16.02(1); 2) that the dispute is not subject to arbitration in the absence of contractual language covering the subject matter; 3) that the management rights clause in the parties' collective bargaining agreement authorized the employer to take the action that is the subject of the grievance; 4) that the Union's request is an effort to obtain a benefit that it specifically and unsuccessfully sought in a prior negotiation; and 5) that the action that is the subject of the grievance is subject to a statutory procedure that culminates in a review by the district court, not arbitration. Accordingly, we ordered that the disputes raised by the Union's requests for binding arbitration be promptly submitted to binding arbitration.

Here, the Employer raises essentially the same arguments as it did in case Nos. RBA-01-151 and RBA-01-152. Therefore, for the reasons set forth in *Essex County Sheriff's Department*, Case Nos. RBA-01-151, RBA-01-152 (October 11, 2002), we conclude that an arguably arbitrable dispute over the interpretation or application of a written collective bargaining agreement between the Union and the Employer exists, and that the Agreement does not provide for final and binding arbitration.

Order

WHEREFORE, by virtue of the power vested in it by Section 8 of the Law, the Commission HEREBY ORDERS:

1. That the dispute raised by the Union's request for binding arbitration be promptly submitted to binding arbitration;

2. That within thirty (30) days of the date of service of this decision the parties shall inform the Commission of the arbitrator selected. If the parties do not agree on an arbitrator, they shall submit the dispute for arbitration before the Board of Conciliation and Arbitration.

SO ORDERED.

* * * * * *

In the Matter of TOWN OF DENNIS

and

RUSSELL F. BRADBURY, JR.

Case No. MUP-01-2976

63.21	***filing a grievance***
63.7	***discrimination – union activity***
65.22	***filing a grievance***
65.6	***employer speech***
82.12	***other affirmative action***

October 10, 2002
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner
Peter G. Torkildsen, Commissioner

Lisa C. Adams, Esq.	*Representing Town of Dennis*
Russell F. Bradbury, Jr.	*Pro Se*

DECISION[1]

Statement of the Case

Russell F. Bradbury, Jr. (Bradbury) filed a charge of prohibited practice with the Labor Relations Commission (Commission) on April 23, 2001, alleging that the Town of Dennis (Town or Employer) had engaged in a prohibited practice within the meaning of Sections 10(a)(3) and (1) of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on September 24, 2001. Count I of the complaint alleged that the Employer had interfered with, restrained and coerced Bradbury in the exercise of his rights guaranteed under the Law in violation of Section 10(a)(1) of the Law by telling Bradbury that he had received low scores on his performance evaluation because he had filed grievances that should not have been filed. Count II of the Complaint alleged that the Town had violated Sections 10(a)(3) and, derivatively, 10(a)(1) of the Law by providing Bradbury with a negative performance evaluation and denying him a merit wage increase because Bradbury had filed grievances. The Town filed its answer on August 20, 2001.

On December 13, 2001, Marjorie F. Wittner, Esq. a duly-designated Commission hearing officer, conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence.[2] Bradbury opted to make a closing argument at the close of the evidence and both the Employer and Bradbury filed post-hearing briefs on or about December 14, 2001. On February 20, 2002, the hearing officer issued Recommended Findings of Fact. The Town challenged portions of those findings on March 7, 2002. Bradbury filed a response to the Town's challenges on March 13, 2002. After reviewing those

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. Bradbury appeared *pro se* at the hearing, assisted by Anthony Pini, a representative from Massachusetts Laborers' District Council, Public Employees Local Union 1249.

challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted and summarize the relevant portions below.

Findings of Fact[3]

Bradbury has worked for the Employer's Department of Public Works (the department) since August 30, 1996. Bradbury was an on-call heavy equipment operator from August 30, 1996 through July 2, 1997, when he accepted the Town's offer to become a full-time heavy equipment operator. That latter position is covered by a collective bargaining agreement (Agreement) between the Town and the Massachusetts Laborers' District Council, Public Employees Local Union 1249 (Union or MLDC). From at least August 2000 through March 2001, Bradbury was the shop steward for members of the bargaining unit covered by the Agreement. Robert Crowell (Crowell) has been the department foreman and Bradbury's supervisor since December 1998. As of the date of the hearing, Crowell supervised fifteen full-time employees.

Sometime in March 2000, Crowell observed Bradbury at the fueling pump outside the Town's police station. Bradbury had been assigned to the transfer station on that particular day. Crowell asked Bradbury what he was doing, and Bradbury indicated that an MLDC bargaining unit member, Richie Hall, was working out of classification. Bradbury was acting crew leader that day and had observed Hall running a backhoe while he (Bradbury) was fueling his vehicle. Crowell told Bradbury to mind his own business or words to that effect, and Bradbury replied that he was a shop steward and employees working out of classification were his business. Crowell did not understand why Bradbury had a problem with the assignment if Hall did not have a problem and believed that Bradbury was going around looking for things to "upset the apple cart." Crowell did not issue a warning, put anything in Bradbury's personnel file, or otherwise document this incident.

Article VI, Section 2 of the Agreement states:

> The name of the Union Steward and two (2) other representatives shall be furnished to the Town immediately after their designation and the Union shall notify the Town of any changes. The Union steward, or in his/her absence one of the other representatives, shall request time during work hours to participate with the Town representatives in the attempt at grievance resolution.

As of the date of the hearing, Bradbury had never requested time off to file or process grievances. If he had to file a grievance at Town Hall, he would inform his supervisors in advance that he was going to drop off the grievance or try to drop it off if and when he happened to be heading in the direction of Town Hall during his work day.

Sometime in the spring or summer of 2000, Bradbury received a Commercial Driver's License "A". Bradbury needed that license for the work he had been doing and continued to do on an occasional basis at the transfer station, but not for the work that he did for the highway department as of the date of the hearing. Earlier that summer, Bradbury had expressed his interest to department superintendent Dennis Hanson (Hanson) about applying for a different position within the department. Bradbury did not get that position.

From August through October 2000, Bradbury filed six grievances.[4] He filed two of the grievances on his own behalf. Bradbury filed the other four grievances, which related to unit members' entitlement to certain overtime and detail assignments, on behalf of the entire bargaining unit, in his capacity as shop steward. Bradbury filed those grievances either at Step One of the grievance procedure with Hanson or directly at Step Two, with Town Administrator Lombard (Lombard).

The grievance that Bradbury filed on October 3, 2000 alleged that he had been "continually harassed and discriminated against because of [his] shop stewardship" and that he had "alone...been reassigned on a permanent basis to the Transfer Station... intentionally bypassed for Highway Department overtime and had [his] card removed from the highway department overtime list." The department resolved that grievance at a meeting in early October 2000 attended by Bradbury, Lombard and Hanson, by reassigning Bradbury to the Highway Department. None of Bradbury's remaining five grievances proceeded to the next step or to arbitration and their ultimate resolution is uncertain.[5]

The Town has a merit pay increase program that is tied to the scores that all Town employees, except those employed by the fire and police departments, receive on their annual performance evaluation.[6]

Performance evaluations take place each year in the fall. In January of the following year, Robert Canevazzi (Canevazzi), the Assistant Town Administrator proposes approximately eight potential merit pay plans to the Board of Selectmen. The Town's individual departments and managers are not privy to Canevazzi's proposals, and thus are not informed of the specifics of the merit program until the Board of Selectmen select and approve a plan. That generally occurs within two to three weeks after the Board of Selectmen receive Canevazzi's proposals. [7]

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3. The Commission's jurisdiction is uncontested.

4. Bradbury filed two grievances on August 30, 2000; two on September 29, 2000; one on October 3, 2000 and one on October 6, 2000.

5. Bradbury was unable to recall whether or not the Union had withdrawn the grievances and the record does not otherwise reflect their ultimate disposition. The Town challenged this finding and sought to add a finding that the Union later had a problem about the grievances that Bradbury had filed on behalf of the other bargaining unit members. However, we decline to supplement the finding as it is unsupported by the record.

6. Out of a total of 200 Town employees, between 117 and 120 are eligible for merit pay increases under the plan.

7. The Town challenged the Hearing Officer's failure to include information about the objective nature of the performance review process. Upon review of the record, we find the hearing officer's findings to be sufficient, and we decline to amend the findings.

In January 2001, the Board of Selectmen approved merit increases for fiscal year 2002 (FY02) for those Town employees who had achieved ratings in the top 67% of all those evaluated. The Town granted employees whose scores were in the top twenty percent (20%) a two percent (2%) pay increase, and granted a one percent (1%) merit increase to those employees who had scored in the next forty-seven percent (47%). In fiscal years 2001(FY01) and 2000 (FY00), the Town granted employees who scored in the top ten percent (10%) a 2% merit increase, while granting a 1% increase to the employees who scored in the next 57%. Bradbury received a 1% merit increase in FY00, but did not receive any merit increase in FY01 or FY02. Since 1996, Bradbury has received one other merit increase, in FY 1998. That increase was based on an evaluation that was completed by his then-supervisor, Stephen Santos (Santos). [8]

Crowell evaluated Bradbury's performance in October 1999 and again in October 2000.[9] On October 23, 2000, Crowell completed an evaluation of Bradbury's performance for the previous year. The form Crowell used had nine separate criteria on which Crowell rated Bradbury on a scale of one (1) through five (5), with 5 being the best score. The form also assigns a point value to each criterion. An employee's total evaluation score is computed by multiplying the numerical rating that an employee receives for a specific criterion (e.g. 1 through 5) by the value of that criterion, which can range from five (5) to twenty (20) points. In October 2000, the maximum score an employee could receive was 500. Crowell's evaluation of Bradbury totaled 335 points. Bradbury would have needed to score at least 425[10] points to receive a 1% merit pay increase in FY 02.

The criteria, point value and the ranking (1 through 5) that Crowell gave to Bradbury on October 2000 evaluation are as follows: [11]

Management Organization	
Ability to structure and systematize individual duties (20 points)	4 (80)
Job Skills	
Possession of the technical, mechanical, professional and operational skills to get the job done (15 points)	4 (60)
Application of individual skills to requirements of position and beyond. (5 points)	3 (15)
Performance	
Quality and quantity of individual output is complete, accurate and presentable. (15 points)	3 (45)
Method and manner individual achieves output (attitude, initiative, ingenuity, etc.) (5 points)	3 (15)
Public/Personal Relations	
Ability to interact with public in effective, courteous, and professional manner. (5 points)	4 (20)
Ability to interact with co-workers, subordinates, and administration to achieve goals in an agreeable environment. (15 points)	2 (30)
Personal	
Individual attributes effecting production and environment, (responsibility, reliability, ability to take criticism, etc). (10 points)	3 (30)
Ability to project professional attitude (appearance, attendance, punctuality, concern for safety, composure, etc) (10 points)	4 (40)
	TOTAL 335 points

Crowell also included three handwritten comments in the "Specific Goals/Constructive Comments" section of the form that stated:

1) Focus more on individual duties;

2) Continue to assist in transfer station operations as needed;

3) Cross-train on catch-basin truck.

Crowell intended his comment that Bradbury focus more on his individual duties to pertain to what he characterized as Bradbury's "perceived" role as shop steward. Crowell believed that Bradbury, in his capacity as shop steward, was looking for ways to "upset the apple cart." Crowell did not intend the second and third comments to be criticisms of Bradbury, although Bradbury perceived them as such.

Five other MLDC members received scores that were lower than 335 on their October 2000 (FY 02) evaluations, although the record does not reflect whether Crowell evaluated those employees.[12] No MLDC bargaining unit members received scores high enough to receive 2% merit pay increase in FY02, while four received scores that qualified them for the 1% increase. Five MLDC members qualified for a 1% merit pay increases in FY01. Again, no MLDC members qualified for a 2% merit pay increase that year.

Santos, Crowell's predecessor, evaluated Bradbury in October 1998, and gave him a score of 400, which made him eligible for a 1% increase in FY00. Eleven other MLDC bargaining unit members received scores high enough to qualify them for a 1% merit pay increase that year, although none were eligible for a 2% increase. Santos also evaluated Bradbury in October 1997, and gave him a score of 430 points. Hanson gave Bradbury a six-month evaluation in June 1997, and gave him a score of 415 points.[13]

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8. The Town asserts that this fact should have been included in the findings. We find this fact to be supported by the record and have amended the findings accordingly.

9. The Town uses the evaluation score that an employee received in October 2000 to determine his or her merit pay eligibility in FY02; likewise, the Town uses the evaluation score that an employee received in October 1999 to determine his or her merit pay eligibility in FY01.

10. Although neither party requested to amend this finding, we have modified the facts to more accurately reflect the record.

11. Although neither party requested to amend these findings, we have revised them by putting the information in chart form.

12. Twenty-one MLDC bargaining unit members were eligible for merit increases in FY 02.

13. Although neither party requested that this finding be supplemented, we have modified the facts to more accurately reflect the record.

Crowell handed Bradbury a copy of his FY 02 evaluation on November 22, 2000. Crowell had previously reviewed it with Hanson[14] and Canevazzi, who made no changes or suggestions. Crowell handed Bradbury's evaluation to him as Bradbury was leaving work on November 22. Bradbury remarked that the scores were low and Crowell stated words to the effect that the scores were low because he believed that the grievances that Bradbury had filed could have been handled in a different way, or were inappropriate to file. [15]

As his words indicate, at the time that Crowell handed the evaluation to Bradbury, he was aware of the various grievances that Bradbury had filed within the last two months.[16]

At the time he evaluated Bradbury however, or handed him his evaluation, Crowell was not aware of what specific evaluation score would have qualified Bradbury for a merit increase in FY02. Crowell invited Bradbury to discuss the evaluation with him at a later date when there was more time. However, Bradbury never intended to follow up with Crowell.[17] Instead, he followed the procedure set forth in Article XVI, Section 2 of the Agreement. The fourth paragraph of that provision states:

> If an employee is dissatisfied with the outcome of management review regarding merit increases, the employee may discuss the matter with the Assistant Town Administrator and thereafter with the Town Administrator. The determination of the Town Administrator shall be final.

Bradbury called Canevazzi and set up an appointment to meet with him the following week . At that meeting, Bradbury repeated to Canevazzi what Crowell had told him when handing him his evaluation. Canevazzi told Bradbury that he would check into the matter and get back to him. Approximately a week and a half later, Bradbury called Canevazzi, who told him that Crowell and Hanson were supposed to meet with Bradbury and discuss the evaluation. However, neither Crowell nor Hanson contacted Bradbury.

Bradbury was out of work for health-related reasons from December 1, 2000 through February 5, 2001. Upon his return to work, still not having been contacted by Crowell or Hanson, Bradbury, in accordance with Article XVI, Section 2 of the Agreement, contacted Town Administrator Lombard. Lombard proceeded to set up a three-way meeting between Crowell and Bradbury and himself. At the meeting, Bradbury told Lombard and Crowell that Crowell had told him that his evaluation score was low due to his having filed grievances. About a week and a half later, in response to a call from Bradbury, Lombard informed Bradbury that he had decided to change Bradbury's "2" rating to a "3" on the "Public/Personal Relations" criterion. That raised Bradbury's total score by fifteen (15) points to a total score of 350. That score was still seventy-five points lower than the 425 points he needed to receive a 1% merit pay increase in FY02.[18]

As of the date of the hearing, Bradbury's personnel records did not reflect the fact that Lombard had changed his evaluation score, nor had Bradbury received any confirmation from the Town to that effect.

Bradbury's personnel file contains no written or verbal reprimands or warnings or any record of disciplinary action.

As of July 1, 2001, Bradbury's annual salary was $34, 257.60.

Opinion

Independent 10(a)(1) Allegation

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). Here, Crowell told Bradbury that his perfor-

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14. Although Hanson routinely reviews Crowell's evaluations before they are distributed, he had never indicated to Crowell that he thought a particular score was too high or too low.

15. The Town challenged this finding and proposed a finding that Crowell did not give Bradbury a lower score on his evaluation because he had filed some grievances. Although Crowell did not directly deny stating to Bradbury that his evaluation had been negatively impacted by the grievances he had filed, Crowell did deny that Bradbury's filing grievances had lowered his evaluation. The hearing officer did not credit Crowell's testimony on this point for a number of reasons, including his failure to directly deny making that statement and his overall demeanor when testifying that Bradbury's grievances had not affected his evaluation. The Commission will not disturb a hearing officer's findings unless they are clearly wrong. *See Vinal* v. *Contributory Retirement Appeal Board*, 13 Mass. App. Ct. 85 (1971). Moreover, the Town's proposed finding is a legal conclusion that is more appropriately addressed in the opinion section of this decision.

16. The Town also challenged the hearing officer's finding that Crowell was aware of the various grievances that Bradbury had filed and proposed findings that Crowell did not know or see the grievances until after he had prepared the evaluation. The Town also proposed a finding that Bradbury would have received the same score on his evaluation regardless of the grievances that he filed. The record reflects that Crowell testified that he found out that Bradbury had filed grievances "after the fact" but did not elaborate on that statement. However, the hearing officer did not credit Crowell's testimony that he was not aware that Bradbury had filed grievances when he prepared his evaluation. The hearing officer further discredited Crowell's testimony that he lacked knowledge of the grievances because she found it unlikely that Lombard, Hanson and/or Canevazzi would not have discussed those grievances with Crowell prior to November 22, 2000 particularly because the department had resolved at least one of those grievances by transferring Bradbury back to the transfer station. Rather, the hearing officer credited Bradbury's testimony that Crowell directly told him that his filing of grievances had negatively impacted his performance evaluation. That statement demonstrates that Crowell was aware of Bradbury's grievances when he prepared Bradbury's evaluation and that Bradbury would not have received the same score on his evaluation regardless of the grievances that he had filed.

17. This finding has been modified slightly in response to one of the Town's challenges. However, we decline to amend the findings to reflect that Canevazzi believed that it would have been helpful if Bradbury had discussed his evaluation with Crowell, as we find the hearing officer's findings to be sufficient on this issue.

18. This finding has been modified to reflect the change described in note 10, above. We decline to amend the hearing officer's findings to reflect additional information about Bradbury's evaluation or the number of MLDC employees who received merit increases in FY 01 as the Town has requested as that information is included in other sections of this decision. We further decline to amend the findings to reflect that Bradbury had failed to show that he would not have received a merit increase even if the alleged retaliation had not occurred as that is a legal conclusion that is more appropriately addressed in the opinion section of this decision.

mance evaluation contained low scores because Bradbury had filed grievances that his supervisor believed should not have been filed. Because that remark clearly ties adverse employment action to protected activity, we find that that remark would tend to intimidate and discourage a reasonable employee from filing grievances. *See Quincy School Committee*, 27 MLC 83 (2001). Therefore, we find that Crowell's statements and actions constitutes interference, restraint, and coercion of an employee in the exercise of his Section 2 rights and that, by those statements, the Town has independently violated Section 10 (a)(1) of the Law.

Alleged Retaliation: 10(a)(3) and (1)

Bradbury also alleges that the Town gave him a low performance evaluation and denied him a merit pay increase because the Town, through Crowell, believed that he had filed too many grievances. A public employer that retaliates or discriminates against an employee for engaging in activity protected by Section 2 of Chapter 150E violates Section 10(a)(3) of the Law. *Southern Worcester Reg. Voc. School District* v. *Labor Relations Commission*, 386 Mass. 414 (1982); *School Committee of Boston* v. *Labor Relations Commission*, 40 Mass. App. Ct. 327 (1996). To establish a *prima facie* case, a charging party must show that: 1) an employee was engaged in activity protected by Section 2 of the Law; 2) the employer knew of that conduct; 3) the employer took adverse action against the employee; and 4) the employer took the adverse action to discourage the protected activity. *Town of Clinton*, 12 MLC 1361, 1365 (1985); *Boston City Hospital*, 11 MLC 1361, 1365 (1985); *Town of Athol*, 25 MLC 208, 211 (1999) and cases cited therein.

Bradbury meets all four elements of his *prima facie* case. First, it is well-established, and the Town does not dispute, that filing grievances constitutes concerted, protected activity protected by Section 2 of the Law. *Town of Chelmsford*, 8 MLC 1913, 1917 (1982) *aff'd sub. nom. Town of Chelmsford* v. *Labor Relations Commission*, 15 Mass. App. Ct. 1107 (1983). Second, as discussed above, Crowell's statement to Bradbury demonstrates that Crowell was aware that Bradbury had recently filed a number of grievances. Third, we conclude that lowering Bradbury's scores on his performance evaluation, particularly where those scores are directly tied to merit pay increases, constitutes an adverse employment action. *See Commonwealth of Massachusetts*, 6 MLC 1397 (1979). Finally, we find that Crowell's statement to Bradbury constitutes direct evidence that the Town took the adverse action to discourage the protected activity.

In discrimination cases arising under Section 10(a)(3) of the Law where the charging party has proffered direct evidence of discrimination, the Commission applies the two-step analysis articulated in *Wynn & Wynn, P.C.* v. *Massachusetts Commission Against Discrimination*, 431 Mass. 655, 667 (2000) *citing Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 277 (1989). According to the first step in the *Wynn & Wynn* analysis, a charging party meets its initial burden by proffering direct evidence that proscribed criteria, here, engaging in protected concerted activity, played a motivating part in a respondent's adverse action. *Id.* at 667. Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probably 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 decision, and statements made by decision makers, unrelated to the decisional process itself do not suffice to satisfy a charging party's threshold burden. *Wynn & Wynn, P.C.* at 667 (2000) *citing Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 277 (1989). Here, Bradbury credibly testified that Crowell had told him that he had given him low evaluation scores because he had filed grievances. That was not a stray remark because it was made in response to Bradbury's comment that his scores were low. Further, Crowell was the person responsible for completing Bradbury's evaluation. Therefore, we find that Bradbury has proffered direct evidence that the Town's adverse action was unlawfully motivated and has therefore satisfied all elements of his *prima facie* case as well as his initial burden under *Wynn & Wynn*.

Once a charging party meets its initial burden under the two-step mixed-motive analysis, the burden shifts to the respondent to "show that its legitimate reason, standing alone, would have induced it to make the same decision." *Wynn & Wynn* 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.*

Here, Bradbury alleges that as a result of having filed grievances, he received a lower score on his performance evaluation, which in turn caused him not to receive a merit increase.[19] In response, the Town maintains that Bradbury would have received the same score on his evaluation and that he would not received a merit increase even if he had not filed grievances. In support of its arguments, the Town claims that Bradbury's evaluation for the previous year from Crowell was not much different than the evaluation he received in FY02. The Town also argues that it had a legitimate business reason for giving Bradbury a "2" on his performance evaluation because Crowell felt that Bradbury needed to improve on remaining at his assigned job for the day.

We do not find that the Town's legitimate reasons standing alone would have caused it to give Bradbury the same performance evaluation. First, we note that Crowell directly told Bradbury that he had received a lower score because he had filed grievances. That statement manifestly indicates that Crowell would not have given Bradbury the same score had he not filed grievances. Second, Crowell stated that he gave Bradbury a "2" in the category "Ability to interact with co-workers, subordinates and administration to

19. We do not treat the allegation that the Town denied Bradbury a merit increase as an independent violation of the Law. Under the Town's merit pay system, whether or not Bradbury, or any other eligible Town employee, receives a merit increase in a particular year is a necessary function of the score the employees receives on his or her performance evaluation, the scores received by other Town employees and the Board of Selectman's merit pay increase formula that year. There is no allegation that anyone in the Town other than Crowell retaliated against Bradbury for having filed grievances and there is no dispute that Crowell had no way of knowing what the cut-off score for a merit pay increase would be when he evaluated Bradbury in October 2000.

achieve goals in an agreeable environment" based on the incident when he observed Bradbury away from his post in March 2000. The record reflects that Bradbury had complained to Crowell on the day that he was purportedly away from his assigned post because he (Bradbury) had observed an MLDC member working out of classification. In response to that complaint, Crowell told Bradbury to mind his own business, believing that Bradbury was looking for ways to "upset the apple cart." Consistent with that belief, Crowell commented on the evaluation that Bradbury should focus more on his "individual duties" and Crowell admittedly intended that comment to pertain to what he characterized as Bradbury's "perceived role" as shop steward. Thus, even Crowell's stated reasons for giving Bradbury a low score on his performance evaluation were related to Bradbury's activities on behalf of bargaining unit members.

The Town nevertheless argues that Crowell's comments and score on his performance evaluation reflect Bradbury's poor job performance, particularly his being away from his post during working hours. However, Bradbury was neither counseled nor disciplined for that purported infraction. Moreover, Crowell gave Bradbury his lowest rating in a category that rated, among other things, Bradbury's relationship with the Town's administration, and not his specific job skills or performance. Based on the foregoing, the Town has failed to demonstrate that it would have given Bradbury the same score on his performance evaluation had he not filed grievances or engaged in other protected, concerted activities. Accordingly, we find the Town has violated Sections 10(a)(3), and derivatively, Section 10(a)(1) of the Law by scoring Bradbury lower on his performance evaluation because he had filed grievances.

Conclusion

For all of the above reasons, we conclude that the Town independently violated Section 10(a)(1) when Crowell told Bradbury that he had given him low scores on his performance evaluation because he had filed grievances. Further, we conclude that the Town violated Section 10(a)(3) and, derivatively Section 10(a) (1), of the Law when it lowered Bradbury's performance evaluation scores because he engaged in protected, concerted activity.

Remedy

The Commission's remedies are designed to ensure that the charging party is placed in the same position that he or she would have been in but for the respondent's unlawful activity. *See Quincy School Committee* 27 MLC 83, 94 n.36 (2001). Because we have concluded that Crowell deliberately and unlawfully lowered Bradbury's performance evaluation ratings, and because Bradbury's eligibility for a merit pay increase in FY 02 was directly tied to the score that he received on his 2000 evaluation, we order the Town to remove Bradbury's October 2000 performance evaluation from his personnel file and take all steps necessary to determine whether Bradbury would have been eligible for a merit pay increase in FY 02. If Bradbury is determined to be eligible for a merit pay increase, the Town is ordered to make Bradbury whole for any losses that he has suffered as a result of the Town's unlawful actions, plus interest on all sums due calculated in the manner specified in *Everett School Committee*, 10 MLC 1609 (1984). [20]

Order

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Town shall:

1. Cease and desist from:

   a. Making statements that would tend to interfere with, restrain or coerce employees from filing grievances;

   b. Discriminating against Bradbury in regard to any term or condition of employment in retaliation for grievances that he filed;

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

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

   a. Immediately remove Bradbury's October 2000 performance evaluation from his personnel file and take all steps necessary to determine whether, absent the unlawful retaliation, Bradbury would have been eligible for a merit pay increase in FY 02;

   b. Make Bradbury whole for any losses that he has suffered as a result of the Town's unlawful actions, plus interest on all sums due calculated in the manner specified in *Everett School Committee*, 10 MLC 1609 (1984);

   d. 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.

   e. 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 POSTED BY ORDER OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Labor Relations Commission (Commission) has determined that the Town of Dennis violated Sections 10(a)(1) of M.G. L. c. 150E by informing Bradbury that it had lowered the scores on Bradbury's performance evaluation because Bradbury had filed grievances. In addition, the Commission has determined that the Town violated Sections 10(a)(3) and (1) of M.G.L. c. 150E by retaliating against Bradbury because he filed grievances.

WE WILL NOT make statements that would tend to interfere with, restrain or coerce employees from filing grievances;

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20. The Town argues that because Bradbury's 1999 evaluation, which Crowell prepared before Bradbury was shop steward, was not that different from his 2000 evaluation, Bradbury would still have been ineligible for a merit pay increase even if he had not filed grievances and therefore, Bradbury is not eligible for any back pay. We reject that argument as speculative, as it assumes, without support, that Crowell would have given Bradbury the same or similar score in 2000 that he received in 1999, even if Bradbury had not filed any grievances.

WE WILL NOT retaliate against employees for filing grievances;

WE WILL NOT interfere, restrain or coerce employees in the exercise of their rights under M.G. L. c. 150E.

WE WILL immediately remove Bradbury's October 2000 performance evaluation from his personnel file and take all steps necessary to determine whether, absent the unlawful retaliation, Bradbury would have been eligible for a merit pay increase in FY 02.

WE WILL make Bradbury whole for any losses that he may have suffered as a result of the Town's unlawful activities, plus all interest on all sums due calculated in the manner specified in *Everett School Committee*, 10 MLC 1609 (1984).

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Labor Relations Commission, 399 Washington St., 4th Floor, Boston, MA 02108-5213 (Telephone: (617) 727-3505).

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