

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

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In the Matter of	*	
	*	
CITY OF WORCESTER	*	Case No. MUP-12-2131
	*	
and	*	Date Issued: November 30, 2015
	*	
THOMAS C. DUFFY	*	
	*	

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Board Members Participating:

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

Appearances:

William R. Bagley Jr., Esq. - Representing the City of Worcester  
Peter J. Duffy, Esq. - Representing Thomas C. Duffy

1 **DECISION ON REVIEW OF HEARING OFFICER'S DECISION**

2 **SUMMARY**

3 This appeal by the City of Worcester (City or Employer) seeks the reversal of a  
4 Hearing Officer decision concluding that the City violated Section 10(a)(3) and,  
5 derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) when it retaliated against a  
6 police officer, Thomas Duffy (Duffy), for engaging in protected, concerted activity. After  
7 reviewing the record on appeal and the arguments of the parties, we affirm the Hearing  
8 Officer's decision for the reasons set forth below.

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**Facts**

Because we adopt the factual findings of the Hearing Officer, we recount only those facts pertinent to the City's contention that certain factual findings in the decision are clearly erroneous and that these allegedly erroneous facts caused the Hearing Officer to misapply the standard for a violation of Section 10(a)(3) of Chapter 150E. More specifically, the facts below are pertinent to the City's argument on appeal that the sequence of events leading up to Police Chief Gemme's (Chief Gemme) decision to suspend Officer Thomas Duffy preclude a finding that Duffy's suspension was motivated by anti-union animus. Further reference may be may to the Hearing Officer's decision, which is reported at 41 MLC 144 (December 16, 2015) and attached to the slip opinion of this decision.

By the time of the events that form the basis of this action, Duffy, a member of the New England Police Benevolent Association Local 911 (Union), had twenty-five years of service with the City's police department. Consequently, he earned twenty-eight days of paid leave per year (furlough days). Police officers submit requests to their supervising officer to use accrued furlough days for an entire calendar year. The City then informs the officers whether their requests have been granted. A work schedule policy limits the number of employees who can take furlough days in each division of the police department to ten percent of a particular shift.

After Duffy's furlough days in 2011 were approved by the supervising officer in the Operations Division where Duffy worked, he was reassigned to the Service Division. Once relocated to the Service Division, Duffy requested a furlough day in October of

1 2011. That request was approved and documented by the Service Division's  
2 supervising officer.

3 On November 23, 2011, the evening before Thanksgiving, Duffy was listed on  
4 the Service Division's work schedule roster but did not report to work. When the shift  
5 supervisor, Sergeant Ronald LaPointe (LaPointe) became aware of Duffy's absence, he  
6 checked the Service Division's Red Book where records of officers' furlough approvals  
7 are maintained. LaPointe determined that Duffy was not listed as having a furlough day  
8 approved by the Service Division on this date. Duffy was immediately contacted by the  
9 senior patrol officer on the November 23 evening shift. Duffy informed that officer that  
10 his furlough approval was listed in the Red Book kept by the Operations Division where  
11 he was previously assigned. After LaPointe verified that Duffy did indeed have his  
12 furlough approved by his prior division, he listed Duffy as being on furlough in the  
13 Service Division's Red Book. At some point after November 23, LaPointe informed  
14 Duffy that he did not want "any more surprises."

15 On December 24, 2011, Duffy was listed on the roster as scheduled to work the  
16 11 PM – 7 AM shift, but he did not report to work. The shift commander, Lieutenant  
17 James Grady (Grady), called Duffy at 11:30 PM. Duffy informed Grady that he was  
18 home with his family and had requested Christmas Eve as a furlough day in January  
19 2011. The Service Division's Red Book, however, indicated that Duffy had used all his  
20 furlough days and only had a wellness day remaining in 2011. Grady recorded Duffy's  
21 absence as a sick day.

1 Prior to Duffy returning to work on December 26, Grady informed LaPointe of  
2 Duffy's absence on December 24. LaPointe responded that Duffy had similarly not  
3 reported to work on November 23. LaPointe also recounted to Grady that, after the  
4 November 23 incident, he told Duffy that there should be "no more surprises."

5 On December 26, 2011, Duffy returned to work and queried Grady as to why he  
6 had been charged with a sick day for his December 24 absence. Duffy was concerned  
7 that the sick day designation would jeopardize his eligibility for Christmas holiday pay.  
8 Duffy also informed Grady that he had other leave time that could be used to cover his  
9 time off on December 24. Grady responded that he would not alter the sick day  
10 designation. Duffy then asked his Union steward to initiate a grievance to address this  
11 matter.

12 On December 26, Grady informed Deputy Chief McGinn (McGinn), who oversees  
13 the Service Division, that Duffy had failed to report to work on both November 23 and  
14 December 24. Grady also conveyed to McGinn the warning that LaPointe gave Duffy  
15 on November 23. Within a few days of this conversation, McGinn informed Chief  
16 Gemme that he was going to investigate Duffy's absences. At some point during the  
17 next week, Grady informed McGinn that he had charged Duffy with a sick day on  
18 December 24. Within a week of December 26, Grady learned that Duffy was grieving  
19 the decision to give him a sick day for his December 24 absence. That same week,  
20 Grady informed McGinn about the grievance. McGinn then asked Grady and LaPointe  
21 for reports regarding the November 23 and December 24 absences.

1 On January 10, 2012, the Union filed a written grievance on Duffy's behalf. After  
2 Chief Gemme received the grievance, he determined that it was inappropriate to charge  
3 Duffy for a sick day on December 24 because Duffy had not actually been ill. On  
4 January 13, 2012, Chief Gemme ordered payroll to credit Duffy with a wellness day.

5 Following the filing of the January 10 grievance, and based on LaPointe's and  
6 Grady's prepared reports that respectively addressed Duffy's November 23 and  
7 December 24 absences, McGinn prepared a report on Duffy's absences. That report  
8 was submitted to Chief Gemme on February 8, 2012. McGinn's report contained a  
9 complaint against Duffy suggesting that he may have violated Worcester Police  
10 Department rules, namely, neglect of duty and insubordination. Two days later, on  
11 February 10, Chief Gemme issued a two-day suspension to Duffy.

12 On June 14, 2012, the City reduced the suspension to one day after Duffy  
13 requested a hearing before the City Manager. Duffy then appealed to the Civil Service  
14 Commission (CSC) and, on April 18, 2013, the CSC voted to adopt the administrative  
15 law judge's finding and vacated the one-day suspension. The City did not appeal.

### 16 **Opinion<sup>1</sup>**

17 The City seeks reversal of the Hearing Officer's ultimate finding that the Police  
18 Chief would not have suspended Duffy for his absence on December 24, 2011 if Duffy  
19 had not engaged in protected concerted activity. The City claims that reversal is  
20 required because the Hearing Officer erroneously applied the mixed motive test set  
21 forth in Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 565-

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<sup>1</sup> The CERB's jurisdiction is not contested.

1 566 (1981), to the facts and ignored her own factual findings when she determined that  
2 the City violated Section 10(a)(3) of the Law.

3 The City essentially presents two arguments. First, it contends that the record  
4 does not support a finding of employer animus. In this regard, the Employer  
5 emphasizes that the investigation that led to Duffy's suspension was initiated *prior to* the  
6 protected activity that Duffy engaged in, which the Hearing Officer found to be the  
7 reason for Duffy's discriminatory treatment. Accordingly, the City contends that it would  
8 be illogical to find that the suspension was motivated by animus toward Duffy for filing  
9 the grievance. Second, the City argues that to uphold a Section 10(a)(3) violation on  
10 these facts would be contrary to DLR policy because it would send a message to  
11 employees that otherwise lawful discipline could be avoided by preemptively filing a  
12 grievance after one has engaged in misconduct. We address each of these arguments.

13 The Hearing Officer first examined whether Duffy had established the four  
14 elements of a prima facie case of unlawful discrimination under established CERB  
15 precedent, i.e., that he had engaged in activity protected by Section 2 of the Law, that  
16 the City had knowledge of that activity, that Duffy suffered an adverse action, and that  
17 the City took the action to discourage the conduct. See, e.g., Quincy School  
18 Committee, 27 MLC 83, 92, MUP-1986 (December 29, 2000). The Hearing Officer  
19 found that Duffy had met the first three prongs of this test, and the Employer does not  
20 contest this aspect of the Hearing Officer's findings.

21 As to the fourth prong, the Hearing Officer identified the following facts as

1 circumstantial evidence that the employer's action was motivated by union animus.<sup>2</sup>  
2 First, the Hearing Officer found that the timing of the suspension was probative of  
3 animus because Chief Gemme suspended Duffy within six weeks of Duffy initiating the  
4 grievance and within four weeks of his receipt of the grievance. She further found that  
5 the Employer's shifting and inconsistent reasons for Duffy's suspension supported a  
6 conclusion that the City harbored animus toward Duffy's use of the grievance  
7 procedure. See, e.g., Everett Housing Authority, 13 MLC 1001, 1006-1007, MUP-5656  
8 (June 4, 1986) (inferring animus based on circumstantial evidence such as timing and  
9 inconsistent reasons for adverse action).

10 Having determined that Duffy had established a prima facie case, the Hearing  
11 Officer next examined whether the Employer had met its burden of establishing a  
12 legitimate, non-discriminatory reason for the suspension. Trustees of Forbes Library,  
13 384 Mass. at 566. She found that the Employer had, by producing evidence that it  
14 believed that Duffy had transgressed certain workplace standards by not advising his  
15 supervisors that he had been granted time off by his supervisor in the Operations  
16 Division before absenting himself from work on December 24, 2011. She then  
17 examined whether, under the third part of the Forbes Library test, Duffy had met his  
18 burden of establishing that "but for" Duffy's protected activity, the Employer would not  
19 have suspended him. Id. She found that he had for reasons discussed below.

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<sup>2</sup> The Hearing Officer found, and no party contests, that Duffy proffered only indirect evidence of discrimination in support of his claim.

1           The Employer asks the CERB to reverse the Hearing Officer's ruling because her  
2 ultimate finding of animus, as a "but for" cause of Duffy's suspension, rests on  
3 erroneous factual findings. For the reasons set forth below, we reject the Employer's  
4 argument. Rather, we find that the Hearing Officer drew reasonable inferences from the  
5 factual record consistent with the CERB's judicially approved mixed-motive analysis.  
6 See, e.g., Town of Brookfield v. Labor Relations Commission, 445 Mass 315, 323  
7 (2005).

8           First, the Employer contends that there is no evidence that LaPointe, Grady,  
9 McGinn or Chief Gemme harbored anti-union animus. The Employer points to the  
10 absence of evidence in the record that any of these individuals ever made any kind of  
11 anti-union remarks or statements. In this regard, it also points to Chief Gemme's long  
12 history of participation in police unions prior to his becoming the police chief. While the  
13 Employer's factual assertion may accurately reflect the record, it is well established that  
14 the absence of direct evidence of animus or hostility toward the union or towards the  
15 protected activity at issue is not required to prove unlawful motivation. See, e.g., Athol-  
16 Royalston Regional School Comm., 28 MLC 204 MUP-2279 (January 14, 2002).  
17 Rather, such motivation may be established through circumstantial evidence, including,  
18 among other things, timing and shifting reasons given by the employer, and reasonable  
19 inferences drawn from that evidence. Id. As described above, there is such  
20 circumstantial evidence here.

21           Next, the Employer points to the fact that Deputy Chief McGinn began his  
22 investigation into Duffy's alleged misconduct *prior to* McGinn learning that Duffy had

1 filed a grievance. Based on this fact, the Employer argues that it would be illogical to  
2 credit a finding that an employer harbored animus toward protected activity when the  
3 investigation of the conduct that was at issue began prior to Duffy filing his grievance.  
4 We reject the City's argument because, as discussed below, it ignores other salient  
5 factual facts found by the Hearing Officer that occurred in the course of the investigation  
6 that led to Duffy's suspension and which provide circumstantial evidence from which the  
7 Hearing Officer properly inferred an anti-union animus.

8 First, the Hearing Officer was entitled to infer unlawful motivation, at least in part,  
9 from the closeness in timing between the protected activity and the adverse action  
10 (within six weeks of Duffy initiating grievance and within four weeks of Chief Gemme  
11 receiving the grievance) as one of the factors from which she could infer unlawful  
12 motivation. This was not error. See, e.g., Quincy School Committee, 27 MLC 83, MUP-  
13 1986, (December 29, 2000) (when coupled with other circumstantial evidence of  
14 animus, negative evaluation that occurred one month after employee told supervisor  
15 that she was considering filing a grievance against him was sufficient to establish a  
16 prima facie case of unlawful motivation).

17 The Hearing Officer also inferred animus based on the shifting and inconsistent  
18 reasons offered by the Employer for its decision to suspend Duffy, i.e., that Chief  
19 Gemme's suspension letter indicated that Duffy was being suspended for his failure to  
20 report to work on December 24, but Chief Gemme's testimony at hearing was that he  
21 suspended Duffy based on his failure to report to work on both November 23 and  
22 December 24. The Employer denies that it offered shifting reasons for Duffy's

1 suspension. Rather, it claims that Chief Gemme “merely acknowledged” at hearing that  
2 if Duffy had not been absent on November 23 and been spoken to about his actions, the  
3 Police Department would not have had reason to know that Duffy had purportedly  
4 engaged in misconduct on December 24. The Hearing Officer, however, describes the  
5 testimony on which she based this finding in footnote 31 of her decision and the  
6 Employer does not identify those portions of the record or testimony to support its  
7 alternative view of the facts. See 456 CMR 13.15 (4) (“A party claiming that the hearing  
8 officer has made erroneous findings of fact shall identify the specific findings challenged  
9 and clearly identify all record evidence supporting the party’s proposed findings of fact”).  
10 Based on footnote 31, therefore, the Hearing Officer’s finding that Chief Gemme offered  
11 shifting reasons for the suspension was warranted and not clearly erroneous. The  
12 Hearing Officer therefore reasonably inferred unlawful motivation from this combination  
13 of timing and shifting reasons to conclude that Duffy had established a prima facie  
14 Section 10(a)(3) violation. See Quincy School Committee, 27 MLC at 92.

15 The Hearing Officer next found this to be a mixed motive case and ruled that  
16 Duffy would not have been suspended but for his filing a grievance challenging the  
17 designation of his absence on December 24 as a sick day. The crux of the City’s  
18 appeal of this aspect of the decision is that Duffy’s grievance could not have been the  
19 but for cause of his suspension because the investigation that led to his suspension  
20 began before Duffy engaged in protected, concerted activity. It is true that the  
21 investigation began before the *written grievance* was filed. However, the facts also  
22 show that McGinn learned about the grievance before he requested reports from

1 LaPointe and Grady. These reports, in turn, served as the basis for Chief Gemme's  
2 decision to suspend Duffy. Further, this argument ignores the fact that in analyzing but  
3 for causation, the Hearing Officer properly took into account the City's contradictory  
4 treatment of Duffy's absence, i.e., suspending him for his absence on December 24,  
5 even though Grady did not order him to report to work that day and allowed him to take  
6 paid time off. The City's argument also ignores the Hearing Officer's reliance on the  
7 fact that it was not until Duffy protested the sick leave designation to Grady that Grady  
8 notified McGinn about the situation, thus setting in motion the series of events leading  
9 up .Duffy's suspension. Viewed as a whole, these events support the Hearing Officer's  
10 conclusion that, but for Duffy's protected activity, he would not have been suspended.

11 The Employer also complains that the Hearing Officer improperly considered the  
12 fact that Chief Gemme first upheld Duffy's grievance but then suspended him for two  
13 days for insubordination and neglect of duty as evidence that Chief Gemme harbored ill  
14 will towards Duffy's protected, concerted activity. It argues this is both illogical, (i.e.,  
15 someone who harbors union animus would not have granted Duffy's grievance), and  
16 sends the wrong message to employers whom the DLR should be encouraging to  
17 speedily resolve labor management disputes. It further claims that the technical  
18 grounds on which Chief Gemme resolved the sick day grievance were unrelated to the  
19 misconduct for which Duffy was suspended.

20 This argument misses the point. The Hearing Officer referenced Chief Gemme's  
21 conduct as yet another example of the contradictory manner in which the City treated  
22 Duffy's December 24 absence. Although the City paints a different picture of the facts,

1 we cannot say that the Hearing Officer was wrong as a matter of fact or law to rely on  
2 this unusual sequence of events to conclude that, but for Duffy's complaints over  
3 Grady's sick leave designation, he would not have been suspended.

4 **Conclusion**

5 For these reasons, and those stated in the Hearing Officer's decision, the CERB  
6 affirms that the City violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the  
7 Law by retaliating against Duffy for engaging in concerted, protected activity.

8  
9 **ORDER**

10 WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the  
11 City shall:

- 12 1. Cease and desist from:  
13  
14 (a) Retaliating against Duffy for engaging in concerted, protected  
15 activity.  
16  
17 (b) In any like manner, interfering with, restraining and coercing its  
18 employees in any right guaranteed under the Law.
- 19 2. Take the following action that will effectuate the purposes of the Law.<sup>3</sup>  
20  
21 a) Post immediately in all conspicuous places where members of the patrol  
22 officers' bargaining unit usually congregate, or where notices are usually  
23 posted, including electronically, if the City customarily communicates with  
24 these unit members via intranet or email and display for a period of thirty  
25 (30) days thereafter, signed copies of the attached Notice to Employees.  
26

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<sup>3</sup> The Hearing Officer did not order the City to revoke Duffy's suspension or to make Duffy whole for any lost pay and benefits related to his suspension because the Civil Service Commission already ordered that remedy when rendering its decision. Duffy did not appeal from the Hearing Officer's limited remedy.

- 1 b) Notify the DLR in writing of steps taken to comply with this decision within ten
- 2 (10) days of receipt of this decision.

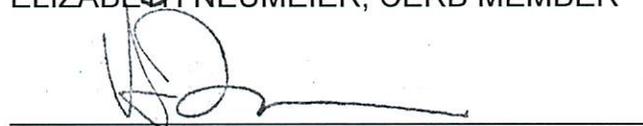
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**SO ORDERED.**

COMMONWEALTH OF MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

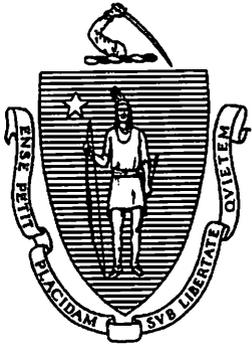
  
MARJORIE F. WITNER, CHAIR

  
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 City of Worcester (City) violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) when it suspended Patrol Officer Thomas C. Duffy (Duffy) for two days in retaliation for his engaging in concerted activity protected by Section 2 of the Law.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

- to engage in self-organization to form, join or assist any union;
- to bargain collectively through representatives of their own choosing;
- to act together for the purpose of collective bargaining or other mutual aid or protection; and
- to refrain from all of the above.

The City assures its employees that:

**WE WILL not retaliate against Duffy for engaging in concerted activity protected under Section 2 of the Law.**

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For the City of Worcester

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Date

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

CITY OF WORCESTER

and

THOMAS C. DUFFY

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Case No. MUP-12-2131

Date Issued: December 16, 2014

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Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

William R. Bagley Jr., Esq. - Representing the City of Worcester

Peter J. Duffy, Esq. - Representing Thomas C. Duffy

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of Worcester (City) violated Section  
2 10(a)(3) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter  
3 150E (the Law) by retaliating against Thomas C. Duffy (Duffy) for engaging in  
4 concerted, protected activity. I find that the City violated the Law in the manner alleged.

STATEMENT OF THE CASE

5  
6 On August 7, 2012, Thomas C. Duffy (Duffy or the Charging Party) filed a charge  
7 with the Department of Labor Relations (DLR), alleging that the City of Worcester (City)  
8 had engaged in prohibited practices within the meaning of Sections 10(a)(4) and (1) of  
9 Chapter 150E of the Massachusetts General Laws (the Law). A DLR hearing officer

1 conducted an investigation on September 26, 2012.<sup>1</sup> On October 9, 2012, the  
2 investigator issued a complaint alleging that the City violated Section 10(a)(3) and,  
3 derivatively, Section 10(a)(1) of the Law by retaliating against Duffy for engaging in  
4 concerted, protected activity when it suspended Duffy for two days. The City filed an  
5 answer to the complaint on October 30, 2012.

6 I conducted a hearing on November 7, 2013 and November 14, 2013. Both  
7 parties had an opportunity to be heard, to examine witnesses and to introduce  
8 evidence. The parties submitted their post-hearing briefs on January 6, 2014. Upon  
9 review of the entire record, including my observation of the demeanor of the witnesses, I  
10 make the following findings of fact and render the following decision.

11 Stipulated Facts

- 12 1. The City is a public employer within the meaning of Section 1 of the Law.
- 13
- 14 2. The New England Police Benevolent Association, Local 911 ("Association") is an  
15 employee organization within the meaning of Section 1 of the Law.
- 16
- 17 3. The Association is the exclusive bargaining representative for patrol officers  
18 employed by the City.
- 19
- 20 4. Duffy is a police officer and a member of the bargaining unit.
- 21
- 22 5. On December 24, 2011, the City recorded Duffy's absence as a sick day.
- 23
- 24 6. On a date after December 24, 2011, Duffy protested to the Association that he  
25 had been denied the right to take approved time off on December 24, 2011, and  
26 his time off had been improperly recorded as sick time.
- 27

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<sup>1</sup> At the investigation, Duffy moved to amend the charge to allege a violation of Sections 10(a)(3) and (1) of the Law and withdrew all other allegations.



1 may take furlough or wellness days at the same time. If more than ten percent of the  
2 officers on a shift request to take furlough or wellness days on a certain date, the City  
3 approves the requests based upon seniority.<sup>5</sup> Each division's sergeants and lieutenants  
4 maintain a hardbound, handwritten log of approved leave requests for their shifts, which  
5 is referred to as that division's Red Book.

6 As of January 2011, Duffy worked in the operations division from 11 PM to 7 AM,  
7 the so-called last-half shift, and was the most senior patrol officer on that shift. On or  
8 about that time, Duffy submitted a request to take time off on certain dates in 2011. The  
9 Operations Division subsequently approved his requests. On or about August 11, 2011,  
10 the City temporarily reassigned Duffy from the Operations Division to the Service  
11 Division<sup>6</sup> on the last-half shift and placed him on restricted duty<sup>7</sup> in the cell room.<sup>8</sup> After  
12 Duffy's reassignment, he did not inform his new supervisors in the Service Division  
13 about those upcoming dates for which the Operations Division previously approved him

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<sup>5</sup> Police officers can request to use wellness at different times throughout the year. However, employee requests to use furlough days supersede requests to use wellness days, when ten percent of the police officers on a shift already have requested to take time off.

<sup>6</sup> The Service Division oversees prisoners and their assets, which includes operating the cell room.

<sup>7</sup> The reasons for Duffy's August 11, 2011 reassignment are not pertinent to the present case.

<sup>8</sup> Police Chief Gary Gemme (Chief Gemme) issued an order that required Duffy to remain in the cell room during his tour of duty.

1 to use time off.<sup>9</sup> After his transfer, he made a request to the Service Division to take a  
2 furlough day in October 2011, which was granted, and the approved request was  
3 recorded in the Service Division's Red Book.

4 November 23, 2011

5 On November 23, 2011, the evening before Thanksgiving, Duffy did not report for  
6 duty even though he was listed on the roster as scheduled to work. When Sergeant  
7 Ronald LaPointe (LaPointe), the supervisor on the shift, became aware that Duffy had  
8 not reported to work and that the shift was short-staffed,<sup>10</sup> he checked the Service  
9 Division's Red Book. LaPointe observed that Duffy was not listed as being on paid  
10 leave. LaPointe then directed a police officer named Dowd, who was working in the  
11 Service Division's office,<sup>11</sup> to contact Duffy. Dowd telephoned Duffy and informed him  
12 that he was on the roster to work that evening. Duffy responded that he had taken a  
13 furlough day and that his approved request for leave was listed in the Operations

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<sup>9</sup> Duffy testified that there was no written policy that a police officer who is involuntarily transferred must notify his superiors in his new division of requests to use furlough days, which his prior division previously approved. His commander in the Service Division Deputy Chief Edward McGinn (McGinn) testified that a longstanding, unwritten practice existed whereby an involuntarily transferred police officer would give such notification to his new superiors. However, I need not reconcile the testimony of Duffy and McGinn because it is not inconsistent as McGinn confirmed on cross-examination that no written policy existed.

<sup>10</sup> The cell room is on a lower level in the Police Station than the Service Division's office where LaPointe works.

<sup>11</sup> The Service Division's office is upstairs from the cell room.

1 Division Red Book. Duffy also urged Dowd to go upstairs and check out the Operations  
2 Division Red Book.<sup>12</sup>

3 Dowd then reported his conversation with Duffy to LaPointe. LaPointe  
4 subsequently reviewed the Operations Division red book and verified that Duffy was  
5 listed as being approved to take a furlough day on November 23<sup>rd</sup>. LaPointe did not  
6 require Duffy to report to work on November 23, 2011 and listed him as on a furlough  
7 day in the Service Division red book. Subsequent to November 23, 2011, LaPointe  
8 informed Duffy that he did not want "any more surprises."

9 December 24, 2011

10 On December 24, 2011, Duffy also was listed on the roster as scheduled to  
11 work.<sup>13</sup> When he had not reported to work by 11:30 PM, his shift commander  
12 Lieutenant James Grady (Grady) called him. Grady informed Duffy that he was on the  
13 roster to work that evening and asked what Duffy was doing. Duffy replied that he was  
14 having a glass of wine and enjoying his family. Grady then inquired why Duffy had not  
15 shown up for work. Duffy responded that he had asked for the day off back in January  
16 2011. Grady stated that Duffy's approved leave for December 24<sup>th</sup> was not listed in the  
17 Service Division Red Book but that Grady would check the Operations Division Red  
18 Book. The call then ended without Grady ordering Duffy to report to work. After the call

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<sup>12</sup> The Operations Division office is on a floor above the Service Division office.

<sup>13</sup> Duffy had worked earlier that week and admittedly did not check the roster to see whether he was scheduled to work on December 24, 2011.

1 ended, Grady checked the Service Division Red Book, which listed Duffy as being  
2 approved for leave on December 24, and the Police's Department computerized  
3 personnel records, which showed Duffy as having a wellness day but no furlough days  
4 left to use in 2011. Grady then recorded Duffy's absence as a sick day.

5 Thereafter, Grady informed LaPointe that Duffy had failed to show up for work on  
6 December 24<sup>th</sup>. LaPointe then told Grady that Duffy had failed to appear for work on  
7 November 23<sup>rd</sup>. LaPointe also related the conversation that he had with Duffy in which  
8 he informed Duffy that he did not want any more surprises.

9 On December 26, 2011, when Duffy returned to work, he approached Grady and  
10 asked why Grady had charged him sick leave for December 24<sup>th</sup>. Duffy expressed the  
11 concern that his eligibility to receive holiday pay<sup>14</sup> for Christmas might be jeopardized if  
12 he were designated as having called in sick on December 24<sup>th</sup>. Duffy also noted that  
13 he had other leave time to use. Grady responded that he would not change the  
14 designation. Duffy then approached Timothy Reynolds, the third-shift Union steward,  
15 and asked him to initiate a grievance over the matter.<sup>15</sup>

---

<sup>14</sup> Police officers earn a special higher rate of pay for Christmas and certain other holidays.

<sup>15</sup> Step 1 of the parties' contractual grievance procedure provides that Step 1 is an informal process where the aggrieved employee raises his grievance orally with his immediate supervisor and the immediate supervisor makes an oral disposition of the grievance. However, Chief Gemme indicated that since before he became police chief, including the periods when he was president of both the patrol officers' union and the superior officers' union, the unions presented grievances in the first instance to the then police chief(s) rather to an aggrieved employee's immediate supervisor. I need not

1           Also, on December 26, 2011, Grady notified Deputy Chief Edward McGinn  
2 (McGinn), who oversees the Service Division, that Duffy had failed to report to work on  
3 December 24, 2011 and about his phone conversation with Duffy.<sup>16</sup> Grady also told  
4 McGinn that Duffy had failed to report to work on November 23, 2011 and related what  
5 LaPointe had told him about his conversation with McGinn. Several days later, McGinn  
6 informed Chief Gary Gemme (Chief Gemme) that he was going to launch an  
7 investigation<sup>17</sup> into the matters that Grady had discussed with McGinn concerning Duffy.  
8           Shortly thereafter, incoming Union president Brian Halloran notified Grady about  
9 Duffy's grievance. Within a week of December 26, 2011, Grady informed McGinn<sup>18</sup>  
10 that Duffy had grieved Grady charging him sick leave for December 24<sup>th</sup>.<sup>19</sup> Thereafter,

---

reconcile the differences between the contractual language and Chief Gemme's testimony because it is not material to the outcome of the case.

<sup>16</sup> Grady usually did not bring up personnel matters with McGinn.

<sup>17</sup> The Police Department conducts two types of investigations into alleged employee misconduct. The Bureau of Professional Standards investigates major incidents, while unit commanders investigate more minor incidents (commander level investigations). Because the service division does not have a captain in charge, McGinn conducts its commander level investigations.

<sup>18</sup> Grady and McGinn typically spoke on a weekly basis.

<sup>19</sup> Grady testified that he informed McGinn about Duffy's grievance during the same conversation that he informed McGinn about Duffy's December 24, 2011 absence. However, McGinn testified that he had two conversations with Grady approximately one week apart. The first conversation concerned Duffy's December 24, 2011 absence and the second conversation concerned Duffy's grievance. I credit McGinn's testimony on this point because he testified with greater clarity and in more specific detail about the matter than Grady did.

1 McGinn requested that Grady and LaPointe submit reports regarding the events of  
2 November 23, 2011 and December 24, 2011.

3 On January 10, 2012, the Union filed a written grievance on behalf of Duffy that  
4 summarized the grievance as:

5 Officer Duffy was not given an opportunity to utilize one of his wellness  
6 days prior to the end the calendar year. This resulted in Officer Duffy's  
7 wellness day being "lost" in accordance to the "Use it or lose it" policy.  
8 Officer Duffy had been scheduled in the "red book" in operations for the  
9 day in question prior to being transferred to service division.

10 The Union also requested the following remedy:

11 Officer Duffy should have his wellness day rolled into the current calendar  
12 year (2012) where he may utilize the time in accordance with the "Use it or  
13 lose it" policy as well as his division's time off structure.<sup>20</sup>

14 When Chief Gemme received a copy of Duffy's grievance, he determined that  
15 charging Duffy for sick leave to cover his absence on December 24, 2011 was  
16 inappropriate because Duffy was not sick on that date. Chief Gemme ordered payroll to  
17 credit Duffy with a sick day and to charge him for a wellness day on December 24<sup>th</sup>.  
18 Chief Gemme subsequently notified the Union, and the City's payroll office made the  
19 change on January 13, 2012. Duffy did not become aware of the change until several  
20 months later.<sup>21</sup>

---

<sup>20</sup> Chief Gemme received a copy of Duffy's grievance on January 10, 2012.

<sup>21</sup> The parties introduced as Joint Exhibit #4 a snapshot of a computer screen from the City's administrative timekeeping system, which showed that the City restored Duffy's sick time on January 13, 2012 and which contained the surname of the City employee who made the change. However, Duffy asserted that the City had not actually credited him with a sick day on January 13, 2012 but that at a later date, the City altered its computer files to reflect that change. However, the snapshot of the computer screen is

1 Reports of Grady, LaPointe and McGinn

2 On January 15, 2012, Grady submitted the following report to McGinn:<sup>22</sup>

3  
4 On 24 December 11 Officer Thomas Duffy was listed as working on the  
5 roster in the cell, 2300-0700HRS. As of 2320HRS on that date he had not  
6 reported for duty. I called his phone. He answered, and I asked how are  
7 you doing. He said, I'm sitting here having a glass of wine enjoying my  
8 family. I told him you are on the roster to work tonight. He said no I'm on  
9 furlough. I said you are not in the book. He said he was in the book in  
10 Operations and he has taken the day the last ten years. I hung up the  
11 phone. I checked the computer. He had no furlough time left. He had  
12 one wellness day left. I checked the red book and there were two people  
13 in the book already. That is the maximum allowed. So I put him down  
14 sick.

15  
16 The next day when he reported for duty he asked why he was put down  
17 sick. I told him he had no furlough time and the red book was full.

18  
19 He was told previously on November 23, 2011 by Sgt. LaPointe that if he  
had any more time in the Operations Book to notify us so we would not  
have any surprises at 2300HRS.<sup>23</sup>

20  
21 On December 24, 2011 he was not listed for any day off in the red book.  
22 Officer Duffy was not denied his wellness day for 2011. He never asked  
23 to take the day. He could have taken the wellness day on Wednesday  
24 December 28, 2011, Thursday, December 29, 2011 or Friday, December  
25 30, 2011. There was only one person in the red book on those days.  
26 Duffy furlough October 10, 2011.

---

consistent with Chief Gemme's testimony that he ordered the change made on or about January 13, 2012. Thus, I decline to credit Duffy's assertion on this point.

<sup>22</sup> The report bore the subject reference of "P.O. Duffy, Wellness Day"

<sup>23</sup> I have reprinted Grady's report above, because this is the report that he submitted to the Employer. However, Grady's description of LaPointe's conversation with Duffy varies somewhat from LaPointe's testimony about that conversation. Earlier in the findings on page 6, I credited LaPointe's testimony as to the nature of the conversation because Grady was not actually present when LaPointe made the statements but instead was stating his second-hand understanding of the conversation.

1  
2 On January 23, 2012, LaPointe submitted a report to Grady regarding Duffy.<sup>24</sup>

3 LaPointe's January 23, 2012 report stated:

4 The undersigned Sergeant recalls that on one occasion I came in to work  
5 to find that Officer Duffy had not shown up for a scheduled day of work.  
6 There was no notation in our "red" book of his having a scheduled day off.  
7 Upon contacting Officer Duffy he informed me that he had scheduled the  
8 day off in Operations prior to being transferred to Services. The  
9 undersigned gave Duffy the scheduled furlough day, but informed him that  
10 we needed to know ahead of time of any scheduled days so as to  
11 preclude any last minute surprises.<sup>25</sup> The undersigned believes that this is  
12 the November 23 furlough day that is listed in our morning reports.

13 On February 8, 2012, McGinn submitted a report<sup>26</sup> to Chief Gemme regarding Duffy.<sup>27</sup>

14 In the February 8, 2012 report, McGinn described the nature of the complaint against

15 Duffy as:

16 On Monday 26 December 2011, this reporting Deputy was notified by Lt.  
17 James Grady, Unit Commander of the Service Division LH, of an issue  
18 involving P.O. Thomas C. Duffy and that officer's failure to report to work  
19 on the night of 24 December 2011; Christmas Eve.  
20

---

<sup>24</sup> The subject bore the reference "P.O. Duffy, Furlough from Ops".

<sup>25</sup> I have reprinted LaPointe's report above, because this is the report that he submitted to the Employer. LaPointe's description of his statement in the January 23, 2012 report varies somewhat from his testimony at hearing. During cross-examination, LaPointe repeatedly described his "word for word" comments to Duffy as "I don't want any more surprises." In the findings, I have credited LaPointe's testimony on this point, because it was made under oath and subject to questioning from both the Charging Party and the Employer.

<sup>26</sup> The subject of the report bore the heading Unit Investigation: PO Thomas C. Duffy.

<sup>27</sup> At that time, McGinn and Chief Gemme had a brief conversation in which McGinn informed the Police Chief that he was submitting the report.

1 Lt. Grady further advised me that Officer Duffy failed to adhere to the  
2 directives of his supervisors to properly notify his current supervisors of  
3 any time off requests he may have submitted to his commanders when he  
4 worked in the Operations Division LH.

5  
6 A perfunctory review of the allegations suggests that Officer Thomas C.  
7 Duffy may have violated the following Worcester Police Department's  
8 Rules and Regulations:

- 9  
10 1516.1 Neglect of Duty  
11 1515.1 Insubordination

12 McGinn made certain findings in his report and then completed an analysis of the  
13 complaint against Duffy. McGinn in his analysis stated:

14 Officer Duffy's contention that he was validly on a furlough day off on  
15 December 24<sup>th</sup> is summarily rejected. Despite being told to transfer his  
16 time from his prior unit, he failed to do so; at least in the case of this  
17 December 24<sup>th</sup>. Moreover, there is no policy, procedure, rule regulation or  
18 departmental custom that would assure that an officer that is transferred  
19 from one unit to another is guaranteed specific benefit days off.

20  
21 According to the report of Lt. James Grady, Officer Duffy was directed at  
22 least twice to inform his current supervisors of any days that he had  
23 requested off to Operations Division supervisors so as to avoid any "11:00  
24 PM surprises."<sup>28</sup>

25  
26 It seems that this directive was offered to Officer Duffy as a courtesy as  
27 the commanders and supervisors of one unit are not bound by a granting  
28 of time off given by officials of another unit. In practice, if an officer has  
29 already been granted a day off in a past unit, efforts will be made to  
30 accommodate him provided that the maximum day off number has not

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<sup>28</sup> McGinn identified LaPointe's comments to Duffy as one instance where a supervisor had directed Duffy to inform his supervisors of any days off that he had requested in the Operations Division. When asked on cross-examination, McGinn could not identify the second supervisor who gave a similar direction to Duffy or exactly when the supervisor issued those directions. Therefore, I decline to find that a second supervisor directed Duffy to inform his supervisors of any days off that he requested in the Operations Division.

1           been reached. In this matter, this is not the case as Officer Duffy had no  
2           furlough days remaining and even if he did, he never informed his current  
3           officials of any such days having been logged.  
4

5           Duffy's Suspension

6           On February 10, 2012, Chief Gemme issued Duffy a two-day suspension.<sup>29</sup> The

7           February 10, 2012 suspension letter stated in pertinent part:

8           This letter is being served to advise you that you are being suspended  
9           without pay for your failure to report to work on December 24, 2011, as  
10          stated below:

11  
12          You were scheduled for a tour of duty on December 24, 2011 and when  
13          contacted by Lieutenant James Grady via telephone phone that night, you  
14          replied to Lieutenant Grady that you were on "furlough" [emphasis in  
15          original] and that you were, "home enjoying a glass of wine enjoying your  
16          family". As a result, Lieutenant Grady subsequently listed you as being  
17          sick for December 24<sup>th</sup> and called in a replacement officer to work your  
18          shift on an overtime basis.

19  
20          In his report to the investigating Deputy, Lt. Grady stated that early on in  
21          your reassignment from Operations Last Half to Service Division Last Half,  
22          you were directed to notify your supervisors of any time off requests that  
23          you had submitted to your supervisors from Operations Last Half,  
24          however, you failed to do so.

25  
26          The fact that you were at work the preceding three (3) days, would have  
27          had access to all time records as well as the automated Administrative  
28          Time System, clearly demonstrate that you knew or should have known  
29          that you were scheduled to be working on December 24, 2011.  
30          Furthermore, on December 24, 2011, you had no furlough days remaining  
31          for calendar year 2011. Lastly, there were two Service Division Last Half  
32          officers, the maximum permitted to be off, already scheduled on days off  
33          on December 24, 2011.  
34

---

<sup>29</sup> Shortly before Chief Gemme issued Duffy the two-day suspension, he informed McGinn about the discipline that he intended to impose. The Police Chief also discussed with McGinn the recommendations that McGinn had made in the February 8, 2012 report.

1 As a result of the investigation I have determined that you have violated  
2 the following two Rules and Regulations of the Worcester Police  
3 Department:  
4

5 **1515.1 Insubordination** [Emphasis in the Original]: Deliberately failing or  
6 refusing to obey a lawfully issued order.  
7

8 **15616.1 Neglect of Duty**: Being absent from assigned duty without leave  
9 or failing to take suitable and/or required police action when a crime,  
10 public disorder or other incident requires police attention.  
11

12 Accordingly, you are hereby suspended without pay for a period of two  
13 days, Monday February 13, 2012 and Tuesday, February 14, 2012.<sup>30</sup> You  
14 may request a hearing before the City Manager within forty-eight hours of  
15 the receipt of this notice on the question whether there is just cause for  
16 this suspension ...<sup>31</sup>

#### 17 Civil Service Proceedings

18 Duffy subsequently requested a hearing before the City Manager. On June 14,  
19 2012, the City reduced Duffy's suspension from two days to one day. Duffy then  
20 appealed his one-day suspension for neglect of duty to the Civil Service Commission.

21 On April 18, 2013, the Civil Service Commission voted to adopt the March 1,  
22 2013 findings and recommended decision (March 1, 2013 decision) of Administrative  
23 Magistrate Judithann Burke (Burke), which vacated Duffy's one-day suspension and

---

<sup>30</sup> Although the City suspended Duffy for two days, Duffy indicated that he actually lost three days of pay.

<sup>31</sup> Chief Gemme testified at hearing that he suspended Duffy because he failed to report to work on November 23, 2011 as well as on December 24, 2011. He indicated that although he did not reference Duffy's November 23, 2011 absence in the February 10, 2012 suspension letter, McGinn's February 8, 2012 letter report referenced that absence and that the Police Chief relied on that report when he imposed the discipline.

1 ordered the City to reimburse Duffy for any lost pay and benefits related to his one-day  
2 suspension. The March 1, 2013 decision stated in pertinent part that:

3 After a careful review of all the testimony and documents in this case, I  
4 have concluded that the Appointing Authority did not have just cause to  
5 impose the one-day suspension on the Appellant. The Appointing  
6 Authority has not proven by a preponderance of the evidence that the  
7 Appellant violated Paragraph 1516.1 of the WPD Rules and Regulations  
8 on December 24, 2011.

9  
10 Rule 1516.1 is labeled "Neglect of Duty" and defines same as being  
11 absent from assigned duty without leave. In actuality, after Lt. Grady  
12 spoke to the Appellant [Duffy] on December 24, 2011, he put the latter  
13 down as "sick." Sick leave is a form of leave in the WPD. Several weeks  
14 later, after the Union's filing of the grievance, December 24 was recorded  
15 as a "wellness" day. This is also an authorized leave. Under either  
16 scenario, sick day or wellness day, the Appellant was granted leave for  
17 December 24. Ergo, he was not absent from assigned duty on December  
18 24 without leave.

19  
20 Next the testimony of all parties was found to be credible with regard to  
21 the individual beliefs of each concerning the use of single wellness and  
22 furlough days in the various divisions as well as the use of the Red Book.  
23 In this case, the Deputy Chief and the superior officers in the SD all  
24 believe that it was incumbent upon the Appellant to re-request his desired  
25 days off in the SD after the transfer from the OD. At the same time, the  
26 Appellant and Lt. Fogarty share the legitimate belief that past practice  
27 dictated that the Red Book entries were shared among shift supervisors  
28 after transfers and the Appellant did not need to take the initiative.

29  
30 The fissure in this case appears to be the lack of communication among  
31 the parties. Deputy Chief McGinn, Sgt. LaPointe and Lt. Grady all  
32 acknowledged that there is no written rule or regulation compelling an  
33 officer who is involuntarily transferred to approach the supervisor in his  
34 new division and re-request his desired days off. As such, the Appellant's  
35 belief that he did not need to do anything further regarding his time off  
36 appears reasonable. He had already used furlough days in August,  
37 September and October as a member of the SD. On November 23, he  
38 was phoned at home, but not ordered into work. He was given a furlough  
39 day for that time. It is unclear exactly what additional message he may  
40 have received concerning future furlough days in the SD in his November



1 Turning to the first three elements of the prima facie case. Duffy engaged in  
2 activity protected by Section 2 of the Law when he requested that the Union file a  
3 grievance on his behalf in late December 2011, and when the Union subsequently filed  
4 a written grievance on his behalf on January 10, 2012. See Boston City Hospital, 11  
5 MLC 1065 (1984). Second, the City was aware of Duffy's grievance because Halloran,  
6 the incoming Union president, notified Grady about the grievance and, in turn, Grady  
7 notified McGinn about the grievance. Also, Chief Gemme received a copy of the  
8 Union's written grievance on or about the date of its submission. Third, Duffy's  
9 suspension constitutes adverse action. See Town of Dracut, 25 MLC 131, 133, MUP-  
10 1397 (disciplinary actions are examples of adverse action).

#### 11 Animus

12 Next, I must consider whether there is evidence of employer animus towards  
13 Duffy's protected activity. A charging party may proffer direct or indirect evidence of  
14 discrimination in support of its claim. See Town of Brookfield, 28 MLC 320, 327-328,  
15 MUP-2538 (May 1, 2002), aff'd sub nom., Town of Brookfield v. Labor Relations  
16 Commission, 443 Mass. 315 (2005). Here, Duffy proffers indirect evidence in support  
17 his claim of animus. The burden of proof in indirect evidence cases is set forth in  
18 Trustees of Forbes Library v. Labor Relations Commission (Trustees of Forbes Library),  
19 384 Mass. 559 (1981).

20 Absent direct evidence of unlawful motivation, unlawful motivation may be  
21 established through circumstantial evidence and reasonable inferences drawn from that

1 evidence. Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4,  
2 2001). Circumstantial factors may include; the timing of the adverse action in relation to  
3 the protected activity, Town of Somerset, 15 MLC 1523, 1529, MUP-6404 (March 9,  
4 1989); the insubstantiality of the reasons given for the adverse action, Commonwealth  
5 of Massachusetts, 14 MLC 1743, 1749, SUP-3081 (May 19, 1988); and the employer's  
6 divergence from longstanding practices. Town of Mashpee, 36 MLC 163, 171, MUP-02-  
7 3653 (April 15, 2010). The City argues that because Chief Gemme approved Duffy's  
8 grievance in January 2012, his decision to subsequently suspend Duffy could not have  
9 been motivated by animus towards Duffy's protected activity.

10 The facts before me show that Chief Gemme issued a notice of suspension to  
11 Duffy within six weeks of Duffy initiating his grievance and within four weeks of his  
12 receipt of the written grievance. Chief Gemme in his February 10, 2012 letter states  
13 that he suspended Duffy because of his failure to report to work on December 24, 2011.  
14 However, at hearing, Chief Gemme contended that he suspended Duffy not only for his  
15 December 24, 2011 absence but also for his absence on November 23, 2011, and that  
16 both absences were discussed in McGinn's February 8, 2012 report. The close timing  
17 of the suspension notice to Duffy's concerted, protected activity coupled with the  
18 inconsistent and shifting reasons that the City has given as the basis for Duffy's  
19 suspension leads me to conclude that the City's decision to suspend Duffy was  
20 motivated by animus towards his protected activity. See Everett Housing Authority, 13  
21 MLC 1001, 1006-1007 (inferring animus when circumstantial evidence such as timing

1 and shifting and inconsistent reasons are present). Thus, Duffy has established the four  
2 elements of his prima facie case.

### 3 Employer's Burden of Production

4 Under the three-part Trustees of Forbes Library analysis, once a charging party  
5 establishes a prima facie case of retaliation, it is the employer's burden to produce a  
6 legitimate, non-discriminatory motive for taking the adverse action. The employer's  
7 burden to produce legitimate, non-discriminatory reasons for taking the adverse action  
8 is more than simply stating an unsubstantiated allegation. Commonwealth of  
9 Massachusetts, 25 MLC 44, 46, SUP-4128 (August 24, 1998). The employer must  
10 state a lawful reason for its decision and produce supporting facts indicating that the  
11 proffered reason was actually a motive in the decision. Trustees of Forbes Library, 384  
12 Mass. at 566; Quincy School Committee, 27 MLC at 92; Commonwealth of  
13 Massachusetts, 25 MLC at 46.

### 14 Collateral Estoppel

15 Duffy argues that pursuant to the doctrine of collateral estoppel, the City cannot  
16 claim any legitimate reasons for Duffy's suspension. Specifically, because the Civil  
17 Service Commission ruled that the City did not have just cause to suspend Duffy, the  
18 City is precluded from raising the issue of the legitimacy of Duffy's discipline in this  
19 forum. The judicial doctrine of collateral estoppel provides that when an issue of fact or  
20 law is actually litigated and determined by a final judgment, the determination is  
21 conclusive in a subsequent action between the parties, whether on the same or a

1 different claim. Martin v. Ring, 401 Mass. 59, 61 (1987). Duffy points to the Supreme  
2 Judicial Court (SJC) decision in Alba v. Raytheon Co. (Alba), 441 Mass. 836 (2004) to  
3 support his claim that the doctrine may apply to administrative determinations, such as  
4 the Civil Service Commission, as well as judicial decisions. The SJC in the Alba case  
5 delineated four factors that must be satisfied before the doctrine applies. The four  
6 factors are: 1) was there a final judgment on the merits in the prior adjudication; 2) was  
7 the party against whom estoppel is asserted a party (or in privity with a party) against  
8 whom the judgment is asserted; 3) was the issue decided in the prior adjudication  
9 identical with the one presented in the action in question; and 4) was the issue decided  
10 in the prior adjudication essential to the judgment in the prior adjudication. See Id. at  
11 842. Here, it is undisputed that the decision of the Civil Service Commission became a  
12 final order because the City did not appeal the order, and that the parties in both actions  
13 are identical. However, a review of the Civil Service Commission decision shows that  
14 the issue in that proceeding, which was whether pursuant to M.G.L. c.31, the City had  
15 just cause to suspend Duffy, is not the same issue that is the subject of the present  
16 case, which is whether the City retaliated against Duffy for engaging in concerted,  
17 protected activity in violation of Section 10(a)(3) of the Law. Because the issues are not  
18 identical, I decline to find that the City is estopped from claiming that it had legitimate  
19 reasons to discipline Duffy.

20 Turning to the City's proffered reasons for its actions, the City cites Duffy's  
21 absence on December 24, 2011 and his failure to advise his supervisors before

1 December 24, 2011 that the Operations Division had granted him the time off as  
2 legitimate reasons. It is undisputed that Duffy was absent from work on December 24,  
3 2011. Further, the City presented testimony from LaPointe, one of Duffy's supervisors,  
4 to show that when Duffy did not report to work on November 23, 2011, LaPointe  
5 subsequently informed him that he did not want any more surprises. McGinn, who as  
6 deputy chief conducted the investigation into Duffy's conduct on December 24, 2011  
7 and Chief Gemme, who made the decision to suspend Duffy, relied, in part, on  
8 LaPointe's comments to Duffy as grounds for disciplining Duffy. As the City correctly  
9 points out, pursuant to Trustees of Forbes Library, the City need not persuade the trier  
10 of fact that it was correct in its belief that Duffy had committed transgressions but only  
11 that City had proposed reasons for the discipline and facts to support it. Trustees of  
12 Forbes Library, 384 Mass. at 566. Consequently, the City has met its burden or  
13 production.

14 "But For" Analysis

15 Once an employer produces evidence of a legitimate, non-discriminatory reason  
16 for taking the adverse action, the case becomes one of "mixed motives." Under the  
17 Trustees of Forbes Library analysis, the Commonwealth Employee Relations Board  
18 (CERB) considers whether the employer would have taken the adverse action but for  
19 the employee's protected activities. Suffolk County Sheriff's Department, 27 MLC at  
20 160; Quincy School Committee, 27 MLC at 92. The charging party bears the burden of  
21 proving that, but for the protected activity, the employer would not have taken the

1 adverse action. Athol-Royalston Regional School Committee, 28 MLC 204, 214, MUP-  
2 2279 (January 14, 2002); Town of Athol, 25 MLC 208, 211, MUP-1448 (June 11, 1999).

3 For the following reasons, I find that the City would not have suspended Duffy for  
4 his December 24, 2011 absence if he had not engaged in concerted protected activity.  
5 The facts before me show that the City actually condoned Duffy's absence on  
6 December 24, 2011 before it cited his absence as grounds for discipline on February  
7 10, 2012. When Grady called Duffy on December 24, 2011 to inquire about his  
8 whereabouts and Duffy told him that the Operations Division previously had approved  
9 him for leave, Grady did not order Duffy to report to work. Grady subsequently  
10 confirmed that Duffy previously had been approved for the time off when he worked in  
11 the Operations Division and that Duffy still had a wellness day available to him.  
12 Because the Service Division already had two police officers on leave on December 24,  
13 2011, which was the ten-percent of the total shift and the maximum permissible under  
14 the Work Schedule Policy, Grady marked Duffy as sick. It was only after Duffy  
15 protested the sick leave designation to Grady that Grady notified McGinn about Duffy's  
16 absence and about LaPointe's earlier comments to Duffy that he did not want any more  
17 surprises.<sup>33</sup>

---

<sup>33</sup> While LaPointe subsequently cautioned Duffy about not wanting any more surprises after Duffy was absent on November 23, 2011, he also condoned Duffy's absence by designating Duffy as being on a furlough day even though Duffy was only listed as approved for leave in the Operations Division Red Book and not in the Service Division Red Book.

1           After Grady complained to McGinn about Duffy's absence on December 24,  
2 2011, McGinn commenced an investigation into Duffy's actions that evening. Within a  
3 week, Grady informed McGinn about the grievance and McGinn subsequently  
4 requested that Grady and LaPointe submit reports about Duffy's absence on December  
5 24, 2011 and November 23, 2011 respectively.

6           During the pendency of the investigation, Chief Gemme on or about January 13,  
7 2012 affirmed Duffy's contractual right to use his wellness day on December 24, 2011  
8 when he upheld Duffy's grievance and ordered the payroll department to charge Duffy  
9 for a wellness day on December 24<sup>th</sup> and to credit him with the sick day that he had  
10 previously been charged for that date. Thus, Chief Gemme acknowledged the  
11 legitimacy of Duffy's actions on December 24<sup>th</sup>. However, approximately one month  
12 later, Chief Gemme cited Duffy's conduct on December 24<sup>th</sup> as neglect of duty and  
13 insubordination and grounds for a two-day suspension.

14           Additionally, in the February 10, 2012 suspension letter, Chief Gemme claimed  
15 that Duffy had committed insubordination by ignoring directives to notify his supervisors  
16 of any time off requests that he had submitted to his prior supervisors in the Operations  
17 Division. However, the City's witnesses could not identify any supervisor other than  
18 LaPointe who had given Duffy directives about time off requests. Finally, McGinn  
19 acknowledged that the City did not have a written policy that required Duffy to notify his  
20 supervisors about time off requests that he had submitted in the Operations Division.

21

CONCLUSION



MARGARET M. SULLIVAN  
HEARING OFFICER