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

a) Suspend the bicycle patrol program implemented on or about June 20, 1996;

b) Make whole any member of the Union's bargaining unit who lost wages or benefits, or suffered other harm as a result of the bicycle patrol program implementation, plus interest on all sums due calculated in the manner specified in *Everett School Committee*, 10 MLC 1609 (1984);

c) Upon request by Local 482, International Brotherhood of Police Officers, bargain in good faith to resolution or impasse over the mandatory subjects of bargaining directly affected by the implementation of a bicycle patrol program;

d) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate and where notices are usually posted, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the Attached Notice to Employees; and,

e) Notify the Commission in writing within ten (10) days of receiving this Decision and Order of the steps taken to comply with it.

SO ORDERED.

NOTICE TO EMPLOYEES

A hearing officer of the Labor Relations Commission has determined that the Town of East Longmeadow (Town) has violated Sections 10(a)(5) and (1) of General Laws, Chapter 150E, the Public Employee Collective Bargaining Law (the Law) by its June 1996 implementation of a bicycle patrol program without giving Local 482, International Brotherhood of Police Officers prior notice and an opportunity to bargain to resolution or impasse over the mandatory subjects of bargaining directly affected by the implementation of the bicycle patrol program.

WE WILL NOT implement a bicycle patrol program without giving Local 482, International Brotherhood of Police Officers prior notice and an opportunity to bargain to resolution or impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under the Law.

WE WILL suspend the bicycle patrol program implemented in June 1996.

WE WILL make whole any police officer represented for the purposes of collective bargaining by Local 482, International Brotherhood of Police Officers who lost wages or benefits or suffered other harm as a result of the bicycle patrol program implemented in June 1996.

WE WILL upon request by Local 482, International Brotherhood of Police Officers bargain in good faith to resolution or impasse over the mandatory subjects of bargaining directly affected by the implementation of a bicycle patrol program.

[signed]
FOR THE TOWN OF EAST LONGMEADOW

* * * * * *

In the Matter of TOWN OF DRACUT

and

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 379

Case No. MUP-1397

65.22 filing a grievance
91.1 dismissal
91.52 failure to file answer

February 17, 1999
Robert C. Dumont, Chairman
Helen A. Moreschi, Commissioners

Jean Zeiler, Esq. — *Representing the International Brotherhood of Police Officers, Local 379*

Stanley Weinberg, Esq. — *Representing the Town of Dracut*

DECISION[1]

Statement of the Case

On January 9, 1996, the International Brotherhood of Police Officers, Local 379 (Union) filed a charge with the Labor Relations Commission (the Commission) alleging that the Town of Dracut (the Town) had violated Sections 10(a)(5), (3) and (1) of M.G.L.c.150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on September 5, 1996 alleging that the Town had violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by retaliating against unit members for engaging in concerted, protected activity. The Commission dismissed those portions of the Union's charge alleging that the Town had violated Section 10(a)(5) of the Law.[2] The Town filed an answer to the complaint on or about July 10, 1997.

On July 15, 1997, Stephanie B. Carey, Esq., a duly designated administrative law judge (ALJ) of the Commission, conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. At the hearing, the Union presented two oral motions.[3] Both parties submitted

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

2. The Union did not seek reconsideration pursuant to 456 CMR 15.03 regarding that alleged violation.

3. [See next page.]

post-hearing briefs on or about September 3, 1997. On September 10, 1997, the ALJ issued her Recommended Findings of Fact in which she made rulings denying the Union's two motions.[4] The Town filed timely challenges to these findings pursuant to 456 CMR 13.02(2).

Findings of Fact[5]

The Town challenged the ALJ's Recommended Findings of Fact, arguing that the ALJ had omitted four specific findings. After reviewing those challenges and the record, we adopt the ALJ's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

A Board of Selectmen, an elected body of five members, governs the Town. The Union is the exclusive collective bargaining representative for all permanent civil service police officers employed by the Town, excluding the Chief and the Deputy Chief.

In October 1991, the following members comprised the Board of Selectmen: Frank Gorman, Chairman, Douglas G. Willett (Willett), Vice-Chairman, John F. Lyons, Mary I. Rowe and Warren L. Shaw, Jr. (Shaw). The selectmen voted at that time to furlough Town employees for seven days by requiring these employees to take seven three-day weekends without pay during the summer and fall of 1991. In lieu of having the police and fire department personnel take seven days off from work, the selectmen voted to eliminate the pay that these public safety personnel would have received for seven holidays.[6] The unions representing the Town's police and fire personnel were the only unions to file grievances when the Town implemented its furlough policy. The Union and the Town resolved the grievance filed by the Union over the furlough policy on April 6, 1992 through the auspices of the state Board of Conciliation and Arbitration. Pursuant to a settlement agreement, the Town compensated unit members in the form of sick time for the pay that the police officers had lost.

In June 1995, the following members comprised the Board of Selectmen: James O'Loughlin, Chairman, Jack DeTillio (DeTillio), Vice-Chairman, Michael Blatus (Blatus), Willett and Shaw.[7] At a meeting of the Board of Selectmen on June 13, 1995, Blatus made a three-part motion[8] "the Board (of Selectmen) set the summer schedule for the months of July, August and September for the second Tuesday of the month; the Town Hall evening hours be suspended until September and that Town Hall be closed on July 3rd, 1995."[9] After Blatus made the motion and Willett seconded it, the following exchange took place.[10]

> Mr. Shaw asked if the day before the 4th of July was a normal day off.
>
> Mr. Piendak replied that "it's not provided for—the 4th is on a Tuesday."
>
> Mr. O'Loughlin said "so we'll be closed on Tuesday."
>
> Mr. Shaw stated "The people in this building have been gracious to the town when we've had our financial problems so I don't have a problem with giving them an additional day off."
>
> Mr. Piendak said "they were very cooperative during the furlough day period—without question."
>
> Mr. Shaw said "that's right, and this is the time to remember those days."
>
> Mr. Blatus: "exactly."[11]

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3. The Union moved to have all allegations deemed admitted as true because the Town failed to submit its answer to the complaint in a timely manner. The Union also moved to amend the complaint to add an allegation that in addition to the Town's conduct in 1995 which was the subject of the complaint that the Town had engaged in the same kind of conduct in 1996. The Union later reduced this second motion to writing. The Town opposed both motions.

4. We affirm those rulings. First, the Commission has previously observed that a late-filed answer does not automatically preclude a party from presenting any and all of its defenses at a hearing. *Commonwealth of Massachusetts*, 20 MLC 1179 (1993). In the present case, the Union was not unduly prejudiced by the Town's late answer. *See Commonwealth of Massachusetts*, 22 MLC 1200 (1995). Second, we have previously observed that the complaint should describe the facts to be fully litigated to provide both parties an opportunity to contest these facts. *Town of Randolph*, 8 MLC 2044, 2050 (1982). At the hearing, the Union raised for the first time the allegation that the Town had again denied unit members a day off with pay in 1996. To permit the Union to amend the complaint at the hearing to add this new factual allegation would have unduly prejudiced the Town's ability to contest the factual basis of the allegation and to defend against such an allegation. *Id.* at 2051.

5. The Commission's jurisdiction in this matter is uncontested.

6. Police officers are compensated for holidays pursuant to Article 21 of the collective bargaining agreement that reads, in part:

> (3) Police officers receive an additional day's pay at the straight time rate for holidays worked.
>
> (4) Police officers shall have the option of being paid for such holiday or receiving compensatory time off for same. If an officer elects to take time off in lieu of holiday pay. (sic) Such officer shall take time off within seven (7) calendar days of the date on which it was accrued unless, if such officer entitled to time elects to take the time off later than seven (7) days after written notice of the date on which he/she wishes to take the time. As no more than four (4) officers may be on vacation at a given time, the vacation schedule will take precedence over compensatory time off if taking the time off would result in more than four (4) officers being out.
>
> (5) If a holiday shall occur while an employee is on vacation or not scheduled to work, he/she shall be compensated for such holiday with an additional day's pay at the regular rate as if he/she had worked on such holiday.

7. The Town requested a finding of fact that Blatus was not a selectman in 1991 when the furlough issue arose. The ALJ clearly noted in her findings that only two of the members of the Board of Selectmen in June 1995 had also been selectmen in 1991. The ALJ also named the members of both Boards of Selectmen. Because the Town's requested finding would merely reiterate a fact that the ALJ had already found, the Commission declines to issue this finding.

8. The Town requested us to amend the findings to state that Blatus made the motion during the conduct of new business regarding summer scheduling; that the issue was not specified on the agenda, and that the selectmen had not engaged in prior discussion on this issue. The Union alleged anti-union animus on the basis of certain comments that were made during the meeting and that are reprinted below. This additional information is not relevant to those comments. The record also does not contain sufficient information to support the finding that the Town is seeking. Thus, the Commission declines to add the requested findings.

9. The Commission agrees with the Town that the content of the entire motion is relevant and should be reprinted.

10. The Board meeting was videotaped and the parties have agreed that the transcript of the relevant portion of that hearing is an accurate reflection of the conversation at issue.

11. Dennis Piendak (Piendak) was present at the meeting in his capacity as Town Manager but he is not a member of the Board of Selectmen. Piendak was also the Town Manager in 1991.

The selectmen passed the motion unanimously.[12] The employees at Town Hall received July 3, 1995 off with pay.[13] Police and fire personnel worked on that day and received no additional monetary compensation or paid leave.[14]

Opinion

The Commission applies a three-step analysis when it reviews an alleged violation of Section 10(a)(3) of the Law. *Trustees of Forbes Library* v. *Labor Relations Commission*, 384 Mass. 559, 565 (1981); *Town of Clinton*, 12 MLC 1361, 1364 (1985). First, the Commission determines whether the charging party has established a *prima facie* case of retaliation based on protected activity by producing evidence to support each of the four elements: 1) that the employee was engaged in activity protected by Section 2 of the Law; 2) that the employer was aware of this activity; 3) that the employer took adverse action against the employee; and 4) that the employer's conduct was motivated by a desire to penalize or discourage this protected activity. *Boston City Hospital*, 11 MLC 1065, 1071 (1984). If the charging party establishes a *prima facie* case, the employer may then offer evidence of one or more lawful reasons for taking the adverse action. Finally, if the employer produces that evidence, the employee must establish that, "but for" the protected activity, the employer would not have taken the adverse action. *Trustees of Forbes Library* at 563.

In this case, the Union had filed a grievance to protest the loss of holiday pay that was caused when the Town implemented the furlough policy. This kind of grievance activity is protected by Section 2 of the Law. *Town of Southborough*, 21 MLC 1242, 1248 (1994). The Commission finds that the Town was certainly aware of this grievance because the parties had actually negotiated a settlement that resolved the grievance. The next question is whether the Union suffered an adverse action as the result of the shutting down of Town Hall. Prior Commission case law defines an adverse action as an adverse personnel action. *Commonwealth of Massachusetts*, 15 MLC 1644, 1649 (1989); *Commonwealth of Massachusetts*, 14 MLC 1743, 1747 (1988); *Minuteman Regional Vocational School District*, 10 MLC 1177, 1184 (1983); *City of Boston*, 10 MLC 1140, 1144 (1983); *Commonwealth of Massachusetts*, 9 MLC 1059, 1064 (1982); *Fall River School Committee*, 7 MLC 1454, 1462 (1980). Common examples are a suspension, *Commonwealth of Massachusetts*, 15 MLC at 1644; a discharge, *Commonwealth of Massachusetts*, 14 MLC at 1743; an involuntary transfer, *Fall River School Committee*, 7 MLC at 1454; or a reduction in supervisory authority, *Town of Clinton*, 12 MLC at 1361. All of the above-cited cases involve an employer's action that adversely affected a person's employment. *See Id.* Here, the selectmen's decision to shut down Town Hall on July 3, 1994 did negatively impact members of the bargaining unit because they did not receive the same benefit received by other employees of the Town. Therefore, we must consider whether this disparate treatment was motivated by the selectmen's decision to penalize the members of the unit for their protected activity.

Philip Berard, president of the Union local, testified that, in his opinion, the comments that were made at the June 13, 1995 selectmen's meeting and which were reprinted above demonstrated the Town's anti-union animus. In cases in which a decision-making body is charged with anti-union animus, the Commission examines how the individual members have voted to determine whether a particular decision was improperly motivated. *See e.g., Town of Northborough*, 22 MLC 1527, 1549 (1996); *Town of Plainville*, 22 MLC 1337, 1353 (1996); *Town of Randolph*, 8 MLC 2044, 2053 (1982). Here, the vice-chairman of the selectmen DiTillio testified that he was present when the disputed conversation took place. He claimed that the comments of Shaw and Piendak did not influence him in any way because he did not understand the nature of the conversation. DiTillio was unaware at that time that unit members had previously grieved the furlough policy. Rather, he testified that the operational needs of the Town were the reason that he and the other selectmen had voted in favor of Blatus's motion. He claimed that the selectmen had anticipated that very few patrons would visit Town Hall on July 3, 1995.

Piendak testified that the Town had a practice of permitting Town Hall employees to have relief days, days when the employees were permitted to leave work with pay, on extraordinary occasions. These relief days occurred in emergency or weather-related cases. The Town required public safety personnel to remain on duty on these relief days. The Town never provided any kind of additional compensation to the employees who continued to work. Piendak noted that it would have endangered public safety if the Town had permitted members of the police and fire departments to stay home from work on July 3, 1995.

Therefore, the testimony of the selectmen who voted to close Town Hall on July 3, 1995 does not demonstrate that the selectmen voted in favor of Blatus's motion for any reason other than the reasons given by the employer's witnesses on the record. However, the Commission has previously ruled that a charging party need not introduce direct evidence of unlawful motivation but rather may offer circumstantial evidence and reasonable inferences if there is no direct evidence. *Commonwealth of Massachusetts*, 6 MLC 2041, 2045 (1980). Circumstantial factors may include: the timing

12. The ALJ had previously noted this fact in her recommended findings, which obviates the request by the Town that the Commission make the finding.

13. The Commission in response to the Town's proposed finding hereby takes administrative notice of the relevant fact that July 3, 1995 was a Monday; the Independence Day holiday was observed on Tuesday, July 4, 1995.

14. The Town requested a finding that "The closing of Town Hall on July 3, 1995 and relieving non-emergency employees from duty with pay did not impose any additional, non-budgeted costs upon the Town; on the other hand, the giving of an additional days pay to public safety employees (police and fire) would have imposed an unbudgeted cost on the Town of approximately eight to ten thousand dollars." Piendak testified about the potential cost to the Town of treating July 3, 1995 as a holiday for the police and fire personnel. The Selectmen, however, never raised the issue of the potential cost when they actually voted to close Town Hall. This information only arose retrospectively and is not relevant to our determination about why the selectmen voted as they did at the time of the vote. Thus, the Commission declines to amend the findings to include the additional fact requested by the Town.

of the adverse action in relation to the protected activity, *Town of Somerset*, 15 MLC 1523, 1529 (1989); the insubstantiality of the reasons given for the adverse action, *Commonwealth of Massachusetts*, 14 MLC 1743, 1749 (1988); the employer's divergence from longstanding practices, *Everett Housing Authority*, 13 MLC 1001, 1006 (1986); expressions of animus or hostility towards the bargaining representative, *Town of Andover*, 17 MLC 1475 (1991). Here, the record does not reflect circumstantial evidence of the employer's improper motivation. The timing of the vote of the Board of Selectmen does not support the Union's claim of animus because the Union settled the furlough grievance approximately three years before the meeting of June 13, 1995. The Union also has not shown that the reasons that the Town gave for its actions were illusory. Neither Shaw nor Piendak directly referred to the Union or criticized the Union in the conversation that took place between them on June 13, 1995. The speakers instead praised the Town Hall employees. Therefore, the Union has failed to satisfy its burden of showing a prima facie case of retaliation because the record does not demonstrate that the Town's actions were motivated by a desire to penalize members of the unit because they had filed a grievance three years earlier.

Conclusion

Based on the record for the reasons stated above, the Commission concludes that the Town did not retaliate against members of Local 379 for engaging in concerted, protected activity in violation of Sections 10(a)(3) and (1) of the Law. Therefore, this Complaint of Prohibited Practice is DISMISSED.

SO ORDERED.

* * * * * *