In the Matter of TOWN OF BROOKFIELD

and

PETER GRAUPNER, JAMIE GRIFFIN, and KENNETH HAYES

and

MASSACHUSETTS COALITION OF POLICE, AFL-CIO

Case No. MUP-2538

45.25	*prohibited practice*
62.3	*discrimination*
65.	*interference, Restraint or Coercion*
65.62	*threat of reprisal*
82.12	*other affirmative action*
91.1	*dismissal*
92.33	*rules of evidence*
92.45	*motion to re-open*

May 1, 2002
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner
Peter G. Torkildsen, Commissioner

Christopher J. Groll, Esq.	*Representing the Town of Brookfield*
Leigh A. Panettiere, Esq.	*Representing Peter Graupner, Jamie Griffin, Kenneth Hayes, and the Massachusetts Coalition of Police, AFL-CIO*

DECISION[1]

Statement of the Case

On November 15, 1999, Peter Graupner, Jamie Griffin, and Kenneth Hayes (Charging Parties) filed a prohibited labor practice charge with the Labor Relations Commission (Commission) alleging that the Town of Brookfield (Town) had failed to re-appoint the Charging Parties in retaliation for their efforts to organize a union, in violation of Sections 10(a)(3) and (1) of M.G.L. c. 150E (the Law). On November 18, 1999, the Charging Parties filed a Motion for In-Person Investigation and Expedited Probable Cause Determination. In the memorandum the Charging Parties submitted in support of that motion, they also alleged that the Town had independently violated Section 10(a)(1) of the Law by its conduct on November 14 and 15, 1999.

The Commission allowed the Charging Parties' motion for an expedited in-person investigation, and a Commission agent conducted an in-person investigation of the Charging Parties' allegations on November 26, 1999. In a post-investigation submission, the Charging Parties alleged two additional violations of Section 10(a)(1): 1) the Town informed police officers in other communities that it would ask the state police to monitor Graupner for traffic violations; and 2) the Town continually asked Graupner to return items the Town claimed were Town property. Following the investigation, the Commission issued a three-count Complaint of Prohibited Practice alleging that the Town had: 1) failed to re-appoint the Charging Parties in retaliation for engaging in concerted activity protected by Section 2 of the Law in violation of Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law; 2) interfered with, restrained, and coerced the Charging Parties in the exercise of their rights on November 14, 1999 in violation of Section 10(a)(1) of the Law; and 3) interfered with, restrained, and coerced the Charging Parties in the exercise of their rights on November 15, 1999 in violation of Section 10(a)(1) of the Law. The Commission dismissed that portion of the charge alleging that a statement by the Chairman of the Town's Board of Selectmen on October 26, 1999 violated Section 10(a)(1) of the Law. The Commission also dismissed the allegations that the Town had violated Section 10(a)(1) of the Law by telling unnamed police officers in other municipalities that the Town would ask the state police to pull over Graupner for traffic violations and by continually demanding that Graupner return items the Town claimed belonged to it.

On January 14, 2000, the Charging Parties filed a Request for Reconsideration with the Commission, asking the Commission to reconsider its decision to dismiss three of the allegations they had raised during the investigation. By letter dated January 28, 2000, the Commission affirmed its prior decision to dismiss those portions of the charge.

On January 25, 2000, the Massachusetts Coalition of Police (Union) filed a motion to intervene in this matter, and the Commission allowed that motion on January 28, 2000. The same day, the Union filed a representation petition with the Commission seeking to represent all full-time and regular part-time police officers working for the Town, and the Commission docketed that petition as Case No. MCR-4796. The Union filed a motion with the Commission on February 9, 2000 requesting the Commission to consider its charge in this matter a blocking charge that would block further processing of Case No. MCR-4796. The Commission allowed that motion on May 3, 2000.

Commission Chief Counsel John B. Cochran, Esq., a duly-designated Commission Hearing Officer (Hearing Officer), conducted a seven-day hearing in this matter on February 1, February 2, February 16, February 18, February 23, March 6, and March 20, 2000. At the outset of the hearing, the Charging Parties informed the Hearing Officer that, as part of the remedy here, they would request the Commission to issue an order in accordance with the Supreme Court's theory in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), directing the Town to bargain with it as the exclusive collective bargaining representative, without the need for an election in Case No. MCR-4796. The parties agreed to argue the merits of that requested relief in their post-hearing briefs.

1. The Commission has designated this case as one in which the Commission will issue a decision in the first instance pursuant to 456 CMR 13.02(2). On February 8, 2001, the parties filed a Joint Motion for Recommended Decision requesting to have the hearing officer issue a recommended decision, and the Commission denied that motion.

The Union submitted its brief on June 15, 2001 and additional post-hearing argument on July 3, 2000.[2] The Town requested a two-week extension to submit its brief, and the Hearing Officer allowed that request. The Town had not filed its brief by August 21, 2000, and the Union filed a Motion to Close Record. The Hearing Officer allowed that motion on September 14, 2000. On September 21, 2000, counsel for the Town filed a Motion for Reconsideration of that ruling, asserting that counsel for the Charging Parties had verbally assented to extend the time for the Town to file its brief until September 5, 2000 and that he had mailed two copies of his brief to the Commission on September 2, 2000. Because the Charging Parties did not demonstrate that they were prejudiced by the late filing of the Town's brief and the proposed findings and legal arguments proffered by the Town would assist the Commission to decide the issues in this matter, the Hearing Officer allowed the Town's motion and accepted its brief.

After the close of the hearing in this matter, both parties proffered new evidence. The Charging Parties moved to submit a videotape of a March 21, 2000 Board of Selectmen's meeting allegedly showing the Town's Board of Selectmen approving a motion by the Chairman to end Chief Smith's paid administrative leave effective March 17, 2000. According to the Union, the videotape is relevant because it conflicts with the Chairman's testimony at the Commission on March 20, 2000 and reflects a pattern of retaliation against those who support the Charging Parties' efforts to unionize the Town's police force. Without filing a motion to re-open the record, the Town appended a series of letters to its post-hearing brief, including correspondence from the Worcester County Retirement Board dated March 20, 2000 concerning Chief Smith's accidental disability retirement application. The Charging Parties filed a Motion to Exclude Evidence Submitted With Town's Brief.

The Hearing Officer declined to re-open the record to allow either party to submit the additional post-hearing evidence they had offered. First, the Hearing Officer did not find the videotape proffered by the Union to be sufficiently material or probative of the issues in this matter to warrant re-opening the record. The Union offered the videotape for two purposes: 1) to impeach the testimony of the Chairman of the Town's Board of Selectmen on March 20, 2000 concerning Chief Smith's leave status; and 2) as evidence of a pattern of retaliation against those who supported the Charging Parties' union organizing efforts. However, the Hearing Officer found the testimony about Chief Smith's leave status too peripheral to the issues here to warrant additional evidence simply to test the credibility of the Chairman of the Board of Selectmen on that issue. Further, the Hearing Officer did not find that the videotape would be probative of whether the Town was improperly motivated at the time it took the actions that were the subject of the Commission's complaint. Second, because the Town failed to file a motion to re-open the record and appeared to have attached correspondence to its brief to rebut any inference the Charging Parties asked the Commission to draw from the videotape, there was no basis for including that correspondence in the record.

The Hearing Officer issued Recommended Findings of Fact on December 21, 2001. The Town and the Charging Parties filed challenges to the Recommended Findings of Fact on February 6 and 7, 2002, respectively. The Charging Parties and the Town filed responses to each other's challenges on February 15 and 26, 2002, respectively.

Findings of Fact[3]

Both the Charging Parties and the Town challenged portions of the Hearing Officer's Recommended Findings of Fact. After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

The Town of Brookfield is governed by a Board of Selectmen (Selectmen). In October and November 1999, the three Selectmen were Chairman Floyd Moores (Moores), Michael Seery (Seery), and Ronald Dackson (Dackson). Moores had been a selectman since July 1997, Seery since May 1998, and Dackson since September 1999. The Town hired Albert Smith (Smith) as its first full-time police chief in 1990, and Smith served in that capacity until August 6, 1999. At that time, Smith applied for benefits under Section 111F because he believed he had suffered a breakdown caused by his job, and the Town placed him on administrative leave. Deputy Chief Victor Boucher (Boucher) became acting chief when Smith began his administrative leave, and Boucher remained in that position until he resigned on October 27, 1999. On October 28, 1999, Patrolman Ross Ackerman (Ackerman) was appointed the Town's acting police chief.[4]

In early summer 1999, Chief Smith recommended that the veteran police officers in the department receive raises, and the selectmen voted to approve those raises at a meeting on July 13, 1999. The officers slated to receive a raise were: Chief Smith, Deputy Chief Boucher, Sergeant Graupner, and Officers Lazarik and Ackerman. At a meeting on July 28, 1999, however, the two selectmen at the time, Moores and Seery, voted to rescind the wage increases and to reconsider the matter after a third selectman was elected in September. Shortly after Smith was placed on administrative leave on August 6, 1999, the selectmen reinstated the raises for Boucher, Ackerman, and Lazarik.

R. Peter Graupner

In July 1993, the Town appointed R. Peter Graupner (Graupner) as an auxiliary police officer for a period of six months. In that capacity, Graupner worked with regular officers to get on-the-job training but had no powers of arrest. In December 1993, the Town

2. The Charging Parties moved to submit additional post-hearing argument in light of the decision of the Supreme Judicial Court in *Wynn & Wynn, P.C.* v. *Massachusetts Commission Against Discrimination*, 431 Mass. 655 (2000), which issued on June 6, 2000. Because the Town had not yet filed its brief at the time the Union made that request and the argument concerning the decision in *Wynn & Wynn* would assist the Commission to decide the issues in this case, the Hearing Officer allowed the Charging Parties' motion.

3. Neither party contests the Commission's jurisdiction in this matter.

4. The Town requested a supplemental finding that, in or about June 1999, Ackerman and Graupner conducted a wage survey together. Because the record supports the Town's challenge, we include that information here.

re-appointed Graupner as an auxiliary officer until December 1994. The Town appointed Graupner as a regular patrol officer in November 1994 for a six-month period and re-appointed him in 1995 and 1996. In January 1997, the Town re-appointed him for a two-year period, ending on April 30, 1999. The Town also appointed Graupner as an acting police sergeant in April 1997. Graupner became a full-time police sergeant in May 1997 and was subsequently re-appointed to that position in December 1997, December 1998, and May 1999, with his most recent appointment scheduled to expire on November 30, 1999. Prior to his re-appointment in December 1998, Graupner sent an open letter to the residents of the Town requesting their help because there was talk by the selectmen that his appointment was in jeopardy and that, if they did re-appoint him, it would only be for six months.[5]

As a police sergeant, Graupner oversaw patrol officers, prepared and submitted grant proposals, and served as the Town's DARE officer. His normal shift was forty (40) hours per week, although he regularly worked as many as fifteen (15) to twenty (20) additional hours each week on the DARE program and extra investigations. Because there was not a lot of overtime money in the police department's budget, officers were compensated for overtime out of grant money or with compensatory time. For example, most of Graupner's overtime work was funded through DARE and community policing grants. Officers submitted their time sheets to Smith bi-weekly, and Smith transmitted that information to the Town treasurer's office without reviewing it.

The police chief was the only person authorized to sign grant applications and administer grants; however, Graupner has signed the chief's name to grant forms, with the chief's permission. When Graupner performed work as the DARE officer, he would fill out a form reflecting hours worked and submit it for payment from a DARE grant.

The only discipline Graupner received as a police officer employed by the Town was a two-day suspension the Town issued to him in connection with Graupner's role in responding to an alleged suicide attempt in February 1998. Although Smith had investigated and determined that the police and rescue personnel did everything in their power in connection with the incident, the selectmen directed Smith to suspend Graupner. At a selectmen's meeting on October 13, 1998, the selectmen voted to go into executive session to "discuss the reputation and attitude of Sgt. Graupner in the performance of his duties." During that executive session, Smith said that, if Graupner's attitude did not improve, he would lose his sergeant's stripes.[6] There was also some discussion about Graupner's role in the alleged suicide attempt, but Selectman Pierce believed that the issue was moot. At a selectmen's meeting on November 9, 1998, the selectmen questioned Smith about the time Graupner spent on the DARE program and other issues regarding time slips.

Sometime in 1996 or 1997, before Dackson became a selectman, Graupner and Smith went to Dackson's house to investigate an allegation that Dackson had assaulted a minor child. Smith read Dackson his rights, while Graupner questioned him about the allegations. Neither Graupner nor Smith reported the allegations to any social service agency, and they discontinued their investigation at the request of the child's mother.[7] [8]

The selectmen met on October 26, 1999. Only Moores and Dackson were present at that meeting.[9] Acting Chief Boucher submitted a request that Graupner be re-appointed as a sergeant for one year.[10] Dackson moved to place Graupner on administrative leave until his term expired on November 30 for safety reasons,[11] and Moores seconded that motion. Both voted in favor of it, and Moores directed Boucher to retrieve Graupner's badge, weapon, and keys. Both Moores and Dackson denied that their decision not to re-appoint Graupner had anything to do with union organizing activities. According to Moores, the decision was because of discrepancies in Graupner's time sheets. According to Dackson, it was because they did not want someone with Graupner's temperament on the force and because of irregularities in the payroll and failing to include cover letters with grant requests.[12] Dackson claims that he did not cite these reasons for the record at the October 26 selectmen's meeting because they were the subjects of an ongoing investigation.[13]

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5. At a selectmen's meeting on November 9, 1998, two of the selectmen told Smith that they were uncertain about whether to re-appoint Graupner.

6. Although Smith testified that he never recommended that Graupner lose his stripes, the minutes of the October 13, 1998 Executive Session of the Board of Selectmen reflects that Smith did say that Graupner would lose his stripes if his attitude did not improve. Therefore, the Hearing Officer did not credit Smith's testimony on this point.

7. Smith never informed Dackson that the investigation had been discontinued.

8. M.G.L. c. 119, §51A requires police officers having reasonable cause to believe that a child has been abused to make a report to the Department of Social Services. The Town challenged the finding because it omitted the reporting requirements found in that statute. Because the record supports the Town's challenge, we have included that information here.

9. According to Seery, he had intended to resign from the Board of Selectmen that night, but never told the other members of the Board why he was not attending the meeting.

10. Graupner testified that Boucher had submitted a request that Graupner be re-appointed for a term of three years. However, the minutes of the October 26, 1999 selectmen's meeting reflects that Boucher only submitted a request for a one-year re-appointment.

11. Although Graupner testified that the selectmen were not scheduled to vote on his re-appointment until November 2, and that he was unexpectedly summoned from his second job at Huntington Memorial Hospital on October 26 for a meeting regarding re-appointment, a memorandum that Graupner testified he wrote to the Union on October 25, 1999 states that his appointment was "coming up in only a day." In light of this inconsistency, the Hearing Officer did not credit Graupner's testimony on this point.

12. Dackson testified that, after becoming a selectman, he had encountered discrepancies in Graupner's pay records, including double billing for work, and turned these records over to the state police to investigate. However, he offered no specific information about the dates or extent of any discrepancies. Further, the Town offered no evidence to corroborate Dackson's testimony that there was an ongoing state police investigation into Graupner. Therefore, the Hearing Officer did not credit that portion of Dackson's testimony.

13. The Charging Parties requested that the Hearing Officer find that Graupner submitted a petition to the selectmen at the October 26 meeting in support of Graupner. The Hearing Officer declined to make that finding, because the petition the Charging Parties pointed to was dated October 30, 1999, after the date of the selectmen's meeting.

On October 25, 1999, the day before Selectmen Moores and Dackson voted to place Graupner on administrative leave, Graupner had a conversation with Dackson at the Cumberland Farms store/gas station in Brookfield.[14] Graupner approached Dackson outside of the Cumberland Farms store and, within earshot of Officers Hayes and Griffin, Graupner asked Dackson if there was any problem with his re-appointment. Dackson replied that it was not wise for Graupner to start a union just before his re-appointment. Dackson also told Graupner that unions were trouble, Graupner was trouble, and that Graupner would not be around to enjoy a union.

Jamie Griffin & Kenneth Hayes

Jamie Griffin (Griffin) began working as a part-time officer for the Brookfield Police Department in November 1998, and he worked an average of twenty-three (23) hours per week. At the time he began working for the Town, Griffin lived in Worcester, which is less than fifteen (15) miles from Brookfield. Shortly after he began working for the Town, Griffin began spending a lot of time with his girlfriend, who lived in Westborough, which is more than fifteen (15) miles from Brookfield. Griffin gave his address in Westborough to Smith, Graupner, and the Town Clerk. The W-2 forms the Town issued to Griffin for 1998 and 1999 reflected an address in Westborough. In May 1999, Smith recommended that the selectmen re-appoint Griffin for one year, but the selectmen decided to re-appoint him for six months, until the end of November 1999.

Kenneth Hayes (Hayes) began working for the Town's Police Department on June 15, 1999, and his initial appointment was for a six- month period ending on December 31, 1999. When he was appointed, Hayes told Smith and Graupner that he was separated from his wife, who lived in Southborough, and planned to move into a friend's home in East Brookfield. Hayes did not move to East Brookfield, and began dividing his time between Southborough, which is more than fifteen (15) miles from Brookfield, and his brother's home in Franklin, Massachusetts. At some point during the summer of 1999, Hayes told Graupner that he had an apartment in Worcester, and the 1999 W-2 form the Town issued to him reflected an address on June Street in Worcester. In late summer 1999, Hayes began spending more time in Southborough because his wife was ill. He also continued to operate a business as an electrician out of his home in Southborough.

M.G. L. c. 41, Section 99A requires police officers to live within fifteen (15) miles of the community where they work, although not every town adheres to this requirement. Although Smith did not believe that the selectmen were aware of the requirement during his tenure as chief, at some point in time, they did become aware of the requirement.[15] Smith was not aware of any officer living outside the fifteen-mile limit and he was not aware that the selectmen had ever permitted an officer to live beyond the fifteen-mile limit. When Officer Christopher Shampine (Shampine) moved from Worcester to Framingham, which is more than fifteen (15) miles from Brookfield, Smith told him that he had thirty (30) days to move within the fifteen-mile limit or to resign. Because Shampine had gotten married, moved, and did not want to move back within the fifteen-mile limit, he resigned.[16] Another Brookfield police officer, David Ethier, lived within the fifteen-mile limit when Smith hired him and subsequently moved outside of the fifteen-mile radius.[17] Accordingly, on October 6, 1996, Ethier resigned because he had moved more than fifteen (15) miles from Brookfield.

On October 27, 1999, Griffin reported to the station for the 4:00 p.m. to midnight shift and encountered Ackerman sitting behind a desk and discussing an equipment wish list with a group of other officers, including Hayes. During that discussion, Griffin asked Ackerman why Graupner had been placed on administrative leave, and Ackerman responded that Graupner had embezzled $39,000 for time he did not work and that Ackerman would not be surprised if Griffin was also involved.[18] Immediately after this discussion, Griffin spoke with Ackerman outside the police station by a cruiser, and Griffin asked Ackerman whether there would be any problem with Hayes's and Griffin's appointments. Ackerman responded that Griffin had nothing to worry about, but that he had doubts about whether Hayes would be re-appointed. Ackerman also told Griffin that there might be a problem with where they lived. Griffin then left for his patrol. While Griffin was patrolling, Hayes radioed Griffin and asked Griffin to meet him. They arranged to meet at the Lincoln Street Extension behind the school. While Griffin was

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14. Dackson testified that this conversation never took place and denied that he was even at the Cumberland Farms store/gas station that day. He stated that he could not have been there because he never buys gas at that station but at a station in Auburn, where gas is cheaper. However, the Hearing Officer did not credit Dackson's testimony that he did not have a conversation with Graupner at Cumberland Farms on October 25 for three reasons. First, Dackson's testimony was directly contradicted by the testimony of Graupner and Officers Hayes and Griffin, who each gave a detailed account of the content of the conversation between Graupner and Dackson and the physical location of that conversation. Second, Dackson's testimony that he normally purchases gas at a cheaper location, without more, does not demonstrate that he was not present at the Brookfield Cumberland Farms that day. Third, Dackson acknowledged on cross-examination that he had had conversations with Graupner at the Cumberland Farms store, which further undercuts his testimony that he would have had no reason to be there on October 25, 1999.

In making this credibility determination, the Hearing Officer did not rely on the letter dated October 25, 1999 from Graupner to Union Business Agent Rick Nelson, which the Union argues is a contemporaneous account of the October 25, 1999 discussion between Graupner and Dackson at the Cumberland Farms store. Because that letter appears to be written in the past tense, and Nelson could not recall when he received it, the Hearing Officer was unable to credit it as a contemporaneous account of the October 25, 1999 conversation.

15. This finding is supported by the testimony of Acting Chief Boucher, who testified that the selectmen were concerned that officers did not live within a fifteen-mile radius of the Town.

16. Smith testified initially that he gave Shampine the choice of resigning or moving back within the fifteen-mile limit and Shampine declined to move back because he had gotten married and had moved away. Smith later testified that, because Shampine was not working out that well, Smith used the fifteen-mile limit as an opportunity to let Shampine resign. Because Smith's testimony on this point was inconsistent and changed between the first and second time he testified, the Hearing Officer credited his initial testimony.

17. The first time he testified, Smith specifically stated that, when Smith hired Ethier, Ethier lived in Auburn, within fifteen (15) miles of Brookfield, and subsequently moved. Later in the hearing, however, Smith claimed that his earlier testimony was wrong because he did not expect what would be asked. Because Smith's initial testimony was very specific on this point and reflected no confusion, the Hearing Officer found it to be more credible than the contrary testimony he gave later in the hearing.

18. Although Ackerman testified that he did not recall making these statements, he did not deny making them.

relating to Hayes his conversation with Ackerman, Ackerman paged Griffin to call Ackerman at his residence. Hayes and Griffin returned to the police station and, with Hayes listening on an extension, Griffin called Ackerman, who related the substance of what he had told Griffin by the cruiser. Immediately after Griffin hung up from his call with Ackerman, Hayes and Griffin decided to go to Selectman Moores's house.

At approximately 5:30 p.m. on October 27, 1999, Hayes and Griffin went to Moores's house to discuss their re-appointments. While standing on Moores's front porch, they asked Moores whether there would be a problem with their re-appointments. Moores responded that he had no problem with them and their biggest problem was finding out where they lived. Moores also told them it was up to Acting Chief Boucher to recommend their re-appointments and suggested that they go across the street to Boucher's house and talk with him. Hayes and Griffin then went across the street to Boucher's house and asked Boucher about their prospects for re-appointment. Boucher replied that they could be re-appointed but that the selectmen would want proof of where they lived.[19]

At approximately 10:30 p.m. on October 27, 1999, Boucher called Moores and told Moores he was resigning from the police department and would no longer be serving as the Town's acting police chief because he did not want the pressure of people coming to his house and calling him. According to Boucher, he resigned because it was too much for him. The following morning, the Board of Selectmen met and appointed Ackerman, the only full-time officer on the Town's police force at the time, as the new acting police chief. Immediately after the selectmen decided to appoint Ackerman acting chief, Moores asked Ackerman to contact as many officers as he could for a meeting that morning at which the selectmen notified them of Ackerman's appointment. Neither Griffin nor Hayes were notified about or attended that meeting.[20]

On October 30, 1999, the members of the Town's police department participated in their annual weapons re-certification at the firing range in a sandpit. Acting Chief Ackerman and Officers Griffin, Hayes, Lazarik, Churchey, Savage, LaRocca, Dailey, Taylor, Knight, Forcier, and Clutier were present. Griffin asked Ackerman if he would be re-appointed, and Ackerman responded that it looked like Griffin would not be re-appointed because of where he lived. Griffin became heated, went to his motorcycle, and started it, while he and Ackerman continued talking. His motorcycle was approximately five (5) feet from where the other officers were standing, and they were talking loudly enough for the other officers to hear them. Griffin then said words to the effect that Ackerman was f—ing him and rode off on his motorcycle.[21] [22] The same day, Ackerman talked with Hayes about being re-appointed and told him that he would not be re-appointed because of where he lived.[23]

In early November 1999, Ackerman submitted the names of several officers to the Board of Selectmen and proposed that they be re-appointed. Ackerman did not submit either Griffin's or Hayes's names to the Board, and the Board did not vote on whether to re-appoint them.[24] Therefore, Griffin's employment with the Town ended when his term expired on November 30, 1999 and Hayes's ended when his term expired on December 31, 1999.

According to Ackerman, he did not submit Griffin's name to the selectmen for re-appointment because Griffin lived outside of the fifteen-mile radius. Further, Ackerman testified that he had considered Griffin's conduct on the firing range in deciding not to put his name before the selectmen.[25] Ackerman did not ask Griffin where he lived because he thought Griffin had lied about his residence in the past. Ackerman did call Glen Parker, the Chief of the Westborough police department, where Griffin also worked part-time, and learned that Parker had a Westborough address on file for Griffin. However, Ackerman did not make that call until sometime in December 1999. Ackerman did not give Griffin written notice that he was not submitting Griffin's name for re-appointment because town counsel had told him it was not necessary.

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19. Although Hayes and Griffin testified that both Moores and Boucher had told them there was no problem with where they lived and that they would be re-appointed, the Hearing Officer did not credit their version of these conversations. First, their testimony was inconsistent. Griffin testified that Moores said it was the first he had learned there was a problem with where they lived, but Hayes testified that Moores said Moores had checked into their residency and everything was fine. Second, if Moores had told them there was no problem with their re-appointment or their residency, there would have been no reason for him to suggest that they go talk with Boucher. Third, Boucher testified credibly that he was honestly not sure where Hayes and Griffin lived at the time. Therefore, it is unlikely he would have told them that their residency was not an issue in their re-appointments. Finally, if Moores had assured Griffin and Hayes that they would be re-appointed, there would have been no need for Griffin to ask Ackerman at the sandpit on October 30, 1999 whether he would be re-appointed.

20. Although Ackerman testified that he had called some officers, the record does not reflect whether he called every officer but Griffin and Hayes or whether there were officers whom he failed to contact about the meeting.

21. Both Griffin and Hayes testified that Griffin asked Ackerman if Griffin was not being re-appointed because Griffin had started a union, and Ackerman replied, "yes." In contrast, Ackerman testified that the only reason he gave Griffin for not being re-appointed was where Griffin lived. The Hearing Officer credited Ackerman's version of this exchange for the following reasons. Both Griffin and Hayes testified that there were nine (9) other officers standing close enough to Griffin and Ackerman to overhear their exchange, but not one of the nine, including three who acknowledged signing Union authorization cards (Taylor, Savage, and Knight), corroborated Griffin's and Hayes's testimony. Further, at least three of the officers heard Ackerman tell Griffin that his residency was an obstacle to his being re-appointed, but heard no reference to the Union as a reason why Griffin might not be re-appointed.

22. Although Griffin denied using profanity, Officer Churchey corroborated Ackerman's testimony on this point.

23. Hayes testified that Ackerman told him he would not be re-appointed because he lived too far away and started a union. Because the Hearing Officer did not credit Hayes's version of Ackerman's statements to Griffin at the sandpit that day, however, the Hearing Officer likewise did not credit Hayes's testimony that Ackerman told Hayes in a separate conversation that day that Hayes would not be re-appointed because he started a union.

24. The Town challenged the finding to clarify that the Board never voted on whether to re-appoint Griffin and Hayes. Because the record supports the Town's challenge, we have modified the finding accordingly.

25. The Hearing Officer found that Ackerman considered Griffin's conduct on the firing range in deciding not to put his name before the selectmen. However, the Charging Parties challenged this finding because, although Ackerman testified that he had considered this conduct in deciding not to put Griffin's name before the selectmen, Ackerman's stated reason may not have been the real reason for Griffin's non-reappointment. Because the record supports the Charging Parties' challenge, we have modified the finding accordingly.

Ackerman testified that he had decided not to submit Hayes's name for re-appointment because Hayes lived more than fifteen (15) miles from Brookfield and because the Sturbridge Police Department had written to Acting Chief Boucher on October 17, 1999 concerning a citizen complaint against Hayes while Hayes was working a paid detail in Sturbridge.[26] [27] On October 29 or 30, 1999, Ackerman spoke by telephone with Cynthia Laporte (Laporte) at what he thought was the East Brookfield address Hayes had listed on his resume, and Laporte told him that Hayes did not live there. Ackerman did not provide Hayes with written notice that he was not recommending Hayes for re-appointment.

Union Organizing

In early February 1999, Graupner, Griffin, and Officer Dailey met with Rick Nelson (Nelson), a business agent for the Union, to discuss what was involved in organizing a union, and Nelson gave them Union authorization cards. Although there were occasional discussions about unions among the officers in the Town's police department following that meeting, between early February and early October 1999, there were no further meetings to discuss the Union and the Union authorization cards Nelson had left at the February meeting were not distributed to members of the Town's police department.[28]

On October 9, 1999, all available officers were required to attend the Apple County Fair (Fair). All of the officers except Churchey, Lazarik, and Dailey were working at the Fair that day. Those three officers were not present because they were attending Dailey's wedding, and Griffin signed their names to cards.[29] Graupner and Griffin called over all of the officers who were at the Fair individually and asked them to sign a Union authorization card. Although Dackson and Moores were present at the Apple County Fair, the selectmen were unaware that the police officers were signing Union authorization cards.[30] Each officer except Ackerman signed a card. When they approached Ackerman, he declined to sign a card, even though they wanted him to sign one at that time. In the course of their exchange, Ackerman made a statement to the effect that a union could bring problems and that the selectmen knew about the Union.[31] [32] Ackerman also said he wanted to get more information about the Union.[33] A few days later, however, Ackerman called Griffin and told Griffin that Griffin could put his name on a card.[34] Griffin signed one for him and submitted it with the other authorization cards to the Union. Griffin subsequently retrieved the card he had signed for Ackerman from the Union.[35]

By letter dated October 20, 1999, Nelson wrote to the selectmen and, pursuant to 456 CMR 14.06, requested the Town to recognize the Union as the exclusive collective bargaining representative of the police officers employed by the Town for purposes of collective bargaining. It was in the selectmen's correspondence file at the outset of their October 26, 1999 meeting, and Moores began to read the letter into the record at that meeting. After reading a portion of it, however, Moores said that he was not going to read any more of it and placed it aside.[36]

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26. The letter to Acting Chief Boucher reported that a Sturbridge resident complained that Hayes had left a detail post and made long distance phone calls from an outside phone in their garage without permission and then denied that he was making toll calls from their phone. After receiving that letter, Boucher spoke with Hayes, and Hayes apologized to the Sturbridge residents and reimbursed them for the calls he made from their phone.

27. The Hearing Officer found that Ackerman had decided not to submit Hayes's name for re-appointment because Hayes lived more than fifteen (15) miles from Brookfield and because the Sturbridge Police Department had written to Acting Chief Boucher on October 17, 1999 concerning a citizen complaint against Hayes while Hayes was working a paid detail in Sturbridge. However, the Charging Parties challenged this finding because Ackerman's stated reason for not submitting Hayes's name for re-appointment may not have been the real reason. Because the record supports the Charging Parties' challenge, we have modified the finding accordingly.

28. Smith testified that he had had numerous conversations with Selectmen Moores, Dackson, and Seery in late 1998 and early 1999 about a union in the context of discussions about Graupner, and that they each independently made disparaging remarks about a union and Graupner in those conversations. However, the Hearing Officer did not credit Smith's testimony on this point for several reasons. First, Smith's testimony changed between the first and second times he testified, and his only explanation for that inconsistent testimony was that he did not know why he had been testifying the first day and since then he "ha[d] talked to people and [thought] what was happening was a disgrace." Second, Smith's testimony overall reflected that he has personal animosity toward the selectmen. For example, he complained about the selectmen following him, taking pictures of him on the golf course, and micromanaging him. Similarly, he was critical of the selectmen for not implementing the pay raise he had requested in July 1999. Further, he acknowledged in his testimony that he had threatened the selectmen and been hospitalized for evaluation because the selectmen discontinued his paid leave in the fall of 1999. Third, because the initial contact between the Union, Graupner, Griffin, and Dailey did not occur until early February 1999, there would have been no reason for him to have numerous discussions with the selectmen about their views toward union organizing prior to that time.

29. According to Churchey, he did not learn that his name had been signed to a card until after the Fair, although he did not object.

30. The Town requested a supplemental finding that, although Moores and Dackson were at the Apple County Fair, they were unaware that the police officers were signing Union authorization cards. Because the record supports the Town's challenge, we have modified the finding accordingly.

31. Ackerman denied making those statements. However, the Hearing Officer did not credit his testimony on this point because Graupner, Griffin, and Hayes all gave consistent testimony about Ackerman's statements, and the statements are consistent with and logically explain his reluctance to sign a card at that time.

32. According to Griffin, he discounted Ackerman's statements because Griffin believed that Ackerman often said things that were not true to cause turmoil in the department.

33. The Town requested a supplemental finding that Ackerman stated that he wanted to get more information about the Union. Because the record supports the Town's challenge, we have modified the finding accordingly.

34. The Hearing Officer found that Ackerman called Griffin and expressed an interest in signing a card. However, the Town challenged the finding because the finding did not clearly state that Griffin gave Ackerman his permission to sign his name on a card. Because the record supports the Town's challenge, we have modified the finding accordingly.

35. The Hearing Officer found that Ackerman asked Griffin to get the card Griffin had signed for him back from the Union, which Griffin did. The Town challenged the finding because Ackerman did not ask Griffin to pull his card after Griffin had signed it on Ackerman's behalf. Rather, Griffin retrieved Ackerman's card on his own. Because the record supports the Town's challenge, we have modified the finding accordingly.

36. The Charging Parties argue that Moores also stated, "they ain't gonna get it anyway," and Moores testified that he said "I don't know anything about it anyway." Because the Hearing Officer was unable to determine from the videotape of the October 26, 1999 selectmen's meeting that Moores made the statement the Union attributes to him, the Hearing Officer declined to make the finding requested by the Union.

Post Non-Reappointment Events

1. Lawsuit

By letter dated October 29, 1999, Ackerman requested that Graupner "...return all property of the Brookfield Police Department," including "equipment, firearms, records, reports, receipts, DARE property and any unused grant monies and receipts" by November 1, 1999 at 1:00 p.m. Because Graupner did not sign for that letter, the Town arranged to have it served on him on November 1, 1999 by an officer in West Brookfield, where Graupner lived. On November 4, 1999, the Town filed an action in Superior Court alleging that Graupner had not returned items belonging to the Town that the Town believed to be in his possession. At the time the Town filed the lawsuit against Graupner, he possessed a blue light permit[37] issued by the Registry of Motor Vehicles at the request of the Town, and the only gun he had was one he had purchased himself.[38]

2. Encounter At Wagon Wheel Park

On November 14, 1999, Graupner, Hayes, and Griffin went to several homes asking residents to sign a petition stating that:

> We, the undersigned residents of Brookfield, wish to express our support for Brookfield Police Sergeant Peter Graupner, Police Officer Kenneth Hayes, and Police Officer Jamie Griffin, and we demand that the Board of Selectmen restore them immediately to their positions in the Brookfield Police Department.

They were wearing suits and were not in their police uniforms at the time. At some point, they stopped at Smith's house, and Griffin went into Smith's house to get his signature on the petition. Smith suggested that the three go to Wagon Wheel Park (WWP), a private, mobile home community with a large elderly population located in the Town, to collect additional signatures.[39] The three left Smith's house around dusk, drove to WWP in a white BMW owned by Griffin's girlfriend, and parked in front of the driveway of Pat Robinson's (Robinson) mobile home at 23 Conestoga Trail.[40] Joseph Gadbois (Gadbois) who lives at 27 Conestoga Trail, observed two of the three men get out of the car and walk down the street. Robinson called Little to report that the car was blocking her driveway, and Little advised her to call the police, which she did. Officer Churchey received a dispatch about a suspicious vehicle in front of Robinson's home, and the dispatcher informed him that the plate had been called in and the car belonged to a woman in Westborough. Churchey responded to Robinson's home, walked around the car, and shined his light into it. Churchey observed a DARE clipboard inside the car and a police sticker on the back window. Churchey called Ackerman from Robinson's home and gave him an update. Ackerman called the state police to request back-up assistance and drove to Robinson's home. Ackerman drove his cruiser next to Churchey's, and Churchey briefed Ackerman through the window about what he had observed since arriving at WWP. State Trooper Stephen Bedard (Bedard) arrived in a state police cruiser shortly after Ackerman arrived. Churchey then observed some people in his rear view mirror, and said "there they are." Ackerman, Churchey, and Bedard immediately drove their cruisers to that spot, which was across the street from Little's home.[41]

Bedard arrived first, got out of his cruiser, and encountered Graupner and Hayes standing in a driveway across from Little's home. Churchey and Ackerman arrived immediately afterward, and parked their cruisers in a triangle in front of the driveway where Graupner and Hayes were standing. Ackerman got out of his cruiser and stood by it, and Churchey remained in his cruiser. Bedard asked Graupner, "what are you guys doing here," and Graupner replied, "none of your business, we're visiting friends."

During this exchange, Griffin was in Little's house soliciting signatures on the petition, and he heard a broadcast on the police scanner that there were three suspicious males in WWP. Griffin left Little's house and heard someone yell, "hey, you, get over here." Griffin walked past the three cruisers and joined Graupner, Hayes, and Bedard. After a few minutes of silence, Graupner said, "let's get out of here," and Graupner, Hayes, and Griffin walked to Griffin's car and left WWP. According to Graupner, Hayes, and Griffin, they were afraid that they were going to be arrested during this encounter.

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37. A blue light permit is a permit issued by the Registry of Motor Vehicles through a local police department that authorizes an officer to place a blue police light on a personal vehicle.

38. The Charging Parties requested a supplemental finding that the only gun Graupner had at the time the Town filed the lawsuit was one he had purchased himself. Also, the Town requested a supplemental finding that, when it filed a lawsuit against Graupner, he possessed a blue light permit issued by the Registry of Motor Vehicles at the request of the Town. Because the record supports the parties' challenges, we have modified the finding accordingly.

39. Smith testified that he called Albert Little, Sr. (Little), the president of WWP's board, to let him know that the three officers would be coming to solicit signatures at WWP, and Little responded with words to the effect that the three men should come up. However, Little did not recall having a conversation with Smith about the petition, and Griffin did not recall Smith making a call to that effect while Griffin was present in his house. The Hearing Officer was unable to credit Smith's testimony on this point for two reasons. First, Little testified convincingly that the WWP regulations prevented solicitation and he did not believe he had authority to allow the three to gather signatures. Second, when Little received a telephone call from Pat Robinson about a strange car in front of her house, he advised her to call the police. There would have been no reason for him to give her that advice if he had just received a call from Smith informing him that Hayes and Griffin, who were still on the force at the time, were en route to WWP to collect signatures. Third, the Hearing Officer found that Smith's testimony overall was affected by his animosity toward the selectmen.

40. The rules of WWP provide that residents may not permit guests to park on the streets, lawns, or in front of another resident's area.

41. Both Graupner and Hayes testified that they were standing approximately 500 feet from the vehicle and observed Churchey and Ackerman open the door to the vehicle and look through it. However, the Hearing Officer found their testimony on that point to be inconsistent. According to Graupner, he could clearly identify Churchey and Ackerman because the vehicle was directly under a streetlight and illuminated by the headlights of the two police cruisers. However, Hayes saw only a light inside the vehicle and two officers, whom he could not identify until later as Churchey and Ackerman, enter the vehicle. Further, Churchey testified credibly that, although he had shone his light into the car, nobody entered it while he was on the scene. His testimony was corroborated by Gadbois, who testified that he sat at his office window observing the comings and goings in front of Robinson's house and only saw Robinson, not Churchey, enter the vehicle. Similarly, Trooper Bedard testified that at no time while he was present were Ackerman or Churchey out of their cruisers around the vehicle. Therefore, the Hearing Officer was unable to credit that Graupner and Hayes observed Ackerman and Churchey enter the vehicle.

3. Encounter at the Congregational Church

As he was going off duty on November 15, 1999, Ackerman learned that Graupner was at the basement hall of the Congregational Church next to the town hall, and Ackerman determined that it would be a good opportunity to talk with Graupner about returning some items to the Town. Ackerman received that information from the fire chief who was a member of the church. Ackerman asked Officer Churchey to accompany him, and he called for state police back-up because the town counsel had told him to get assistance from a neutral party. State Troopers Bedard and Robert Benoit (Benoit) met Ackerman at the basement door to the church. Churchey, Benoit, and Bedard waited inside the vestibule while Ackerman went inside the hall to speak with Graupner, who was attending a Girl Scout meeting to gather signatures on a petition to ask the Town to keep him on the police force. Graupner told Ackerman he would talk with him in a few minutes, and Ackerman waited for Graupner in the vestibule with the other officers. When Graupner finished, they all left the building and stood on the concrete apron outside the door to the church basement, with the three officers standing around Graupner. Graupner was wearing a DARE jacket, and Ackerman asked him if he had bought the jacket with Town money. Graupner responded with words to the effect that Ackerman was trying to take the clothes off his back.[42] Ackerman next asked Graupner for his blue light permit, and Graupner responded that he would have his lawyer return it the next day. According to Graupner, he felt restrained and afraid during this encounter. None of the officers blocked Graupner from leaving the concrete apron, and Graupner did not ask if he was under arrest. As Graupner was walking to his car, he asked Ackerman to move because Ackerman was in his way, and Ackerman stepped aside.[43]

Opinion

Retaliation

In allocating the burden of proof in a Section 10(a)(3) allegation, the Commission has traditionally applied the three-step analysis articulated in *Trustees of Forbes Library* v. *Labor Relations Commission*, 384 Mass. 559 (1981). First, the Commission determines whether the charging party has established a *prima facie* case of discrimination, by producing evidence to support each of the four following elements: 1) the employee engaged in protected activity; 2) the employer knew of the protected activity; 3) the employer took adverse action against the employee; and 4) the employer's conduct was motivated by a desire to penalize or discourage the protected activity. If the charging party establishes a *prima facie* case, the employer may offer evidence of one or more lawful reasons for taking the adverse action. Once the employer produces lawful reasons for its actions, the employee must the prove that, "but for" the protected activity, the employer would not have taken the adverse action. *Trustees of Forbes Library*, 384 Mass. at 565-566; *Bristol County*, 26 MLC 105, 108-109 (2000); *South Middlesex Regional School District*, 26 MLC 51,53 (1999); *Town of Athol*, 25 MLC 208, 211 (1999); *Town of Dracut*, 25 MLC 131, 133 (1999); *Town of Belmont*, 25 MLC 95, 96 (1998); *Commonwealth of Massachusetts*, 24 MLC 116, 118 (1998).

The Supreme Judicial Court articulated the analytical framework to be applied in discrimination cases arising under M.G.L. c. 151B when an employment decision results from a mixture of legitimate and illegitimate motives and there is direct evidence of discriminatory bias. *Wynn & Wynn, P.C.* v. *Massachusetts Commission Against Discrimination*, 431 Mass. 655 (2000). Under the Court's two-step analysis, the employee must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. The burden of persuasion then shifts to the employer "who may avoid a finding of liability only by proving that it would have made the same decision even without the illegitimate motive." *Id.* at 669-670, *citing Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 244-245 (1989). In contrast, under *Trustees of Forbes Library*, the burden of persuasion remains with the charging party at every stage. *Id.* at 669.

In two decisions issued after *Wynn & Wynn*, we found it unnecessary to decide whether to adopt the two-step analysis articulated in those cases because the charging parties had met the higher burden of proof articulated in *Trustees of Forbes Library*. *See*, *Quincy School Committee*, 27 MLC 83, 92 (2000); *Suffolk County Sheriff's Department*, 27 MLC 155, 159 (2001). Immediately after we issued our decision in *Suffolk County Sheriff's Department*, however, the Supreme Judicial Court further clarified its position in *Lipchitz* v. *Raytheon Co.*, 434 Mass. 493 (2001), concerning the appropriate allocation of burdens of proof in discrimination cases involving direct and circumstantial evidence. In that case, the Court specifically noted that its holding in *Wynn & Wynn* overruled that portion of *Trustees of Forbes Library* that held that the burden of proof in a direct evidence case remained with the plaintiff. *Id.* at 505 n. 18. The case here presents the Commission with its first opportunity, since *Lipchitz*, to address which analysis it should apply in mixed-motive cases involving direct evidence arising under M.G.L. c. 150E.[44] Because the Court explicitly overruled that portion of *Trustees of Forbes Library* allocating the burden of proof to the charging party at all stages in cases where there is direct evidence of discrimination, we apply the two-step analysis articulated in

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42. Graupner testified that his wife had given him the DARE jacket when he graduated from the police academy, and there is no evidence in the record demonstrating that the jacket was not Graupner's personal property.

43. Graupner testified that he was surrounded by the four law enforcement officers, blocked from leaving the concrete apron, and was scared as Ackerman was talking with him. He also testified that he asked whether he was under arrest and told the officers he thought he was under arrest. The Hearing Officer did not credit Graupner's version of the incident, however. Ackerman, Churchey, Bedard, and Benoit all testified consistently that Graupner never asked if he was under arrest or said he thought he was under arrest. Further, they all testified that neither Ackerman nor any of the other officers blocked Graupner's egress or prevented him from walking to his car. To the contrary, Graupner himself testified that he began walking to his car and asked Ackerman to move because Ackerman was in his way, and Ackerman stepped aside. Further, the Town requested a supplemental finding about the events that happened as Graupner was leaving. Because the record supports the Town's challenge, we have modified the finding accordingly.

44. The three 10(a)(3) decisions that we have issued since Lipchitz have contained only indirect or circumstantial evidence of unlawful employer motivation. See, M.W.R.A., Case No. SUP-4511 (slip op. December 13, 2001); Athol-Royalston Regional School Committee, 28 MLC 204 (2002) (pending appeal); City of Peabody, Case No. MUP-2162 (slip op. March 6, 2002).

Wynn & Wynn to cases arising under c. 150E where the charging party has proffered direct evidence of discrimination. Accordingly, we first determine whether the Charging Parties have proffered direct evidence of discrimination.

According to the first step in the *Wynn & Wynn* analysis, a charging party meets its initial burden by proffering direct evidence that proscribed criteria played a motivating part in a respondent's adverse action. *Wynn & Wynn* v. *Massachusetts Commission Against Discrimination*, 431 Mass. at 667. Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace." *Id.*, *citing Johansen* v. *NCR Comten, Inc.*, 30 Mass. App. Ct. 294, 300 (1991). Stray remarks in the workplace, statements by people without the power to make employment decisions, and statements made by decision makers unrelated to the decisional process itself do not suffice to satisfy a charging party's threshold burden. *Id.*, *citing Price Waterhouse* v. *Hopkins*, 490 U.S. at 277.

The Charging Parties argue that statements made by all three selectmen at various times expressing their opposition to organizing a union in the Town constitutes direct evidence of anti-union animus. However, the Hearing Officer did not credit Smith's testimony that the selectmen had made those statements. Although the Charging Parties further assert that Ackerman told Griffin and Hayes that they had been fired for starting a union, the Hearing Officer did not credit Griffin and Hayes's testimony.

Although the Charging Parties next argue that Ackerman's statement on October 9, 1999 that organizing a union could result in problems constitutes direct evidence of anti-union animus, we do not find that Ackerman's statement leads to an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace. *Id.* Even if we consider Ackerman's statement because he subsequently became acting police chief on October 28, 1999, his remark to the effect that a union could bring problems is ambiguous and does not demonstrate unlawful motivation, especially because: a) Ackerman's initial reluctance to sign a Union authorization card stemmed from his desire to learn more about the Union and not from anti-union sentiment; b) Ackerman ultimately gave Griffin permission to sign his name to a card; and c) Griffin later withdrew Ackerman's card on his own and not at Ackerman's request.

The Charging Parties also contend that Dackson's comments to Graupner constitute direct evidence of anti-union animus. The details of that conversation are as follows. On October 25, 1999, in the presence of Griffin and Hayes, Graupner had a conversation with Dackson. In response to Graupner's inquiry about his re-appointment, Dackson told Graupner that it was not wise for Graupner to start a union before his re-appointment. Dackson further told Graupner that unions were trouble, Graupner was trouble, and Graupner would not be around to enjoy a union. These statements were not stray remarks because they were directed to Graupner. Further, the statements were made by a person with the power to make employment decisions and were related to the re-appointment process itself. Accordingly, the Charging Parties have met their initial burden by demonstrating with direct evidence that anti-union animus played a motivating part in the Town's decision not to re-appoint Graupner. However, we do not decide whether Dackson's comment constitutes direct evidence of anti-union animus with regard to Griffin and Hayes,[45] because, as more fully discussed below, even if we apply the higher burden of proof as set forth in *Trustees of Forbes Library*, we find that the Charging Parties have met their burden to establish that but for their protected, concerted activity, the Town would have re-appointed them. *See, M.W.R.A.*, Case No. SUP-4511 at 20 n. 38, *citing*, *Lipchitz* v. *Raytheon*, 434 Mass. at 505 (Commission applies *Trustees of Forbes Library* analysis in cases involving indirect evidence of anti-union animus); *See also*, *Wynn & Wynn* v. *Massachusetts Commission Against Discrimination*, 431 Mass. at 667 n. 23 (charging parties are not required to choose between a mixed-motive approach and a pretext approach; they may proceed on either basis, or both, depending on the nature of the evidence). Thus, after examining whether the Town has met its burden under the mixed-motive analysis with regard to Graupner's non-reappointment, we will examine Griffin and Hayes's non-reappointment using the burden of proof set forth in *Trustees of Forbes Library*.

Graupner

Once a charging party meets its initial burden under the two-step mixed-motive analysis set forth in *Wynn & Wynn*, the burden shifts to the respondent to "show that its legitimate reason, standing alone, would have induced it to make the same decision." *Id.* at 666, *citing Johansen* v. *NCR Comten, Inc.*, 30 Mass. App. Ct. at 301. The appropriate question in a mixed-motive case is whether the respondent's proffered legitimate reason also motivated the adverse action and, if so, to what extent. *Id.*

The Town contends that Graupner's job performance had been unsatisfactory for approximately one year prior to his non-reappointment. In particular, the Town points to the selectmen's meetings on October 13 and November 9, 1998 where the selectmen and Smith discussed Graupner's attitude, reputation, and time slips. The Town also notes that Graupner sent an open letter to the Town's residents prior to December 1998 asking them to help him get re-appointed because two selectmen had indicated to Smith that they were uncertain about whether to re-appoint Graupner. The Town asserts that Graupner was not re-appointed when his term expired on November 30, 1999 because of his temperament and payroll discrepancies.

Although the Town was concerned about Graupner's job performance in the fall of 1998, there is no evidence that the Town took any action against Graupner at that time. To the contrary, he was re-appointed in May 1999 for a six-month period and the record does not indicate that the Town had any concerns about Graupner's performance between May 1999 and late October 1999. It was only after Graupner solicited Union authorization cards on October 9,

45. We note that Dackson's comment was not directed at Griffin and Hayes, and Dackson did not vote on whether to re-appoint them.

1999 that the Town refused to re-appoint him. Less than three weeks later, on October 26, 1999, the Town placed Graupner on administrative leave and did not allow him to finish the remainder of his term. Despite the Town's assertion that the selectmen took this action for safety reasons, there is no evidence in the record demonstrating why Graupner presented a safety concern. Thus, the Town has failed to demonstrate that any of the legitimate reasons it proffered, standing alone, would have induced it to decide not to re-appoint Graupner. Because the Town has not met its burden of proof, we conclude that the Town violated Section 10 (a) (3) and, derivatively, Section 10 (a) (1) of the Law by failing to re-appoint Graupner.

Griffin and Hayes

Under the test articulated in *Trustees of Forbes Library*, it is undisputed that Griffin and Hayes were engaged in concerted, protected activity, and that the Town took adverse action by not re-appointing them. Although the Town argues that the Charging Parties failed to establish the second element of their *prima facie* case that it knew of the Charging Parties' protected activity, the Hearing Officer credited Ackerman's October 9, 1999 statement that the selectmen knew about the Union. Accordingly, the only remaining element of the Charging Parties' *prima facie* that they must prove is that the Town's conduct was motivated by a desire to penalize or discourage their protected activity.

Absent direct evidence of improper motivation, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. Circumstantial factors may include the timing of the adverse action in relation to the protected activity and disparate treatment. *Suffolk County Sheriff's Department*, 27 MLC at 159; *Bristol County*, 26 MLC at 109-110.

Here, Griffin and Hayes participated in the Union card signing campaign at the Apple County Fair on October 9, 1999, and Ackerman did not submit their names for re-appointment in early November 1999. Further, Griffin and Hayes first became aware on October 27, 1999, approximately three weeks after the card signing campaign and one week after the Union requested voluntary recognition, that the Town might not re-appoint them. The record also reflects that the Town treated Griffin and Hayes disparately. The Town offered Shampine, a similarly-situated officer, the choice of relocating within fifteen (15) miles of the Town or resigning, but did not give Griffin or Hayes the same options after it learned that they lived more than fifteen (15) miles away from the Town. We therefore find that the Charging Parties have met the fourth and final element of their *prima facie* case, by demonstrating, through circumstantial evidence of timing and disparate treatment, that the Town was unlawfully motivated when it took adverse action against Griffin and Hayes.

According to the *Trustees of Forbes Library* test, once a charging party establishes a *prima facie* case of retaliation, it is the employer's burden to produce legitimate, non-discriminatory reasons for taking the adverse action. The employer must state a lawful reason for its decision and "produce supporting facts indicating this reason was actually a motive in the decision." *Quincy School Committee*, 27 MLC at 92; *Suffolk County Sheriff's Department*, 27 MLC at 160.

Here, the Town alleges that Griffin and Hayes were not re-appointed because they did not live within fifteen (15) miles of the Town. Additionally, the Town contends that Griffin was not re-appointed because he was insubordinate toward Ackerman when he directed profanity at Ackerman at the sandpit. The Town also argues that Hayes was not re-appointed because a citizen complaint was filed against him, and he had engaged in inappropriate conduct with a female dispatcher in another town.[46] Consequently, the Town has met its burden of proffering legitimate, non-discriminatory reasons for not re-appointing Griffin and Hayes.

Once an employer produces evidence of a legitimate, non-discriminatory reason for taking the adverse action, the case becomes one of "mixed motives" and, under the *Trustees of Forbes Library* analysis, the Commission considers whether the employer would have taken the adverse action but for the employee's protected activities. *See*, *Quincy School Committee*, 27 MLC at 92; *Suffolk County Sheriff's Department*, 27 MLC at 160.

Despite the Town's assertion that Griffin and Hayes were not re-appointed, in part, because they did not live within fifteen (15) miles of the Town, Griffin informed Smith, Graupner, and the Town Clerk that he had moved from Worcester to Westborough shortly after he began working in Brookfield in November 1998. Although Griffin's 1998 W-2 form from the Town listed a Westborough address, Griffin was re-appointed in May 1999 for a six-month term. His residency did not become an issue until late October 1999, several weeks after the Union organizing drive. Moreover, Ackerman did not investigate where Griffin lived until December 1999, after Griffin's term had expired and he was not re-appointed. Although Hayes reported to Graupner that he lived on June Street in Worcester and later received his 1999 W-2 form from the Town at that address, the only effort Ackerman made to ascertain Hayes's residence was to call the telephone number of the East Brookfield address listed on Hayes's resume. Like Griffin, Hayes's residency was not questioned until late October 1999 after the card signing campaign.

The Town also contends that Hayes was not re-appointed because of a citizen complaint. However, sometime between October 17, 1999 and Boucher's resignation on October 27, 1999, Boucher disciplined Hayes for his conduct by verbally reprimanding him and requiring him to apologize and to reimburse the citizens for the toll calls he had made from their telephone. The record does not reflect that any additional discipline was contemplated at that time. Although the Town further argues that Hayes was not re-appointed because he had engaged in inappropriate conduct with a female dispatcher from another police department while working a paid detail, the Hearing Officer did not make this finding, and the Town did not challenge its omission.

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46. Although the Town raises the allegation about Hayes's inappropriate conduct with a female dispatcher in its brief, that fact is not contained in the record.

The Town next asserts that Griffin was not re-appointed because he was insubordinate to Ackerman when Griffin used profanity during a conversation with Ackerman at the sandpit on October 30, 1999. The Town points out that Smith testified that he had fired an officer for using profanity directed at him in the presence of other officers. However, the Hearing Officer did not make this finding, and the Town did not challenge its omission. Moreover, the Hearing Officer consistently discredited Smith's testimony.

Thus, the preponderance of the record evidence here shows that the Town would not have refused to re-appoint Hayes and Griffin but for their Union organizing activities. Accordingly, we conclude that the Town violated Section 10 (a) (3) and, derivatively, Section 10 (a) (1) of the Law by failing to re-appoint Griffin and Hayes.

Section 10 (a) (1)

A public employer violates Section 10 (a) (1) of the Law if it engages in conduct that tends to restrain, coerce, or interfere with employees in the free exercise of their rights under Section 2 of the Law. *Quincy School Committee*, 27 MLC at 91. A finding of illegal motivation is not generally required in a Section 10 (a) (1) case. *Commonwealth of Massachusetts*, 26 MLC 218, 219 (2000). Rather, the focus of the Commission's inquiry is the effect of the employer's conduct on a reasonable employee. *City of Boston*, 26 MLC 80, 83 (2000).

The Charging Parties allege that the Town restrained, coerced, and interfered with their effort at WWP to gather signatures on a petition seeking their reinstatement. Specifically, the Charging Parties argue that three separate officers in three separate cars attempted to stop their activity by surrounding them with cruisers, blocking their means of egress, and detaining them long enough to intimidate them. However, there is no evidence that Ackerman, Churchey, and Bedard surrounded the Charging Parties with their cruisers. Rather, the officers parked their cruisers in the driveway where Graupner and Hayes were standing. There also is no evidence that the officers detained the Charging Parties. Instead, the record reflects that Bedard asked Graupner and Hayes what they were doing. After Griffin joined Graupner, Hayes, and Bedard, there were a few minutes of silence before the Charging Parties walked to Griffin's car and left WWP. Churchey and Ackerman did not talk to the Charging Parties at any time during this encounter. Because the record does not support the Charging Parties' argument, we dismiss this portion of the complaint.

The Charging Parties next allege that the Town interfered, restrained, and coerced Graupner from collecting signatures on his petition for reinstatement at the Congregational Church. In particular, the Charging Parties allege that Ackerman, Churchey, and two state troopers accosted Graupner, surrounded him, and detained him while Ackerman berated Graupner about failing to return Department property. Again, however, the record does not support the Charging Parties' allegation. The two state troopers and Churchey waited in the church vestibule while Ackerman went inside the church hall to speak with Graupner. After Graupner told Ackerman that he would speak with him in a few minutes, Ackerman waited for Graupner in the vestibule with the other officers. After Graupner arrived, the officers and Graupner went outside and stood on the concrete apron next to the church building. Ackerman asked Graupner if he had bought the DARE jacket he was wearing with Town money and requested that Graupner return his blue light permit. Graupner responded that Ackerman was trying to take the clothes off his back and indicated that his lawyer would return the blue light permit the next day. None of the officers blocked Graupner from leaving the concrete apron after the exchange. Although Ackerman was in Graupner's way as Graupner walked to Graupner's car, Ackerman stepped aside after Graupner asked him to do so. Consequently, we dismiss this portion of the complaint.

Although the Charging Parties assert in their post-hearing brief that the Town violated Section 10 (a) (1) of the Law on three other occasions after the charge was filed, the complaint was never amended to include these allegations. Moreover, because the Town did not address two of these allegations in its post-hearing brief, it would prejudice the Town to consider these allegations at this stage of the proceedings. *Compare*, *City of Boston*, 26 MLC 80 (2000) (charging party filed unopposed motion to amend complaint prior to hearing and both parties presented evidence regarding new allegation at hearing and briefed issue). Accordingly, we decline to consider these allegations.

Conclusion

Based on the record before us, we conclude that the Town violated Section 10 (a) (3) and, derivatively, Section 10 (a) (1) of the Law by failing to re-appoint the Charging Parties. However, we dismiss those portions of the complaint alleging that the Town violated Section 10 (a) (1) of the Law.

Remedy

Having found that the Town violated the Law by retaliating against the Charging Parties, we order the Town to reinstate them, to make them whole, to cease and desist from discriminating against employees, and to post a notice to employees in accordance with our traditional remedies in discrimination cases. *See, e.g., Town of Plainville*, 22 MLC 1337, 1358 (1996). However, the Union requests that we issue an order requiring the Town to bargain with the Union pursuant to the Supreme Court's theory in *NLRB* v. *Gissel Packing Co.* 395 U.S. 575 (1969). In support of its request, the Union argues that, because the Town's conduct was so egregious, it destroyed any possibility of the Commission conducting a fair election in the pending representation case.

In *Gissel*, the United States Supreme Court identified two kinds of employer misconduct that may warrant imposing a bargaining order: "outrageous and pervasive unfair labor practices" (Category I) and "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (Category II). *Id.* at 613-614. The case currently before the Commission falls within Category II. In a Category II case, the following elements must be established before requiring an employer to bargain with a union: 1) the union had a majority at one point; 2) the employer's unfair labor practices have a tendency to undermine the union's majority strength and to impede the election process; and 3) the possibility of erasing the effects of the unlawful conduct and ensuring a fair election by using traditional remedies is slight and, therefore,

previously expressed employee sentiment is better protected by a bargaining order than by an election. *Id.* at 613-615. In determining the propriety of a bargaining order, the seriousness of the violations and the pervasive nature of the conduct is examined, considering factors like the number of employees directly affected by the violations, the size of the unit, the extent of dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. *Garvey Marine, Inc.*, 328 NLRB 147 (1999).

Here, the Union contends that it had support from a majority of employees in the petitioned-for bargaining unit when it filed the representation petition in Case No. MCR-4796. In particular, the Union points to the fact that every member of the bargaining unit signed a union authorization card except Ackerman. However, Griffin signed cards on behalf of Churchey, Lazarik, Dailey, and Ackerman. Although the record reflects that Ackerman gave Griffin permission to sign his card and Churchey did not object when Griffin signed a card for him, we are uncertain whether Griffin had Lazarik and Dailey's permission or if Griffin signed other union authorization cards without permission. Accordingly, we cannot conclude that the Union had a majority at one point. Even if there was no doubt that the Union had the support of a majority of the bargaining unit when it filed the representation petition, as we discuss below, the Union has not established that the possibility of erasing the effects of the unlawful conduct and ensuring a fair election by using traditional remedies is slight, and that previously expressed employee sentiment is better protected by a bargaining order than by an election.

The Union argues that the Town committed the following unfair labor practices that undermined its majority strength and impeded the election process: 1) threatening discharge; 2) discharging because of union activity; 3) harassing union supporters; 4) accosting, detaining, and interrogating union supporters; 5) making anti-union statements; 6) granting wage increases to employees who did not bring in the Union and withholding raises from the employees who did; 7) tampering with witnesses; 8) threatening present employees with termination if they supported the union's efforts; and 9) retaliating against Smith who supported the Union's efforts. However, as noted in our opinion section above, the last three unfair labor practices alleged by the Union are not properly before the Commission because the complaint was not amended. For the same reason, we will not consider the sixth unfair labor practice listed by the Union. Further, because we have held that the Town did not violate Section 10 (a) (1) of the Law in the manner alleged in the complaint, the Town did not commit the third and fourth unfair labor practices listed by the Union.

The remaining allegations concerning threatening discharge, discharging the Charging Parties for engaging in union organizing activity, and making an anti-union remark are supported by the record. Specifically, Dackson threatened Graupner with non-reappointment in the presence of Griffin and Hayes approximately three weeks after the card signing campaign at the Apple County Fair and five days after the Union requested voluntary recognition. One day after this conversation, the selectmen voted not to re-appoint Graupner. Almost two weeks later, Ackerman did not submit either Griffin or Hayes's names to the Board for re-appointment and their terms expired. Because threatening discharge and discharging employees for union activity are hallmark violations, they tend to undermine a union's majority strength and impede the election process.[47]

While we do not minimize the Town's unlawful conduct here, for the reasons we articulated in *Plainridge Race Course, Inc.*, we nevertheless find that the Town's prohibited practices do not constitute sufficiently serious and pervasive violations of the Law warranting an extraordinary remedy like a *Gissel* bargaining order. *See, Plainridge Race Course, Inc.*, 28 MLC 185, 187-188 (2001) (and cases cited therein). Accordingly, because remedying the unfair labor practices and conducting a fair election are possible using the Commission's traditional remedies, we will issue an order requiring the Town to cease and desist, to reinstate the Charging Parties, to make them whole, and to post a notice to employees.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Town shall:

1. Cease and desist from:

   a. Retaliating against the Charging Parties for engaging in concerted protected activities.

   b. In any like manner, interfering, restraining and coercing its employees in any right guaranteed by Law.

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

   a. Immediately offer to reinstate the Charging Parties to their prior positions.

   b. Make whole the Charging Parties for all losses they suffered as a result of the Town's unlawful actions, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6B, compounded quarterly;

   c. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of the attached Notice to Employees.

   d. Notify the Commission within thirty (30) days after the date of service of this decision and order of the steps taken to comply with its terms.

SO ORDERED.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has held that the Town of Brookfield has violated Section 10 (a) (3) and, deriva-

47. Hallmark violations are highly coercive violations that include plant closure or threat of plant closure, conferral of benefits, discharge or threat of discharge, and the use of force in an attempt to discourage union activity. *NLRB* v. *Jamaica Towing*, 632 F.2d 208, 216 (2d Cir. 1980).

tively, Section 10 (a) (1) of the Law by failing to re-appoint Peter Graupner, Jamie Griffin, and Kenneth Hayes (Charging Parties).

WE WILL NOT retaliate against the Charging Parties for engaging in concerted protected activities.

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

WE WILL immediately offer to reinstate the Charging Parties to their prior positions.

WE WILL make whole the Charging Parties for all losses they suffered as a result of the Town's unlawful actions, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6B, compounded quarterly.

[signed]
For the Town of Brookfield

* * * * * *

In the Matter of CAPE COD REGIONAL TECHNICAL HIGH SCHOOL DISTRICT COMMITTEE

and

SCOTT WOLF

Case No. MUP-2541

62.3	*discrimination*
62.5	*insubordination*
65.91	*request for representation at disciplinary interview*
91.1	*dismissal*

May 15, 2002
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner

Scott Wolf	*Pro se*
William F. Butler, Esq.	*Representing the Cape Cod Regional Technical High School District Committee*

DECISION[1]

Statement of the Case

On November 22, 1999, Scott Wolf (Wolf) filed a charge with the Labor Relations Commission (Commission) alleging that the Cape Cod Regional Technical School Committee (School Committee) had engaged in prohibited practices within the meaning of Sections 10(a)(4), 10(a)(3) and 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated Wolf's charge and issued a complaint and partial dismissal on June 30, 2000.[2] On July 7, 2000 Wolf sought reconsideration of the Commission's dismissal and on August 29, 2000, the Commission issued an amended complaint. The Commission's amended complaint alleged that the School Committee had: 1) violated Section 10(a)(3) of the Law by giving Wolf a performance evaluation stating that it would not renew Wolf's teaching contract at Cape Cod Regional Technical High School (CCT) because Wolf had requested the presence of a union representative at a meeting with the school principal and superintendent, and 2) violated Section 10(a)(1) by threatening to terminate Wolf for requesting the union representative's presence at the meeting. The School Committee filed its answer to the Commission's June 30, 2000 complaint on July 13, 2000 and its answer to the amended complaint on September 8, 2000.

On October 5 and 10, 2000, Susan Atwater, Esq., a duly designated hearing officer of the Commission, conducted a hearing at which both parties had an opportunity to examine and cross examine witnesses and introduce documentary exhibits. Both parties filed post-hearing briefs on or about November 30, 2000. Neither party

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 Commission dismissed the 10(a)(4) and independent 10(a)(1) allegations.