy on July 1,
16 2013, which was consistent with its practice of seeking applicants and interviewing
17 paraprofessional candidates in August, after filling the teacher positions. Based on this
18 evidence, I conclude that the Committee's reasons for deleting Ms. Pierce's e-mail
19 account, removing her name from the faculty list and posting and filling the
20 Paraprofessionals (2) job vacancy during the summer months of 2013 were legitimate
21 and not pretextual. Town of Easthampton, 35 MLC 257, 265, MUP-04-4244 (Apr. 23,
22 2009); (citing Boston Water & Sewer Commission, 29 MLC 176, 181, MUP-1677 (April
23 2, 2003)).

1 **V. Mixed Motives**

2 Once the employer produces evidence of a legitimate, non-discriminatory reason
3 for taking the adverse action, the case becomes one of "mixed motives" and the CERB
4 shifts the burden to the charging party to demonstrate that "but for" the protected
5 activity, the employer would not have taken the adverse action. Trustees of Forbes
6 Library, 384 at 565-66; Suffolk County Sheriff's Department, 27 MLC 155, 160, MUP-
7 1498 (June 4, 2001); Quincy School Committee, 27 MLC at 92.

8 The Committee argues that it would have removed Ms. Pierce's name from the
9 faculty list, deleted her e-mail account from the User Directory and posted and filled the
10 Wilbur School Paraprofessionals (2) job vacancy on July 1, 2013 regardless of her
11 participation in ARB-12-2455. First, it asserts that the reasons given for the adverse
12 actions against Ms. Pierce were substantial because the School District needed to
13 ensure that only employees/retirees still working for the District had access to the User
14 Directory e-mail system. However, the record shows that at least five individuals were
15 no longer working for the District as of July 16, 2013 but were permitted to access their
16 e-mail accounts while Ms. Pierce was prohibited from the doing the same on July 1,
17 2013. This points to evidence of disparate treatment because in July of 2013, when
18 Superintendent Medeiros provided Nekrasz with a list of 32 individuals (which included
19 Urban, Donnelly, Vasquez, Lavallee, O'Halloran, and Ms. Pierce) he specifically
20 instructed Nekrasz to delete Ms. Pierce's e-mail account without instructing him to also
21 delete the e-mail accounts of Urban, Donnelly, Vasquez, Lavallee, O'Halloran and
22 Royds.

23 The Committee also argues that there is no evidence of hostility or animus

1 against Ms. Pierce because neither Superintendent Medeiros nor any other School
2 District employee made remarks against Ms. Pierce related to her DLR arbitration
3 proceeding. I agree with the Committee that the record is devoid of any hostility against
4 Ms. Pierce; however, she has successfully presented other circumstantial evidence of
5 anti-union animus based on the timing of the Committee's adverse actions (which
6 occurred four days after she declined the Chace School assignment and three days
7 after she testified at the DLR arbitration hearing) and its departure from established
8 practices (i.e., failing to provide written notification for changed employment status and
9 prioritizing the deletion of User Directory e-mail accounts).

10 Ms. Pierce was engaged in protected activity when she filed a grievance on
11 September 24, 2012 and participated in a DLR arbitration hearing on June 28, 2013.
12 The Committee knew about Ms. Pierce's protected activities, took adverse action
13 against her when it removed her name from the faculty list, deleted her User Directory
14 e-mail account and posted and filled the Wilbur School Paraprofessionals (2) job
15 vacancy in July of 2013, which included a changed job qualification—conduct which
16 amounts to unlawful discrimination against Ms. Pierce. Although the Committee
17 presented legitimate reasons for its actions, I find that but for Ms. Pierce's protected
18 activities Superintendent Medeiros would not have removed her name from the faculty
19 list, and deleted her User Directory e-mail account.

20 I also find that but for Ms. Pierce's protected activities, the Committee would not
21 have posted and filled the Wilbur School Paraprofessionals (2) job vacancy with a new
22 job qualification that required the candidate to have a preference for working with SPED
23 students. The Committee acknowledged that all paraprofessionals are subject to

1 varying assignments, including SPED assignments and, because Ms. Pierce had prior
2 SPED experience during her tenure at the Wilbur School, she was qualified for a SPED
3 assignment. After she declined the Committee's September 24, 2012 offer to take the
4 Chace School assignment, the Committee posted a job vacancy for Ms. Pierce's former
5 paraprofessional position in a general education kindergarten classroom on July 1, 2013
6 but specifically included a new SPED-preference job qualification that it knew—from
7 interviewing Ms. Pierce for the Chace School assignment—that she did not possess.
8 The Committee's posted that vacancy notice on July 1, 2013, which was less than three
9 days after her DLR arbitration hearing and then permanently filled that assignment
10 during the pendency of Ms. Pierce's arbitration. Accordingly, Ms. Pierce has satisfied
11 her shifting burden of demonstrating that but for her protected activity, the Committee
12 would not have taken the adverse action against her in violation of Section 10(a)(4) of
13 the Law.

14 REMEDY

15 Section 11 of the Law grants the Board broad authority to fashion appropriate
16 orders to remedy unlawful conduct. Labor Relations Commission v. Everett, 7 Mass.
17 App. Ct. 826 (1979); City of Gardner, 26 MLC 67, 72, MUP-1489 (H.O. Dec. 29, 1999).
18 When fashioning appropriate remedies, the Commonwealth Employment Relations
19 Board attempts to place employees in the position they would have been in but for the
20 unlawful conduct. City of Gardner, 26 MLC at 78. Ms. Pierce seeks the following
21 traditional remedies: (1) rescission of the July 1, 2013 Wilbur School Paraprofessionals
22 (2) a new job posting; (2) restoration of her User Directory e-mail account; (3) an order
23 to cease and desist from engaging in discriminatory and retaliatory behavior; and (4) an

1 order that the Committee post an appropriate enforcement notice. She also seeks a
2 non-traditional remedy of imposing “any and all civil fines and penalties permitted by
3 law.”

4 While I agree with Ms. Pierce’s requests for a traditional remedy, I deny her
5 request for civil fines and penalties. The standard remedy for a Section 10(a) (4)
6 violation is to place the injured individual in the position he or she would have been in
7 but for the adverse action. Thus, to effectuate that purpose, I order the Committee to
8 rescind the July 1, 2013 Wilbur School Paraprofessionals (2) job posting, repost a new
9 job vacancy announcement pursuant to the terms of the parties’ Agreement that
10 excludes the SPED-preference, and give Ms. Pierce the opportunity to apply for that
11 assignment. I also order the Committee to restore Ms. Pierce’s name to the faculty list
12 and restore access to her User Directory e-mail account.

13 **CONCLUSION**

14 Based on the record, I conclude that the Committee discriminated against Ms.
15 Pierce for engaging in concerted activity protected by Section 2 of the Law, in violation
16 of Section 10(a)(4) and, derivatively, Section 10(a)(1) of the Law.

17 **ORDER**

18 WHEREFORE, based on the foregoing, it is hereby ordered that the Committee
19 shall:

- 20 3. Cease and desist from:
 - 21
 - 22 a. Retaliating against Lorrie Pierce for engaging in the protected,
 - 23 concerted activity of filing a petition for arbitration at the DLR and for
 - 24 participating in proceedings related to that petition under G.L. c. 150E.
 - 25
 - 26 b. In any like manner, interfering with, restraining and coercing its
 - 27 employees in any right guaranteed under the Law.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

- 4. Take the following affirmative action that will effectuate the purpose of the Law:
 - a. Restore Ms. Pierce’s name to the Somerset School District faculty list.
 - b. Restore Ms. Pierce’s access to her User Directory e-mail account.
 - c. Rescind the July 1, 2013 Wilbur School Paraprofessionals (2) job posting, repost a new job posting for that assignment in accordance with the parties’ collective bargaining agreement that excludes the SPED-preference and allow Ms. Pierce to apply for that assignment.
 - d. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted, including electronically, if the Employer customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter signed copies of the attached Notice to Employees;
 - e. Notify the DLR in writing of the steps taken to comply with this decision within thirty (30) of the steps taken by the Committee to comply with the Order.

24 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

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



**THE COMMONWEALTH OF MASSACHUSETTS
NOTICE TO EMPLOYEES
POSTED BY ORDER OF A HEARING OFFICER OF THE
THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the Somerset School Committee (Committee) has violated Section 10(a)(4) and, derivatively, Section 10(a)(1) of G.L. Chapter 150E (the Law) by retaliating against Lorrie Pierce (Ms. Pierce) for engaging in concerted, protected activities. The Committee posts this Notice to Employees in compliance with the Hearing Officer's order.

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

WE WILL NOT discriminate against Ms. Pierce for engaging in the protected, concerted activity of filing a petition for arbitration at the DLR and for participating in proceedings related to that petition under G.L. c. 150E;

WE WILL NOT, in any like manner, interfere with, restrain and coerce Ms. Pierce in the exercise of her rights guaranteed under the Law;

WE WILL restore Ms. Pierce's name to the Somerset School District faculty list and restore her access to her User Directory e-mail account;

WE WILL rescind the July 1, 2013 Wilbur School Paraprofessionals (2) job posting, repost a new job vacancy announcement in accordance with the parties' collective bargaining agreement that excludes the SPED-preference and allow Ms. Pierce to apply for that assignment.

Somerset School Committee

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).