

In the Matter of DANVERS POLICE BENEVOLENT ASSOCIATION, DANA M. HAGAN, in his capacities as President, member of the Executive Board and bargaining team, and in his individual capacity, CAROLE GERMANO, in her capacities as Vice President and Secretary and member of the Executive Board and bargaining team, ROBERT J. SULLIVAN, in his capacities as Treasurer and Executive Board member and in his individual capacity, STEPHEN BALDASSARE, JR., in his capacity as bargaining team member and in his individual capacity, WILLIAM BRADSTREET, in his capacity as bargaining team member and in his individual capacity, TIMOTHY WILLIAMSON, in his capacity as bargaining team member and in his individual capacity, and DAVID G. WOYTOVICH, in his capacity as bargaining team member and in his individual capacity

and

TOWN OF DANVERS

Case No. SI-04-270

108.2 *withdrawal of services*
 108.4 *setting requirements under Chapter 150E, Section 9*
 111.82 *police*

November 9, 2004

Allan W. Drachman, Chairman
 Helen A. Moreschi, Commissioner
 Hugh L. Reilly, Commissioner

Paul T. Hynes, Esq. *Representing the Danvers Police Benevolent Association, its officers, Executive Board members, bargaining team members, and individual members*

Joseph Bartulis, Esq. *Representing the Town of Danvers*

9A PROCEEDINGS

On October 22, 2004, the Town of Danvers (Town) filed a petition with the Labor Relations Commission (Commission) for a strike investigation pursuant to Section 9A(b) of Massachusetts General Laws, Chapter 150E (the Law). The petition alleges that the Danvers Police Benevolent Association (Union) and its officers, Executive Board members, bargaining team members, and individual members listed in the case caption violated Section 9A(a) of the Law by engaging in and by inducing, condoning, and encouraging an illegal work stoppage and withholding of services. The Commission conducted an investigation of the Town's petition on November 2 and November 4, 2004. All parties had an opportunity to be heard, to examine witnesses, and to introduce evidence.

During the first day of the investigation on November 2, 2004, the Union moved to redact any reference to unit members' home addresses. In particular, the Union argued that this information is exempt from disclosure under M.G.L. c. 66, §10(d), the Public Records Law, because unit members are law enforcement personnel. The Town did not oppose that motion. The Hearing Officer took the Union's motion under advisement. We grant that motion.

Parties' Stipulations

1. The Town is a public employer within the meaning of Section 1 of the Law.
2. The Union is an employee organization within the meaning of Section 1 of the Law.
3. The Union represents all regular employees in the Police Department, excluding the Chief of Police, Captain of Police, reserve officers, civilians, managerial and/or confidential employees.
4. Dana M. Hagan (Hagan) is President of the Union, a member of the Union's Executive Board and bargaining team, and a patrol officer employed by the Town.
5. Carole Germano (Germano) is Secretary and Vice President of the Union, a member of the Union's Executive Board and bargaining team, and a sergeant employed by the Town.
6. Robert J. Sullivan (Sullivan) is Treasurer of the Union, a member of the Union's Executive Board, and a patrol officer employed by the Town.
7. Stephen Baldassare, Jr. (Baldassare) is a member of the Union's bargaining team and a patrol officer employed by the Town.
8. William Bradstreet (Bradstreet) is a member of the Union's bargaining team and a patrol officer employed by the Town.
9. Timothy Williamson (Williamson) is a member of the Union's bargaining team and a patrol officer employed by the Town.
10. David Woytovich (Woytovich) is a member of the Union's bargaining team and a lieutenant employed by the Town.
11. The Town and the Union are parties to a collective bargaining agreement that expired on July 1, 2003 (Agreement).
12. Article 15, Section 8 of the Agreement states: "The Association agrees not to engage in, induce or encourage any strike, work stoppage, slow down or withholding of services by employees covered by the terms of this Agreement."
13. The parties have been negotiating since May 20, 2003 for a successor collective bargaining agreement.
14. The Union filed a petition at the JLMC to exercise jurisdiction. The Town did not oppose that petition. A mediator was assigned, and the first mediation session will be held on November 22, 2004.
15. The policy and procedure manual with respect to traffic enforcement has existed since on or about 1985 and has not been revised since March of 2002.

16. The data contained in Exhibit 10 of the Town's strike petition are an official record of the Town's Police Department. The parties believe that the data in Exhibit 10 are accurate.

Findings of Fact

Based upon the Investigation conducted, the Commission makes the following findings of fact:

Traffic Enforcement

Traffic stops may be criminal, civil, or mixed in nature. For civil traffic stops, officers may issue a complaint citation or a verbal or written warning citation. Police officers indicate whether a ticket is a complaint citation or a written warning citation by checking off a box on the ticket. If issued a complaint citation, motorists are fined and either pay the fine through the Registry of Motor Vehicles (RMV) or appeal the fine to District Court.¹ For criminal traffic stops, motorists are either arrested immediately or issued a summons to appear in District Court at a later date.

The policy and procedure manual of the Town's Police Department contains, in part, the following provisions regarding traffic enforcement.

15.1 GENERAL CONSIDERATIONS & GUIDELINES

The primary purpose of traffic law enforcement is to reduce the amount of traffic collisions through vigorous attempts at controlling violations that could cause these collisions. This action is generally achieved by the Patrol Section in the utilization of visibility factors during preventive patrol and by a uniform, active enforcement program.

Uniformity means that guidelines must be established in order to inform officers of the usual expectations of the Department and the community with regard to handling violations. The purpose of this policy is to ensure that the enforcement policies of this Department are commensurate with applicable law, that they take into consideration the degree and severity of the violation committed, that the qualitative and quantitative emphasis are equally integral to the overall program and the activity is conducted in a safe and efficient manner.

Quantity of enforcement measures should not be construed to mean quotas. This Department does not and will not have a quota system. However, all officers conducting traffic enforcement activities and in the regular performance of their duties shall be expected, whenever possible, to take action against all violators and to govern the degree of that action according to the severity of the violation. The non-punitive actions of verbal or written warnings should be substituted for legal arrests and punitive citations when the circumstances warrant, especially in cases of inadvertent violations. Warnings and visible patrol, coupled with intensive public education, should be used as much as possible and punitive enforcement should be used only to the extent necessary.

15.2 PROCEDURES

15.2.1 Any officer who observes or discovers (upon investigation) a traffic violation shall take one of the following courses of action:

15.2.1.1 PHYSICAL ARREST: Arrests for motor vehicle violations may only be made in accordance with Chapter 90, Section 21 of the Massachusetts General Laws for:

- a. Operating a motor vehicle while under the influence of intoxicating liquor or drugs, etc.;
- b. Operating a motor vehicle after suspension or revocation of a driver's license;
- c. The provisions of Chapter 90, Section 25, generally denoted as refusal to obey a police officer;
- d. Leaving the scene of a motor vehicle collision (personal injury);
- e. And, using a motor vehicle without the authority of the owner.

There are also two non-motor vehicle laws/offenses for which a police officer may arrest. They are:

- a. C138 534: Minor transporting alcoholic beverages in a vehicle; and
- b. C266 S28: Stealing, possessing, or concealing a stolen motor vehicle.

It is not necessary to issue a citation for either of the above offenses.

* * *

15.2.2 WRITTEN COMPLAINT CITATIONS: These are the backbone of police traffic enforcement efforts. An officer's discretion plays a big part in the decision to take punitive action against a violator. However, this discretion should be based on a combination of experience, training, and common sense. Naturally, serious offenses, such as operating to endanger, excessive speed, multiple violations, and other offenses, will likely result in a written complaint. Further, a complaint is always issued in conjunction with a legal arrest for motor vehicle violations. The action officers should avoid is the issuance of a complaint for violations based on anger, retribution, or prejudice. It is important to remember that issuing complaint citations is merely another portion of the education process necessary to reduce collisions and that a lesson is seldom learned from the unwarranted action of a police officer.

15.2.3 WRITTEN WARNING CITATIONS: These should be used in borderline cases after considering facts such as the seriousness of the offense, time of day, traffic and vehicle congestion, visibility, weather conditions, and prior violation, if known. If used properly, warnings can effectively be used as a means of educating the public in the area of safe driving and because it involves less emotional stress, it is also considered to be an effective public relations tool. However, the excessive use of warnings, especially if the public generally knows it, should be avoided because it creates an unsafe feeling of lack of commitment by the police department to enforce motor vehicle safety within the community. A written warning should usually be used instead of a verbal warning because it exerts a more effective influence on the driver and aids in recording the incident for guidance in disposing of future violations.

15.2.4 VERBAL WARNINGS: An officer will generally give a verbal warning to those violators that he/she feels has sufficiently learned from the embarrassment of being stopped by a police officer. Verbal warnings are a frequent action of an officer.

1. Monies received by the Town from traffic fines are returned to the Town's general fund.

* * *

15.2.7 APPRAISAL OF CHANGES AND ENACTMENT OF LAWS: It shall be the responsibility of the Executive Officer to appraise officers through the use of roll call, memos, and in-service training of newly enacted or changes in motor vehicle laws and regulations. This appraisal shall include an interpretation of (sic), if necessary, an opinion as to whether verbal or written warnings should be issued in lieu of complaints and/or arrests for a specified period of time to facilitate public awareness.²

* * *

Police officers receive a copy of the manual when the Town hires them. The manual is accessible from the laptop computers in the Town's police cruisers. The manual also is available in digital and paper forms at the Police Department.

Events In 2003-2004

When the parties began negotiating for a successor collective bargaining agreement in May of 2003, the Town explained to the Union that there had been a decrease in the amount of the Town's state aid. As a result of that decrease, the Town informed the Union that it was unlikely that the Town would have the funds to pay for a wage increase for any bargaining unit in fiscal year 2004, except for a previously negotiated wage increase for firefighters. The Union indicated that it understood the situation and agreed to work with the Town. Instead of a wage increase in the first year of the successor agreement, the parties discussed the possibilities of paying wage increases in subsequent years of the contract and changing other benefits in the Agreement. While the parties were negotiating between May and November of 2003, the Town did not notice any decrease in the number of complaint citations issued.

During a bargaining session on December 9, 2003, the Union's negotiating team was upset because they learned that the Town had offered a 2.8% wage increase to first and second class linemen in the Town's Electric Department for fiscal year 2004. One of the Town's negotiators explained that the Town felt that a wage increase was necessary to retain these highly skilled, technical employees and to remain competitive with the wages offered to similar employees in surrounding communities. The Town also stated that the Electric Department generated revenue for the Town. The Union reminded the Town that unit members generated income for the Town through traffic fines and a 10% administrative charge added to bills for private details. Hagan then stated words to the effect that "if the Town continues to insist on 0% [for the first year of the contract], then the \$255,000 in traffic fines could change. It could go another way." Later that same day, Germano sent an e-mail to Union members stating, in part, as follows:

[T]he Union made it clear that we are not going to accept a 0% this year. This is in light of a recent offer made to Electric Light of 2.8%. The fire department already agreed to 3%. The Town originally told

us that they had no money. What they really wanted to say is that they have no money for us. . . .

The town manager explained that the money offered to the linemen (who are already being paid \$10 more an hour than us) was purely market driven. He said that they had to come up with the money in order to keep employees. This, despite the fact, that they have a waiting list of potential employees.

The town manager was questioned about the \$210,000 given back to the Town by the Police Department. He was also informed that officers had generated \$255,000 in citation revenue this year. The town manager emphasized that he has the utmost respect for the police and the job that they do, but that a lot of departments generate revenue for the Town. The money given to the Town by the Police Department does not necessarily mean that it comes back to the Police Department or to officers' salaries.

The manager was reminded of a time in the mid-1980's when officers did not generate any citation revenue. . . .³

In January 2003, the Town began to pay close attention to the number of complaint citations issued by unit members and concluded that the number was decreasing. That same month, the police chief's executive assistant, Christine Perry (Perry), heard that Woytovich was gathering data about the number of complaint citations that were being issued and the identities of the unit members who were issuing them. Perry also heard that Woytovich had expressed dissatisfaction after learning that unit members were continuing to issue complaint citations.

On January 23, 2004, Police Chief Stuart Chase (Chase) sent an e-mail to all Police Department personnel stating in relevant part:

[I]n FY'03, the Police Department returned \$82,609 to the Town Treasury. You may remember that the "cherry sheet" (state funding to cities and towns) was reduced significantly. This \$82K was used to offset deficits in other Departments and came from our salaries and wages apportionment. It was derived from unfilled positions that were the result of conditions beyond our control (like 6-month waits for promotional lists from civil service). This figure represents PAYROLL, and cannot be used for any other purpose. This fact is not often understood by many who question why we didn't purchase things we need - it simply cannot be done. . . .

(Emphasis in original.)

After receiving Chase's e-mail on January 23rd, Hagan went to the Town Accountant's Office to check the accuracy of the figures cited in that communication. Hagan discovered that the Police Department had returned \$190,000 in salaries and wages as well as \$30,000 in other expenses. Hagan next went to Chase's office to inform Chase of this discovery and to alert Chase that Hagan intended to communicate this information to the Union membership.

Following his meeting with Chase on January 23rd, Hagan sent an e-mail on that same date from Baldassare's e-mail address to Union members disclosing the information that Hagan had learned

2. Prior to 2001, motorists who received three written warning citations in a calendar year had their license suspended for seven days according to a provision in M.G.L. c. 90. The Legislature repealed that provision in the Acts of 2001. Currently, there are no sanctions in M.G.L. c. 90 for receiving written warning citations, regardless of the number received in a calendar year. The Town did not change its traffic enforcement policy after the Legislature enacted this repeal.

3. At least seven unit members received written reprimands in the mid-1980's for not enforcing the Town's traffic laws. At that time, the Union and the Town were engaged in contract negotiations. After the parties executed a collective bargaining agreement, the Town rescinded the written reprimands.

from the Town Accountant’s Office as well as stating the Union Executive Board’s position concerning the returned funds. Hagan’s e-mail also stated in pertinent part: “[O]fficers are reminded Police officers may use discretion when issuing traffic citations. According to police promotional texts approved by the Commonwealth of Mass. Department of Civil Service. . . . ‘Warnings are the most effective type of citation given. They provide education and promote good community relations’” The e-mail concluded by indicating that unit members could contact shift representatives or Executive Board members with any questions or concerns, and that unit members’ anticipated cooperation would be greatly appreciated.

At a bargaining session on or before January 28, 2003, one of the Town’s negotiators, Attorney Brian Callahan (Callahan), told the Union’s negotiating team that the citation issue was unacceptable, had to change, and was not conducive to bargaining. On January 28, 2004, Hagan sent an e-mail to Union members stating in part:

[W]hen the Town of Danvers fails to negotiate with the membership and says we are worth another zero for fiscal 2004 . . . this Union has to take a stand Stay together. . . .

While packing up at bargaining the other day . . . Attorney Callahan made a clear ‘idle threat’ to us about the citation issue.

We did not appreciate this. . . and the Union needs to stay together.

If members need this to be clarified further. . . See the Executive Board . . . or give us a call. The numbers are still coming in.

In March and April of 2004, Chase spoke to Hagan and to Operations Commander Lieutenant Edmund Plamowski (Plamowski) and told them that the citation issue had to stop. At Chase’s request, Plamowski conveyed this message to unit members.

At the parties’ April 1, 2004 bargaining session, Callahan told the Union’s attorney, Paul T. Hynes (Hynes), that the citation issue could not continue and was not good for bargaining. Hynes stated words to the effect that police officers would do what they were required to do. Hynes later stated words to the effect that officers would do what they have to do. However, Hynes never encouraged members to withhold their services and, instead, advised them to do their jobs.

On or about June 4, 2004, Captain Neil Ouellette (Ouellette) was near the Records Room and overheard a conversation between Hagan and the Records Room assistant, Lynn Horn (Horn). Horn told Hagan that she had something for him, and that the numbers should help him. Horn also said to Hagan that Hagan could get Horn a raise too. After Hagan had left, Ouellette asked Horn about her conversation with Hagan. Horn stated that Hagan was checking the number of complaint citations issued each month and was comparing the figures to the number of complaint citations issued in the previous year. Horn told Ouellette that unit members were issuing one or two complaint citations each month only if necessary.

On July 18, 2004, Hagan sent an e-mail to all Union members stating:

It has come to my attention that our administrators believe that the recent decline in citations may be the result of a job action by our Union. While we know this to be false, I ask that all members make an attempt to write more citations in an effort to clear up this misconception. I know you have all been working really hard and there is little time to accomplish this. Just try to do the best you can. Any questions . . . feel free to ask Sergeant Germano or myself. Thanks again.

In August 2004, the parties’ contract negotiations stalled. On or about October 7, 2004, the Union conducted an informational picket and distributed leaflets outside of the Police Station.

Statistical Data

Between January and June 2004, Hagan wrote forty written warning citations and no complaint citations.⁴ In 2003, Hagan wrote ninety-one written warning citations and 1,123 complaint citations for that year.

The following tables contain data showing the number of written warning citations, complaint citations, summonses, and arrests relating to traffic enforcement over a five-year period in the Town’s Police Department.

Traffic Warnings Issued by Month and Year

	2000	2001	2002	2003	2004
January	679	521	367	259	199
February	506	458	325	246	248
March	744	402	344	319	284
April	449	469	309	173	318
May	490	491	263	218	303
June	396	414	332	157	225
July	424	356	287	209	326
August	511	472	305	203	291
September	441	438	196	182	275
October	474	376	264	154	
November	433	302	239	189	
December	291	221	153	151	
TOTAL	5838	4920	3384	2460	3069

Traffic Citations Issued by Month and Year

	2000	2001	2002	2003	2004
January	209	196	127	161	51
February	153	183	155	263	41
March	396	141	187	194	25
April	385	117	130	177	9
May	301	342	133	318	10
June	225	179	111	220	19
July	258	135	146	179	14
August	326	188	169	281	19
September	289	202	80	276	14
October	272	193	70	173	
November	168	171	187	277	
December	85	107	155	85	
TOTAL	3067	2154	1650	2604	254

4. Hagan was out of work for twelve weeks starting on January 4, 2004 due to surgery on his back.

Traffic Summonses Issued by Month and Year

	2000	2001	2002	2003	2004
January	12	13	13	19	29
February	9	11	15	19	38
March	23	21	6	11	20
April	13	15	12	22	18
May	22	13	14	35	57
June	16	14	8	44	31
July	23	16	12	51	52
August	16	7	23	42	32
September	15	22	13	62	28
October	17	11	10	45	
November	26	11	12	60	
December	17	10	11	39	
TOTAL	209	164	149	449	422

May	59%	56%	60%	37%	72%
June	61%	66%	69%	35%	71%
July	58%	68%	62%	44%	77%
August	58%	70%	59%	36%	77%
September	58%	65%	62%	32%	81%
October	61%	62%	72%	39%	
November	67%	59%	53%	34%	
December	71%	61%	46%	48%	
TOTAL	62%	66%	62%	42%	72%

The following table indicates the fines generated by complaint citations over a four-year period in the Town's Police Department.

Fines

	2001	2002	2003	2004
January	\$7,495	\$10,025	\$17,585	\$6,065
February	\$14,050	\$14,235	\$21,395	\$5,415
March	\$10,430	\$10,960	\$16,875	\$3,710
April	\$8,260	\$10,805	\$20,795	\$730
May	\$18,185	\$13,885	\$23,025	\$1,220
June	\$11,130	\$11,545	\$21,095	\$2,765
July	\$13,020	\$16,690	\$20,160	\$2,640
August	\$12,760	\$16,725	\$27,963	\$2,020
September	\$14,345	\$10,105	\$30,430	\$1,370
October	\$17,060	\$9,510	\$23,710	
November	\$16,960	\$17,925	\$21,900	
December	\$10,675	\$12,660	\$10,205	
TOTAL	\$154,370	\$155,070	\$255,138	\$25,935

Traffic Arrests by Month and Year

	2000	2001	2002	2003	2004
January	18	17	15	32	35
February	16	19	17	25	62
March	27	13	21	16	47
April	20	18	11	21	49
May	12	25	27	24	51
June	14	17	29	23	43
July	22	16	21	41	32
August	28	9	21	39	35
September	18	15	27	42	23
October	19	23	24	24	
November	19	24	15	32	
December	18	26	17	38	
TOTAL	231	222	245	357	513

Other Information

The Town is approximately fourteen square miles with a population of 26,012 people. In approximately 2004, the Town lost one patrol officer position through attrition. That same year, some police officers were absent from work due to injuries.⁵

Since September 11, 2001, every police officer in the Town has taken on additional responsibilities. Specifically, police officers more frequently patrol sites that are potential terrorism targets.

Unit members presently continue to work regular shifts, details, and overtime as needed. However, some details go unfilled depending on the day of the week.

The Town operates a traffic car that performs traffic enforcement duties. If departmental staffing decreases to minimum levels, however, the officer assigned to the traffic car is reassigned.⁶

Between December 2000 and August 2001 as well as similar periods through 2003, the Town participated in a "Click It or Ticket" program sponsored by the Massachusetts Highway Safety Commission. The program provided grant money to cities and towns in return for their police officers ticketing motorists who had a primary traffic violation and also were not wearing seatbelts. Plamowski instructed unit members to stop a minimum of twelve cars per shift in a four-hour block and to issue fines. The Town has not participated in the "Click It or Ticket" program in 2004.

In addition to the increase in traffic arrests noted above, overall arrest rates have increased.

The following tables show the percentages of complaint citations and written warning citations issued by the Town's Police Department over a five-year period.

Percentage of Citations

	2000	2001	2002	2003	2004
January	23%	26%	24%	34%	16%
February	22%	27%	30%	48%	11%
March	33%	24%	34%	36%	7%
April	44%	19%	28%	45%	2%
May	36%	39%	30%	53%	2%
June	35%	29%	23%	50%	6%
July	35%	26%	31%	37%	3%
August	37%	28%	33%	50%	5%
September	38%	30%	25%	49%	4%
October	35%	32%	19%	44%	
November	26%	34%	41%	50%	
December	21%	29%	46%	27%	
TOTAL	33%	29%	30%	44%	6%

Percentage of Warnings

	2000	2001	2002	2003	2004
January	74%	70%	70%	55%	63%
February	74%	68%	63%	44%	64%
March	63%	70%	62%	59%	76%
April	52%	76%	67%	44%	81%

5. The record does not reflect the identities of the officers who were absent or the dates that they were out of work.

6. The record is silent regarding the frequency with which the Town operates the traffic car.

Opinion

Section 9A(a) of the Law prohibits public employees and employee organizations from engaging in, inducing, encouraging, or condoning any strike, work stoppage, slowdown, or withholding of services. Section 9A(b) of the Law permits a public employer to petition the Commission to investigate alleged violations of Section 9A(a) of the Law “whenever a strike occurs or is about to occur.” M.G.L. c. 150E, § 9A(b). Section 1 of the Law defines strike as:

A public employee’s refusal, in concerted action with others, to report for duty, or his [or her] willful absence from his [or her] position, or his [or her] stoppage of work, or his [or her] abstinence in whole or in part from the performance of the duties of employment as established by an existing collective bargaining agreement or in a collective bargaining agreement expiring immediately preceding the alleged strike, or in the absence of any such agreement, by written personnel policies in effect at least one year prior to the alleged strike. . . .

In prior cases, the Commission has considered whether public employees were refusing to perform some portion of their assigned duties in violation of Section 9A(a) of the Law. *Town of Nahant*, 13 MLC 1041 (1986); *City of Newburyport*, 8 MLC 1373 (1981). To determine whether public employees are engaging in a strike or withholding of services, the Commission generally considers: 1) whether the service is one that employees must perform as a condition of employment; 2) whether the service was in fact withheld or is about to be withheld; and 3) the party responsible for the withholding of the service. *Town of Walpole*, 12 MLC 1039 (1985); *Newton School Committee*, 9 MLC 1611 (1983). Conditions of employment are defined as:

. . . not only those duties specifically mentioned in an existing or recently expired collective bargaining agreements (or personnel policies in effect for more than one year), but also those practices not unique to individual employees which are intrinsic to the position or which have been performed by employees as a group on a consistent basis over a sustained period of time.

Lenox School Committee, 7 MLC 1761, 1775 (1980), *aff’d sub nom. Lenox Education Association v. Labor Relations Commission*, 393 Mass. 276 (1984).

Here, the Town alleges that the Union is unlawfully withholding services. In particular, the Town asserts that Union members are refusing to issue complaint citations to motorists to deprive the Town of revenue in retaliation for the Town insisting on offering the Union a 0% wage increase in fiscal year 2004, despite other bargaining units receiving pay raises that fiscal year. The Town points out that the average annual ratio of complaint citations to written warning citations historically has been 65% complaint citations to 35% written warning citations. The Town notes that the statistical data, above, for the years 2000 through 2003 fall within those historical parameters, but the statistical data for the first nine months of 2004 do not. Specifically, the ratio of complaint citations to written warning citations for January through October of 2004 is 72% written warning citations to 6% complaint citations. The Town contends that a reasonable inference to draw from this data is that unit members are on strike. The Town further contends

that the comments made by the Union’s bargaining team members during negotiations and their e-mails support this inference.

The Town’s argument here is similar to the argument made by the public employer in *City of Newton*, 13 MLC 1463 (1987). In that case, the city contended that unit members historically had accepted voluntary overtime assignments but were refusing to do so nearly unanimously at the time of the strike investigation. The city asserted that their refusal to perform voluntary overtime assignments constituted an unlawful withholding of services. The Commission found that, despite unit members accepting voluntary overtime assignments in the past, the practice was that employees were free to exercise their discretion to decline that work. The Commission held that “having established the practice that employees [could] decline to accept offered overtime, the employer [could] not . . . claim that the performance of offered overtime [was] a mandatory duty of employment based upon the number of employees declining to accept the offered overtime.” *Id.* at 1465-1466.

Like *City of Newton*, the record in the case before us shows that unit members were free to exercise their discretion whether to issue complaint citations or to take some other action against motorists that they had stopped for a traffic violation. The Town’s policy and procedure manual for traffic enforcement clearly states in Section 15.2.2, Written Complaint Citations, that “an officer’s discretion plays a big part in the decision to take punitive action against a violator.” Although that section of the manual also discusses factors like an officer’s experience, training, and common sense as well as the seriousness of the offense, these factors are vague and subjective and do not limit an officer’s discretion to determine whether to issue a complaint citation. *See, Town of Plymouth*, 18 MLC 1191, 1193 (1991) (contractual provision stating that unit members had to perform a “reasonable amount of overtime” was too vague to establish parameters of employees’ commitment to perform that duty). More importantly, Section 15.2.2 of the manual is silent regarding whether unit members must issue certain numbers of complaint citations in a specific time period.

Indeed, the Town did not establish that it ever communicated to unit members that they were expected to issue a sufficient number of complaint citations each year to fall within the 65% historical annual average. To the contrary, Section 15.1 of the policy and procedure manual regarding traffic enforcement specifically states that “this Department does not and will not have a quota system.” Even after the Town noticed that the number of complaint citations was falling in 2004, the most that Chase did about the situation was to instruct Plamowski to tell unit members that the citation issue had to stop. *See, Town of Arlington*, 14 MLC 1043, 1047 (1987) (“No employee was ordered to write a particular number of tickets, so we cannot determine whether employees would have failed or refused to perform at a particular standard of productivity.”)

The Town attempted to establish that issuing a certain number of complaint citations is a condition of employment by proffering evidence of unit members receiving written reprimands in the mid-1980’s for not enforcing the Town’s traffic laws during contract negotiations. However, the Union rebutted that evidence by showing that the Town rescinded these written reprimands after

the parties had executed a collective bargaining agreement. Regardless of whether the Town legitimately issued the written reprimands, this isolated example of discipline occurring twenty years ago is insufficient to prove that unit members must issue an average of 65% complaint citations each year. *See, University of Massachusetts*, 28 MLC 91, 93 (2001) (because employer failed to show that it formerly disciplined employees for turning in grades late, Commission found that activity was not a condition of employment and dismissed strike petition); *City of Newton*, 13 MLC at 1465 (no strike when employees previously refused voluntary overtime assignments without discipline or threat of adverse action).

Accordingly, the preponderance of the record evidence in this strike investigation demonstrates that issuing specific numbers of complaint citations within a definite timeframe is not a condition of unit members' employment. Because the Town failed to establish that element of its case, we find that the conduct alleged here has not been shown to be unlawful. For that reason, we need not analyze the other elements of the Town's case, including possible explanations for the disparity in the number of annual complaint citations issued based upon the other variables mentioned in the record.

Conclusion

Based on the parties' stipulations and the facts set forth above, we conclude that the Town did not meet its burden to show that: 1) the Union and its membership are engaged in a strike, work stoppage, slowdown, or other withholding of services in violation of Section 9A(a) of the Law; and 2) the Union and its officers, Executive Board members, bargaining team members, and individual members listed in the case caption are inducing, encouraging, and condoning such action in violation of Section 9A(a) of the Law. Accordingly, we dismiss the Town's petition.

SO ORDERED.

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In the Matter of BOSTON WATER AND SEWER COMMISSION

and

RICHARD FOWLER

MUP-1677

82.111 Interest

November 19, 2004

Allan W. Drachman, Chairman

Helen A. Moreschi, Commissioner

Hugh L. Reilly, Commissioner.

John Foskett, Esq.

Representing Boston Water and
Sewer Commission

Harold Lichten, Esq.

Representing Richard Fowler

Alfred Gordon, Esq.

RULING ON MOTION FOR MODIFICATION AND CLARIFICATION AND MODIFIED ORDER

Statement of Case

On December 16, 1999, the Commission issued a decision and order in the above-captioned case concluding that the Boston Water and Sewer Commission (BWSC or Employer) had not retaliated against the Charging Party Richard Fowler (Fowler) in violation of Section 10(a)(3) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) for engaging in union activities. *Boston Water and Sewer Commission*, 26 MLC 61 (1999). Fowler filed a timely appeal of that decision pursuant to Section 11 of the Law. On September 26, 2002, the Appeals Court reversed the Commission and remanded the matter for further proceedings consistent with its opinion. *Fowler v. Labor Relations Commission*, 56 Mass. App. Ct. 96 (2002).

On April 2, 2003, the Commission issued a decision on remand, reversing its prior decision and holding that the Employer had violated Sections 10(a)(3) and, derivatively, Section 10(a)(1) of the Law. *Boston Water and Sewer Commission*, 29 MLC 176 (2003). The Commission ordered the Employer to reinstate Fowler and to make him whole "for all losses suffered . . . , plus interest on all sums owed at the rate specified in M.G.L. c. 231, §6B, compounded quarterly." *Id.*, at 181.

On April 29, 2003, the Employer filed a timely notice of appeal of the Commission's decision on remand. The Commission has not yet assembled the record on appeal.

On August 31, 2004, the Employer filed a *Motion for Modification and Clarification*. The Employer states that the only issue that it appeals is the rate of interest imposed by the Commission. It asks the Commission to modify its order M.G.L. c. 231, §6I, instead of the 12% interest rate specified in M.G.L. c. 231, §6B.