However, the parties did bargain. The evidence establishes that the Union proposed that the Town assign the additional oversight duties of snow and ice removal operations to one member of its bargaining unit. The Town's counteroffer was designed to compensate four members of the Union's bargaining unit for any additional oversight duties of snow and ice removal in the Town. The parties negotiated over this issue, but did not reach an agreement. There is no evidence that the Town assigned the Long Pond oversight duties at issue to any member of the Union's bargaining unit or otherwise increased the workload of any bargaining unit member. Absent sufficient information demonstrating that bargaining unit members did perform the additional oversight duties and that these additional duties increased their workload sufficient to trigger a bargaining obligation, the Union's allegation that the Town failed and refused to bargain in good faith must be dismissed. The parties' submissions do not contain this information.

Moreover, even though the Union asserts that the Town engaged in regressive bargaining during these negotiations, the information does not support this allegation. Although it is undisputed that the Town adjusted its original total compensation offer to bargaining unit members during the January 10, 2005 negotiating session, this adjustment, in content, does not constitute regressive bargaining. Rather, the adjustment to the proposed compensation figure reflects the passage in time between the date the Town first made the offer in November of 2004 and January 10, 2005. The change reflects the expectation that the lapse of time reduced the number of snow and ice accumulations the Town would have to address. Accordingly, the Commission does not find probable cause to believe that the Town violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law in the manner alleged and dismisses the Union's charge of prohibited practice.

SO ORDERED.

* * * * * *

In the Matter of LAWRENCE SCHOOL COMMITTEE

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 888

Case No. MUP-02-3631

63.3	*discrimination – hiring, layoffs, promotion*
63.7	*discrimination – union activity*
65.3	*interrogation, polling*
65.62	*threat of reprisal*

December 13, 2006
John F. Jesensky, Chairman
Hugh L. Reilly, Commissioner
Paul T. O'Neill, Commissioner

Earl Wilson, Esq.	*Representing the Lawrence School Committee*
David B. Rome, Esq.	*Representing the Service Employees International Union, Local 888*

DECISION[1]

Statement of the Case

On November 26, 2002, the Service Employees International Union, Local 254 (Union or Local 254) filed a charge with the Labor Relations Commission (Commission) alleging that the Lawrence School Committee (Employer) had engaged in prohibited practices within the meaning of Sections 10(a)(1) and 10(a)(3) of Massachusetts General Laws, Chapter 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on October 17, 2003 alleging that the Employer had violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by retaliating against Sherry Latham (Latham) for engaging in concerted, protected activity when it laid her off effective September 29, 2002 (Count I). Further, the complaint alleges that the Employer violated Section 10(a)(1) of the Law by: statements that its agent, John Laurenza (Laurenza), had made about Latham (Count II); interrogations of Frank Bonet (Bonet), Mary Fonseca (Fonseca), Rosemary Moran (Moran), Ruth Hayes (Hayes), Jerry DiStefano (DiStefano), David LeBlanc (LeBlanc), Doris Moreno (Moreno), Kathleen Powell (Powell) and Eric Roman (Roman) about their involvement with the Union (Count III); Superintendent Wilfredo Laboy's (Superintendent Laboy) threats that employees were going to lose their jobs because of the Union (Count IV); and Superintendent Laboy's interrogation of Maria Gilbert (Gilbert) (Count V).[2]

1. Pursuant to 456 CMR 13.02(2), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

2. The Commission dismissed those portions of the Union's charge alleging that the Employer had discriminated against Stephanie Hannagan (Hannagan) and Alfio Cristaldi (Cristaldi) for engaging in concerted, protected activity by laying them off in violation of Sections 10(a)(1) and 10(a)(3) of the Law. The Union did not seek reconsideration pursuant to 456 CMR 15.04(3) of those portions of its charge that the Commission had dismissed.

On January 29, 2004, the Service Employees International Union, Local 888 (Local 888) filed an assented-to motion to have the Commission substitute it as the charging party in the above-referenced case in place of Local 254 because of an internal union reorganization. The Commission subsequently allowed that motion.

On February 12, 2004, March 10, 2004, April 12, 2004, and April 13, 2004, Margaret M. Sullivan, Esq., a duly-designated Commission hearing officer (Hearing Officer) conducted a hearing. On February 12, 2004, before any witnesses testified, the Hearing Officer allowed the Employer's motion to sequester all witnesses prior to giving testimony, except Latham and Salvatore Petralia (Petralia), the Employer's director of human resources. Both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence.

The parties submitted their post-hearing briefs to the Commission on June 14, 2004. On November 30, 2005, the Hearing Officer issued her Recommended Findings of Fact. On December 8, 2005, the parties jointly requested that three transpositions of names be corrected in the Recommended Findings of Fact. Pursuant to 456 CMR 13.02(2), the Employer filed its challenges to the Recommended Findings of Fact on December 15, 2005. Local 888 filed no challenges to the Recommended Findings of Fact. On January 6, 2006, Local 888 filed its opposition to the Employer's challenges. 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.

Findings of Fact[3]

The Employer employs approximately 2,100 faculty, staff, and administrators who provide services to approximately 13,000 students. The Employer's administrative headquarters, which is known as the central office, is located in a four-story building with a basement at 255 Essex Street. Approximately, 75 to 100 employees work at the site. The transportation department and custodial services are located in the basement. The Employer's meeting room is located on the first floor.[4] The information systems and technology department (IS&T), the human resources department, the budget and finance office, and a reception area are located on the second floor. The curriculum and instruction department and the special education department are located on the third floor. The offices of the superintendent and the assistant superintendent and the grants office are located on the fourth floor.

On or about February 2002, Superintendent Laboy spoke with Bart Galvin (Galvin), the head of the IS&T, about the possibility of outsourcing the Employer's technology functions.[5] Thereafter, Superintendent Laboy instructed Petralia to solicit proposals from private vendors,[6] to schedule presentations with those vendors, and to assemble a team[7] to review the proposals and the presentations.[8] Approximately six vendors submitted proposals, and Petralia scheduled interviews with those vendors on June 27, 2002 and June 28, 2002. On June 30, 2002, Galvin retired.[9] On or about that date, Nguyen became the acting supervisor of the IS&T. Soon after, Nguyen informed Latham, who was an applications developer,[10] and Lesley Maudsley (Maudsley), a computer technician, that the Employer had reclassified them from full-time employees to per diem employees.

On July 1, 2002, Latham and several other members of the IS&T, Cristaldi, Hannagan, and Roman,[11] went to Petralia's office unannounced and asked him why Latham and Hannagan had been reclassified. Petralia met with the employees in a conference room on the fourth floor of the central office building rather than in his office on the second floor. During the meeting, he informed the employees that the Employer had an outsourcing plan in place, that vendors had submitted bids, and that Superintendent Laboy would most likely make a decision about whether to outsource before the start of the school year.[12] Petralia reassured the employees that the successful bidder would have to agree to employ the current IS&T staff members for one year and to provide them with the same or comparable benefits as they had received from the Employer. Petralia also invited the employees to meet with the three vendors who had been selected as the finalists for the outsourcing contract.[13]

Thereafter, Latham was updating the absence reporting database[14] when she noticed that the records showed all the IS&T employees,

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

4. A school safety officer is also permanently assigned to the first floor.

5. Superintendent Laboy recently had read articles that advocated outsourcing. Galvin cautioned him that outsourcing in other school districts had varying degrees of success.

6. The Employer issued a request for proposals in March of 2002.

7. The team consisted of Superintendent Laboy, Petralia, Galvin, Long Nguyen (Nguyen), the senior network analyst, and Assistant Superintendent Mary Lou Bergeron (Bergeron).

8. Neither Superintendent Laboy nor Petralia notified employees in the IS&T that the Employer was considering outsourcing its technology functions. However, certain technology employees heard rumors about the possibility of outsourcing.

9. Galvin previously had notified Superintendent Laboy of his intent to retire in April of 2002. Galvin's official title was administrator in charge of technology.

10. Latham had been an applications developer since 1997. Prior to that, she worked as a program assistant to then Superintendent James Skelly (Superintendent Skelly) from 1995 to 1997 and as an executive secretary to the budget and finance director from 1993 to 1995.

11. Cristaldi and Hannagan were field technicians, while the record does not indicate Roman's position.

12. The school year was scheduled to begin on August 6, 2002.

13. Petralia testified that during the July 1, 2002 meeting, he specifically indicated that the Employer would treat the IS&T employees as per diem employees, and that those employees would not accrue any sick, vacation or personal leave after June 30, 2002. Conversely, Latham testified that Petralia only stated that the IS&T employees would not accrue any additional sick, personal or vacation leave in the future. However, the Hearing Officer did not need to reconcile the contradictory testimony on this point, because it was not material to the issue in contention in the present case. Further, it is undisputed that the employees and Petralia never discussed what would happen to the sick, vacation or personal benefits those unit members had accumulated prior to June 30, 2002.

14. Latham's job duties included maintaining and updating the absence reporting database in order that the database accurately reflected employees' accrual and use of leave time. Only Superintendent Laboy, Fonseca, the then attendance secretary, and Latham were authorized to make changes in the absence reporting database.

except Nguyen, as having no accumulated sick, personal or vacation leave. Petralia had ordered Fonseca to make the changes. On July 22, 2002, Latham drafted the following letter to Petralia:

> We are writing you this letter to respectfully request a formal summary of any benefit changes that have been made to our current employment status at the Lawrence Public Schools. Specifically any benefit changes made regarding our vacation, sick and personal time as of July 1st, 2002.
>
> In addition, are there any additional changes scheduled to take place that may affect our benefits in the near future until an outsourcing vendor has been selected to manage the Technology Department?
>
> We are hoping to receive a response from you in writing within five (5) business days of your receipt of this letter.
>
> We thank you for your time regarding this matter.

The following IS&T employees signed the letter: Carlos Cartagena (Cartagena), Cristaldi, Hannagan, Latham, Maudsley, and Roman. The letter was sent via interoffice mail, and Petralia found it on his desk.[15]

On or about July 23, 2002, Cartagena, Cristaldi, Hannagan, Latham, Maudsley and Roman met with two finalists for the outsourcing contract in order to discuss what types of benefits they would receive if they became employees of the vendors as a result of the outsourcing contract.[16] The technology employees were dissatisfied with the health insurance benefits that the two finalists offered to their employees and learned that the two finalists did not grant as many sick and vacation days as the Employer did.

On August 6, 2002, the school year began, and the Employer had not awarded the outsourcing contract for technology services to a private vendor. Superintendent Laboy had decided not to outsource the technology services because it would not be cost effective, but the Employer did not notify the IS&T employees about the superintendent's decision. The superintendent also concluded that the Employer would need to eliminate positions in order to keep the IS&T intact but maintain its existing technology services. Superintendent Laboy requested that Nguyen review the existing structure of the IS&T and make recommendations about possible cuts.[17]

Latham's July 2002 conversation with Laurenza

Shortly after Latham and the other employees had met with the finalists for the outsourcing contract on July 23, 2002, Latham expressed to Laurenza,[18] the graphic arts and production specialist, her dissatisfaction with the benefits that the private vendors were offering and inquired whether there were any openings in the graphic arts department.[19] Laurenza indicated that a reorganization was taking place in the graphic arts department, that the Employer was eliminating the two clerks' positions, and that he would need an assistant. Latham reminded him that she previously had worked as a project assistant for Superintendent Skelly. She informed Laurenza that she would love to work with him again and asked him to speak to Superintendent Laboy about it. Laurenza agreed to do so.

Union Organizing Campaign

When Petralia did not respond to the July 22, 2002 letter within the requested five business days, Latham and several other technology employees consulted with an attorney to determine whether the Employer had acted lawfully when it stripped them of their sick, vacation and personal leave. The employees also decided to seek representation, contacted the Union, and arranged a meeting. Latham then contacted other employees, including certain employees in the central office as well as the head cooks and the bus drivers, and invited them to attend the meeting.[20]

On August 22, 2002 at 5:00 PM, ten to thirteen people were present at a meeting at the China Blossom restaurant in North Andover, including employees Latham, Hannagan, Roman, Heather McCall (McCall), a head cook, Addie Bennett (Bennett), who worked at the Parent Information Center, Al Gallagher (Gallagher), a computer programmer, Hayes, a human resources benefits specialist,[21] as well as representatives from the Union. The Union representatives handed out authorization cards during the meeting and described the benefits of representation. The individuals present at the meeting talked about contacting other employees who might be interested in being represented by the Union, including the television production assistants.[22] After the first meeting, Latham also distributed copies of the Union's newsletter to employees and referred certain employees to the Union's website.

Latham's August 29, 2002 Layoff Notice

On August 29, 2002, Petralia called Latham to his office[23] and gave her a letter from Superintendent Laboy. The letter, which bore that day's date, states in pertinent part:

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15. Petralia was unaware that Latham had actually drafted the letter and distributed it to her co-workers for their signatures.

16. It is unclear whether any of the employees in the IS&T ever met with the third finalist.

17. We amend the findings to include this additional, relevant information.

18. Laurenza and Latham previously had collaborated on projects.

19. Laurenza functioned as the head of the graphic arts department and reported directly to Superintendent Laboy at that time.

20. Latham also contacted members of the Employer's various bargaining units, including Gary Marcoux (Marcoux), who was president of the teachers' union, to see if they would support an organizing campaign.

21. Petralia was Hayes's superior.

22. On September 5, 2002, the employees and Union representatives held a second meeting at the Loft Restaurant in North Andover to discuss the organizing effort. Prior to this second meeting, Latham contacted certain employees who had not been present at the first meeting and invited them to attend the second meeting. On September 22, 2002, a third meeting took place, during which the Union representatives collected the authorization cards that they had distributed during the first and second meetings, and that employees had subsequently executed. A fourth meeting and a fifth meeting also were held in October of 2002.

23. Nguyen was also present in Petralia's office.

> It is with regret that due to budgetary constraints I have abolished the position of Application Developer[24] and therefore your employment with the district will end on September 30, 2002. Please be assured that this action in no way reflects on your past service and the valuable contribution you have made to the children of Lawrence.

On or about that time, the Employer implemented several other personnel actions concerning IS&T employees. The Employer laid off Cristaldi and Hannagan effective September 30, 2002.[25] Cristaldi earned approximately $42,000, and Hannagan earned slightly less than that figure. Also, the Employer officially placed Nguyen in charge of the IS&T and increased his salary by $7,000 to $77,000, but did not fill Galvin's former position as administrator in charge of technology.[26] Additionally, the Employer promoted Maudsley from technician to senior technician and increased her salary by approximately two thousand dollars to more than $44,000.

Latham's September 6, 2002 Proposal

Shortly after Latham received her layoff notice, Nguyen and Latham discussed the need for her Lotus Notes duties to be performed after September 30, 2002. Nguyen requested that Latham submit a proposal to continue to provide services to the Employer after September 30, 2002 as either an independent contractor or as a part-time employee and informed her that he would present the proposal to Superintendent Laboy and Bergeron. On September 6, 2002, Latham sent an e-mail message to Nguyen that states in relevant part:

> Per your request, here is the proposal I put together for you. It will be for 3 days a week 8 hours a day. Rate will be $40 an hour no benefits. One year contract or $30 an hour with health insurance no vacation or sick or personal time one year contract.
>
> My services will consist of:
>
> Notes Management:
>
> Manage 2000 User Accounts (Create/Move/Delete)
>
> Manage 100 Groups in [Employer's] Address Book
>
> Manage Extra Duty Hiring Databases (5)
>
> Manage [Employer's] Attendance Databases (3)
>
> Run Annual Agents Associated with Attendance Databases
>
> Manage Budget Transfer Database
>
> Manage Help Desk Database
>
> Manage Teacher Evaluations Database
>
> Manage Superintendent's Call Tracking Database
>
> Manage Superintendent's Mail Tracking Database
>
> Manage Full Time Job Postings Database
>
> Monitor Notes Logs
>
> Manage & Monitor all Notes Databases
>
> Troubleshoot End User Problems
>
> Assign web passwords and assist end users with logins
>
> Coordinate Notes Licensing Contract
>
> Coordinate Attendance Contracts
>
> Assist Field Technicians with problems
>
> Coordinate Full Time Hiring Database Rollout
>
> Coordinate Professional Development Database Rollout
>
> Other Projects:
>
> PowerPoint Presentations
>
> Assist Departments with Label Production
>
> Assist Departments with mail merges
>
> Assist Departments with reports
>
> Update [Employer's] Staff Directory
>
> Help Desk
>
> Any other duties you may wish to discuss.

On that same date, Nguyen responded via e-mail and stated: "Thanks, Sherry. I will bring it to the upper management when we discuss the IS&T plan."[27] When Nguyen met with Superintendent Laboy and Bergeron approximately three weeks later, he never mentioned Latham's proposal to them, because he already had determined that Latham's services were unnecessary. Nguyen gave several reasons why he had determined that Latham's services were unnecessary, including that he and other remaining personnel in the IS&T would assume Latham's former duties, and that Entegra Solutions, Inc. (Entegra),[28] an independent contractor, also would assume those duties as part of its contract with the Employer. Nguyen never informed Latham that he had decided not to submit her proposal to Superintendent Laboy and Bergeron.

Employer's 2002-2003 Contract with Entegra

In late September of 2002 or early October of 2002, the Employer entered into a contract with Entegra for $210,000 retroactive to

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24. At that time, Latham earned approximately $44,000.

25. Superintendent Laboy stated that Nguyen had made the recommendation to lay off Latham, Cristaldi, and Hannagan. However, Nguyen indicated that, because he did not have sufficient information to form his own opinion during the brief period of time that he was in charge of IS&T, he relied upon suggestions that Galvin had made in March or April of 2002 about possible courses of action, if the Employer did not outsource its technology functions. In response to the Employer's challenge, we have amended this finding to more accurately reflect the record.

26. Galvin's annual salary was more than $100,000.

27. Nguyen testified that he had informed Latham that he would bring her proposal to upper management if there were a need for it. Conversely, Latham testified that Nguyen had told her that if she submitted a proposal that he would bring it to Superintendent Laboy and Bergeron. Because Nguyen's contemporaneous e-mail message reflects similar language, the Hearing Officer credited Latham's testimony on this point.

28. Entegra had been performing Lotus/Domino support administration and network server support for the Employer since 2000 as a subcontractor for Triumph Technologies and later for NetTeks. Entegra also performed web content filtering and computer firewall management on an as needed basis. Entegra's personnel, including its president, Richard Umenhofer (Umenhofer), worked two days per week alongside certain IS&T employees, including Latham. In February of 2002, when NetTeks' contract with the Employer for $118,900 expired, Entegra became the sole provider of those services on a monthly basis.

July 1, 2002 until June 30, 2003.[29] As a result of entering into the contract, Entegra agreed to perform the following functions: 1) administer Lotus Notes and its applications, including managing the databases, managing user accounts, and providing technical support;[30] 2) interact with third party vendors that had developed or sold applications to the Employer; 3) re-design the website; 4) assume sole responsibility for the web content filter; 5) assume sole management of the computer firewall; 6) develop a paperless application process for the human resources department; 7) develop the hardware and software for a student and staff photo ID system; and 8) install the computer hardware and software at the Wetherbee School. Entegra also continued to be responsible for the network servers. Entegra established a direct connection to the computer systems and was available during business hours five days per week and on an emergency basis outside of those hours. On September 26, 2002, Umenhofer sent an e-mail message to Latham stating that:

> Well, the decision was made to use Entegra for all the Notes work at [the Employer]. I'd like to meet with you tomorrow to talk about the management of the Notes applications. I expect to need a few hours of your time. I'm meeting with Long [Nguyen] at 10:30 and then can meet with you all day after that.
>
> I'd also like to talk to you about working for Entegra on a part-time basis. There are a couple of items we need to discuss to make sure that is the best thing for everyone involved.[31]

September 11, 2002 Conversation between Laurenza and Gilbert

Gilbert is a senior bookkeeper who works in the budget and finance department on the second floor of the central office.[32] On September 11, 2002, Laurenza approached Gilbert to discuss the status of certain bills from private vendors that the graphic arts department had incurred. At some point, Laurenza mentioned that a vacancy existed in his department, and Gilbert suggested Latham for the opening. Gilbert was friendly with Latham, knew that Latham had received a layoff notice, and was aware that Latham and Laurenza previously had worked together on certain projects. Laurenza[33] replied that he could not hire Latham because she talked too much and because she was a troublemaker.[34] Laurenza added that it was Latham's own fault that she got laid off because she talked too much. When Gilbert suggested that Latham also should be considered for a vacant clerical position in IS&T,[35] Laurenza just shrugged his shoulders.[36]

September 11, 2002 Conversation between Latham and Dooley

On September 11, 2002, Latham had a conversation with Donna Dooley (Dooley),[37] a district principal who worked on the fourth floor of the central office and was a member of Superintendent Laboy's cabinet. Dooley informed Latham that she had heard that Latham was laid off because of the Union and offered to intercede with Superintendent Laboy on Latham's behalf. Dooley also opined that Superintendent Laboy was like a "teddy bear," that Latham only needed to apologize, and that the superintendent took things personally.[38]

September 19, 2002 Meeting with Superintendent Laboy

On or about September 17, 2002, Hayes informed Petralia[39] that some discussions and meetings had taken place regarding an effort to organize the Employer's unrepresented employees.[40] Petralia denied having any knowledge about the organizing effort prior to Hayes's statements. Early on September 19, 2002, Petralia[41] informed Superintendent Laboy about Hayes's comments and indicated to the superintendent that the organizing campaign likely involved all of the Employer's unrepresented employees.

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29. In March of 2002, Entegra bid on the outsourcing contract. After the Employer had decided not to outsource its technology functions in August of 2002, the Employer and Entegra began to discuss the scope of the technology services that Entegra would provide in the future. On or about September 5, 2002, the Employer contemplated entering into a contract for $150,000 with Entegra. Instead, Entegra and the Employer continued their discussions for several more weeks, agreed to expand the scope of services that Entegra would provide to the Employer and agreed to increase the contract by $60,000. We amend the findings to include the relevant information that NetTeks' contract with the Employer that expired in February of 2002 was for $118,900.

30. Latham's duties had included managing the Lotus Notes user accounts and managing and monitoring all Lotus Notes databases.

31. Throughout September of 2002, Umenhofer and Latham discussed the possibility of Latham working for Entegra on a per diem basis. Entegra would contact Latham when questions arose concerning the Lotus Notes User accounts and Lotus Notes databases, and Entegra would compensate Latham for her time. Ultimately, Entegra did not need to use Latham as a resource. However, the Employer never informed Umenhofer that he could not engage Latham's services.

32. Gilbert has worked for the Employer for twenty-two years and is currently a member of the clerical bargaining unit.

33. In response to the parties' December 8, 2006 letter, we correct a typographical error in the text that referred to Latham rather than Laurenza.

34. Latham had never approached Laurenza about the organizing campaign.

35. Laurenza exercised no authority over IS&T.

36. In early 2003, the Employer hired an employee named Birchill as a graphics assistant in the graphic arts department. The Employer never contacted Latham about the opening or invited her to apply for the position.

37. Dooley oversaw the Success for All Reading Program. Previously, Latham, Dooley and Superintendent Laboy had worked on several Power Point presentations that the Superintendent had given to outside groups concerning the reading program. Also, Dooley had interacted with Latham when Dooley had problems using Lotus Notes, and Dooley had described her as a lifeline and extremely professional.

38. Latham testified about the nature of her conversation with Dooley. On the other hand, Dooley denied that she ever had a conversation with Latham that referenced union activity, or that she had offered to intercede with Superintendent Laboy on behalf of Latham. However, Dooley admitted that she sometimes referred to the superintendent as a "teddy bear". Considering Latham's testimony that Dooley used the same expression in their conversation and considering Dooley's past working relationship with both Superintendent Laboy and Latham, the Commission concludes that the conversation took place as Latham described.

39. Hayes informed Petralia about the organizing campaign during one of their occasional lunches at a local delicatessen.

40. Approximately ninety percent of the employees were represented at the time. However, no employee organization had attempted to organize any employees since Superintendent Laboy became superintendent.

41. Petralia was a member of the Superintendent Laboy's cabinet.

Superintendent Laboy also denied having any knowledge about the organizing effort prior to his September 19, 2002 conversation with Petralia.

At about 10:00 AM that same day, Superintendent Laboy requested that the following employees attend a meeting in the fourth floor conference room of the central office: Bonet, the human resources generalist, Christine Bufagna (Bufagna), the accounting manager, Walter Callahan (Callahan), the payroll/contracts manager, Kevin Clement (Clement), the transportation manager, Hayes, and Nguyen.[42] Petralia and Bergeron also were present at the meeting. The meeting lasted for approximately forty-five to sixty minutes. Superintendent Laboy spoke in a firm but subdued tone and did not raise his voice. He began the meeting by indicating that he had heard rumors that a union was forming among the managers of the school district, that he wanted to know if the rumors were true, and whether the employees had opinions or information about the rumors. He noted that it was better for him to know now, so there would be less bodies later.[43] The superintendent also indicated that he was surprised and disappointed that employees had sought out the Union and questioned why they had done so, because he thought that he had treated them fairly. Certain employees responded that it was not a managerial union but instead an initiative by many different unrepresented employees, including head cooks, speech therapy assistants, occupational therapy assistants, and bus drivers.

Additionally, Superintendent Laboy stated that he knew many of the employees present in the meeting, and that he would hate for anyone to lose their jobs. He explained that when a union is formed and negotiations take place, any increase in benefits would take away money from other positions, because eighty percent of the budget was salary. He stated that, the way the economy was going, he would hate to see anyone out of a job. Superintendent Laboy commented that a negotiated contract was a bad initiative, because many employees desiring to form a union have different salary schedules or pay and trying to get them all into one contract would be difficult. He noted that all jobs would be out in the parking lot.[44] He indicated that because of budgetary reasons, he could not respond positively to salary increases. Finally, Superintendent Laboy asked if there was anything that he could do to assist employees with any issues that they might have and reminded them that his door was always open.

Callahan responded to the superintendent's query about why employees wanted to form a union by stating that the employees were concerned and wanted to protect the benefits that they already had from being taken away. Callahan then referenced the Employer's decision to cease paying longevity payments to unrepresented employees.

Other Meetings with Employees In September and October 2002

Human Resources Department

At the behest of Superintendent Laboy, Petralia met individually with certain employees in September of 2002[45] and asked them whether they supported the Union. At that time, Petralia called Hayes to his office for a brief meeting. He asked her in a normal tone of voice whether she had signed a union authorization card. She jokingly replied that she had signed four cards, but then admitted that she had not signed any cards. Petralia informed her that he was asking all the other employees in the human resources office besides her whether they had signed a union authorization card. The meeting ended, and Hayes left Petralia's office.

Also, Petralia called Bonet, who was his subordinate, into Petralia's office for a meeting that lasted approximately thirty seconds. Petralia asked Bonet whether or not he was "in the union or part of making the union." When Bonet replied that he could not answer the question and that he knew his rights, Petralia appeared to become frustrated. Bonet then exited Petralia's office.

Transportation Department

Between 8:30 AM and 9:30 AM on September 19, 2002, Clement approached a small group of subordinate employees in the transportation department, Naomi Mena (Mena), Gerardo Gomez (Gomez) and Mario Torres (Torres), who were all bus drivers, and Moreno, who was the transportation dispatcher. Although Clement stated that he was already aware that the Union had approached Moreno,[46] he asked the three drivers if the Union had approached them about becoming members. The three drivers denied that the Union had approached them. When Clement returned from attending the September 19, 2002 meeting with Superintendent Laboy at the central office, Gomez blurted out to him that he had been approached by the Union. Subsequently, Clement informed Moreno that her job title was included in a list of positions that the Union was seeking to represent. He asked her whether she had agreed to that inclusion, and she informed him that she had. Beginning in early October of 2002, Moreno perceived Clement as acting differently towards her and the other employees,[47] because he did not

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42. Superintendent Laboy testified at the hearing that he had called the meeting, because he was concerned why employees felt the need to have a collective voice and to discover any concerns those employees might have.

43. Bonet and Callahan both testified that Superintendent Laboy made this specific remark. Nevertheless, Superintendent Laboy denied making the statement. However, the Hearing Officer credited the testimony of Bonet and Callahan on this point because: 1) Bonet had made notes about the September 19, 2002 meeting that contain this remark; 2) Superintendent Laboy had acknowledged that Bonet's notes of the meeting were otherwise accurate; and 3) Bonet and Callahan were more likely to remember this remark than Superintendent Laboy, who was probably speaking extemporaneously.

44. Superintendent Laboy indicated that he routinely used the phrase "all jobs in the parking lot" when discussing the annual budget with his staff.

45. The record does not establish the specific date in September of 2002.

46. Moreno, who respected Clement's opinion, solicited his views about the Union in late August or early September of 2002. At that time, Moreno was considering whether to become involved in the organizing campaign. Moreno and Clement had several conversations about the Union prior to September 19, 2002. During one of those conversations, Clement asked Moreno whether the Union had approached her, and she answered affirmatively. However, Moreno did not tell Clement that she had attended union meetings, including the meeting on September 5, 2002, because she believed that he distrusted unions.

47. Moreno acknowledged that her pay, benefits and job duties did not change during that period of time.

engage them in conversation and no longer joined them on breaks.[48]

Accounting Department

At the end of September of 2002, George Collins (Collins), the budget and finance director asked LeBlanc, who was the fixed asset specialist and one of his subordinates, several questions about LeBlanc's alleged involvement with the organizing campaign.[49] Collins informed LeBlanc that LeBlanc's name had come up on a list of people who were involved with the Union. Collins inquired whether LeBlanc had attended a Union meeting at the Loft Restaurant and whether LeBlanc had signed a Union authorization card. LeBlanc answered both questions affirmatively, and Collins asked him why. LeBlanc, who felt uncomfortable, replied that he was unfamiliar with unions, because he had always worked in the private sector, and that he wanted to find out more information. LeBlanc then left Bufagna's office.[50]

Also in September of 2002,[51] Callahan, who also reported to Collins and Bufagna, was present in Bufagna's office when Collins approached him and initiated a brief conversation. Collins asked Callahan whether he had been involved in the Union or any activities that resulted in the creation of the Union. Callahan replied that he knew of the Union's existence. Collins then inquired whether Callahan had executed a union authorization card, and Callahan indicated that he had not. Collins next asked whether Callahan was aware that LeBlanc had signed a union authorization card, and Callahan said that he was not.[52] Callahan, who was offended at Collins's questions, then left Bufagna's office.

November 5, 2002 Meeting with Superintendent Laboy

On November 5, 2002, Superintendent Laboy requested that Gilbert and Laurenza attend a meeting in his office. Superintendent Laboy called the meeting because of a statement dated September 26, 2002 that Gilbert had submitted to the Commission as part of the Union's written submission in Case No. MUP-02-3568. Gilbert's statement referenced her September 11, 2002 conversation with Laurenza. Superintendent Laboy read part of Gilbert's statement aloud and asked her to confirm that she had signed the statement. Superintendent Laboy was angry that Gilbert and Laurenza had discussed the employment status of Latham. He asked Laurenza whether he had actually made the statements attributed to him by Gilbert, and Laurenza did not deny that he had made the statements. Superintendent Laboy then informed Gilbert and Laurenza that they had gotten themselves involved in a mess.[53] He then asked Gilbert and Laurenza whether he had ever treated them unfairly, which they both denied. The superintendent next inquired whether he had treated Latham unfairly, and informed Gilbert and Laurenza that he had offered Latham the opportunity to work for him.[54] Superintendent Laboy then indicated that Latham was laid off because of her attendance and tardiness.[55] Gilbert asked rhetorically why the superintendent had offered Latham a position if she was an incompetent employee. Superintendent Laboy also noted that unions make employers keep incompetent people, and that he had to start cleaning them out.[56] Gilbert next inquired whether the superintendent was going to treat her differently after the meeting, and he answered that he would not.[57]

OPINION

Count I-Alleged Retaliation Against Latham
Prima Facie Case

A public employer that retaliates or discriminates against an employee for engaging in activity is protected by Section 2 of the Law 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 of discrimination, a charging party must show that: 1) an employee was engaged in activity protected by Section 2 of the Law;

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48. The Hearing Officer took administrative notice of the following information. On September 25, 2002, the Union filed a petition with the Commission in Case No. MCR-02-4999 seeking to represent certain of the Employer's employees. The Union withdrew that petition on November 26, 2002. On that same date, the Union filed petitions in Case Nos. MCR-02-5009 and MCR-02-5010 seeking to represent certain of the Employer's employees. On May 16, 2002, the Commission issued a decision ordering an election in the following three bargaining units: Unit A-All full-time and regular part-time technological and support personnel; Unit B-All full-time and regular part-time therapeutic, language and childcare assistants; and Unit C-All full-time and regular part-time school related service personnel. On July 23, 2003, the Commission certified the Union as the exclusive representative for all three bargaining units.

49. LeBlanc was present in Bufagna's office on another matter, when Collins joined them.

50. Bufagna said nothing during the exchange between Collins and LeBlanc.

51. The record does not establish the specific date in September of 2002.

52. In response to the parties' December 8, 2006 request, we amend this finding to correct a transposition of the names of Collins and Callahan.

53. Although Superintendent Laboy admitted that he was angry that Gilbert and Laurenza had discussed Latham's layoff and possible eligibility for another position on September 11, 2002, he denied making this specific statement. However, the Hearing Officer credited Gilbert's testimony that the superintendent had made this statement, because it is plausible that he would convey his anger to Gilbert and Laurenza in that manner.

54. A dispute of fact exists as to whether on or about January of 2002, Latham declined Superintendent Laboy's job offer because of personal obligations, or whether the superintendent revoked the offer when Latham informed him that she could not work overtime because of her childcare arrangements. However, the Hearing Officer did not reconcile the contradictory testimony on this point, because it was not material to the issue in dispute in the present case.

55. Superintendent Laboy acknowledged that he had referenced Latham's attendance and tardiness records during this meeting. However, he denied making the statement that Latham was laid off because of her attendance and tardiness records. The Hearing Officer credited Gilbert's testimony on this point, because it is supported by notes that she had made soon after the meeting ended, and that Superintendent Laboy admitted were a generally accurate depiction of the meeting. Also, the School Committee never sought to introduce the testimony of Laurenza, the other participant in the meeting, who potentially could have contradicted Gilbert's testimony.

56. Superintendent Laboy denied making this statement, but for the reasons given in footnote 55, the Hearing Officer credited Gilbert's testimony on this point.

57. The meeting lasted for approximately twenty to thirty minutes. Laurenza left before the end of the meeting. Gilbert and Superintendent Laboy also discussed other matters during the meeting, including inquiries that Gilbert had made about the superintendent's mother.

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. *Quincy School Committee*, 27 MLC 83, 92 (2000); *Town of Clinton*, 12 MLC 1361, 1365 (1985).

Turning to the first three elements of the *prima facie* case, we conclude that Latham was engaged in activity protected by Section 2 of the Law when, in July of 2002, she protested to the Employer about changes in the terms and conditions of employment of the IS&T employees. Her activities included: a) meeting with Petralia and other IS&T employees on July 1, 2002 to question why the Employer had reclassified Maudsley and her as per diem employees; and b) signing the July 22, 2002 letter challenging the Employer's elimination of the sick, personal, and vacation leave that the IS&T employees previously had accrued, which she had discovered while updating the absence reporting system. Second, the facts before us show that the Employer, acting through Petralia, was aware of Latham's concerted, protected activities. Third, Latham's layoff constitutes adverse action. *See, Town of Dracut*, 25 MLC 131, 133 (1999) (disciplinary actions are examples of adverse action). Finally, we must consider whether there is evidence of animus towards Latham's protected activities. A charging party may proffer direct or indirect evidence of discrimination in support of its claim. *See, Town of Brookfield*, 28 MLC 320, 327-328 (2002), *aff'd sub nom., Town of Brookfield* v. *Labor Relations Commission*, 443 Mass. 315 (2005).

A. Direct Evidence

In discrimination claims where the charging party has proffered direct evidence of discrimination, the Commission applies the two-step analysis articulated in *Wynn* v. *Wynn, P.C* v. *Massachusetts Commission Against Discrimination*, 431 Mass. 665 (2000) (*Wynn & Wynn*). 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 concerted, protected 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 a 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.* at 667, *citing*, *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 277 (1989).

Here, Local 888 argues that Laurenza's September 11, 2002 comments to Gilbert and Dooley's September 11, 2002 comments to Latham are direct evidence of discrimination. However, we do not decide whether Laurenza's and Dooley's comments constitute direct evidence of animus towards Latham's protected activities, because, as more fully discussed below, even if we apply the higher burden of proof set forth in *Trustees of Forbes Library* v. *Labor Relations Commission (Trustees of Forbes Library)*, 384 Mass. 559 (1981), we find that Local 888 has met its burden of establishing that, but for Latham's concerted, protected activity, the Town would not have laid her off.

B. Indirect Evidence

Absent direct evidence of improper motivation, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. *Suffolk County Sheriff's Department*, 27 MLC 155, 159 (2001). Circumstantial factors may include: the timing of the adverse action in relation to the protected activity, *Town of Somerset*, 15 MLC 1523, 1529 (1989); the insubstantiality of the reasons given for the adverse action, *Commonwealth of Massachusetts*, 14 MLC 1743, 1749 (1988); the employer's divergence from longstanding practices, *Everett Housing Authority*, 13 MLC 1001, 1006 (1986); or expressions of animus or hostility towards the bargaining representative. *Town of Andover*, 17 MLC 1475 (1991).

Here, Superintendent Laboy issued Latham a layoff notice on August 29, 2002, which was within four to eight weeks of Latham having engaged in the concerted, protected activities referenced above. Superintendent Laboy states in that letter that the Employer was laying off Latham because of budgetary constraints. However, the Hearing Officer credited Gilbert's testimony that, in December of 2002, Superintendent Laboy informed her that Latham was laid off because of her attendance and tardiness.[58] The close timing of the layoff notice to Latham's concerted, protected activities coupled with the inconsistent and shifting reasons that the Employer has given as the basis for Latham's layoff lead us to conclude that the Employer's decision to lay off Latham was motivated by animus towards her protected activities. *See, Everett Housing Authority*, 13 MLC at 1006-1007 (circumstantial evidence such as timing and shifting and inconsistent reasons for an employer's action supports an inference of animus). Thus, Local 888 has established the four elements of its *prima facie* case.

Employer's Burden of Production

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

Here, the Employer argues that it contemplated making changes in the IS&T prior to Latham engaging in her concerted, protected ac-

58. Despite Superintendent Laboy's statements to Gilbert regarding Latham's attendance and tardiness, the superintendent had offered Latham a job working directly for him in January of 2002. Also, the record contains no evidence showing that the Employer ever disciplined Latham for her attendance or tardiness.

tivities. The record supports the Employer's contention that, in February of 2002, Superintendent Laboy discussed the possibility of making changes in the IS&T by outsourcing the Employer's technology functions. Further, the Employer solicited bids in the spring of 2002 from private vendors to perform those technology functions and scheduled interviews with those private vendors who had submitted bids on June 27, 2002 and June 28, 2002. Consequently, the Employer has met its burden of production.

"But For" Analysis

Once an employer produces evidence of a legitimate, non-discriminatory reason for taking the adverse action, the case becomes one of "mixed motives." 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. *Suffolk County Sheriff's Department*, 27 MLC at 160; *Quincy School Committee*, 27 MLC at 92. The charging party bears the burden of proving that, but for the protected activity, the employer would not have taken the adverse action. *Athol-Royalston Regional School Committee*, 28 MLC 204, 214 (2002); *Town of Athol*, 25 MLC 208, 211 (1999).

For the following reasons, we find that the Employer would not have laid off Latham, if she had not engaged in concerted, protected activity. Although the Employer had considered making changes in the IS&T and outsourcing its technology functions prior to Latham engaging in concerted, protected activity, the Employer subsequently decided on or about August 6, 2002 that outsourcing its technology functions would not be cost effective. Only three weeks later, the Employer contemplated entering into a contract with Entegra for $150,000, which was near the time it issued a layoff notice to Latham. Further, by the end of September or early October of 2002, the Employer increased the amount of its proposed contract with Entegra to $210,000, which included Entegra taking over Latham's prior job duties and certain other additional duties. However, the Employer has not explained why it changed its decision about outsourcing.

Further, when the Employer previously had considered outsourcing its technology functions, it required the private vendors, who were interested in performing those functions, to agree to employ the IS&T employees for at least one year after the outsourcing took place. Here, the Employer did not impose a similar requirement when it entered into its contract.

Also, although Superintendent Laboy testified that he had concluded in or about August of 2002 that the Employer would need to eliminate certain IS&T positions to maintain the same level of technology functions, the Employer introduced no budgetary data into evidence to support the superintendent's claim. *Boston School Committee*, Case No. MUP-9067 (slip op. March 2, 1994), *aff'd sub nom., School Committee of Boston* v. *Labor Relations Commission (School Committee of Boston)*, 40 Mass. App. Ct. 327 (1996), *further app. review denied*, 422 Mass. 1111 (1996) (school committee failed to produce budgetary data showing that prevailing conditions actually motivated its decision to lay off employees rather than anti-union animus). Even if the Employer were compelled to cut positions, it provided no explanation about why Latham's position was eliminated, while other positions were not. Superintendent Laboy indicated that he relied upon a recommendation that Nguyen had made to eliminate Latham's position, but Nguyen claimed he did not have sufficient information to form his own opinion during the brief period of time that he had been in charge of the IS&T. Instead, he contended that he relied upon suggestions that Galvin allegedly had made in March or April of 2002 about possible courses of action if the Employer did not outsource its technology functions. However, Galvin did not testify in this proceeding. Moreover, the record contains no information explaining the reason(s) why Galvin allegedly made the suggestion that Latham's position should be eliminated and whether the same reasons still existed in August of 2002 when the Employer issued Latham's layoff notice. *See, Boston School Committee*, Case No. MUP-9067, p. 8, (slip op. March 2, 1994) (documents introduced into evidence did not demonstrate that the decision-maker actually relied on the current budget documents at the time the layoff decision was made). Accordingly, in Count I of the complaint, we conclude that the Employer has violated Sections 10(a)(3) and, derivatively, 10(a)(1) of the Law by laying off Latham for engaging in concerted, protected activity.

Count II-Alleged Statements of Laurenza[59]

A public employer violates Section 10(a)(1) of the Law when it engages in conduct that tends to interfere with, restrain or coerce employees in the exercise of their rights under Section 2 of the Law.[60] *Quincy School Committee*, 27 MLC at 91; *Town of Athol*, 25 MLC at 212; *Town of Winchester*, 19 MLC 1591, 1595 (1992); *Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1555 (1989). The focus of a Section 10(a)(1) analysis is the effect of the employer's conduct on reasonable employees' exercise of their Section 2 rights. *Town of Winchester*, 19 MLC at 1596. The Commission does not analyze either the motivation behind the conduct, *Town of Chelmsford*, 8 MLC 1913, 1916 (1982), *aff'd sub nom.*, 15 Mass. App. Ct. 1107 (1983), or whether the coercion succeeded or failed. *Groton-Dunstable Regional School Committee*, 15 MLC at 1555-1556. The Commission's inquiry focuses on the objective impact that the employer's conduct would have on a reasonable employee under the circumstances. *Quincy School Committee*, 27 MLC at 91. The subjective impact of the employer's conduct is not determinative. *City of Fitchburg*, 22 MLC 1286, 1292 (1995). Even without a direct threat of adverse consequences, the Commission has found a violation when an employer makes disparaging remarks about an employee's exercise of pro-

59. Chairman Jesenky abstained from voting on Count II of the complaint.

60. Section 2 of the Law provides:

> Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restrain or coercion. An employee shall have the right to refrain from any or all such activities, except to the extent of making such payment of service fees to an exclusive representative as provided in Section 12.

tected activities. *Athol-Royalston Regional School Committee*, 26 MLC 55, 56 (1999).

Here, the focus in Count II of the complaint is comments that Laurenza made to Gilbert on September 11, 2002. When Gilbert suggested Latham for a vacancy in the graphic arts department, Laurenza replied that he could not hire Latham because she talked too much and because she was a troublemaker. Laurenza added that it was Latham's own fault that she got laid off because she talked too much.

We first consider whether Laurenza's statements were an expression of his personal opinion or of the Employer's. The Commission has previously found that the authority to act for and to speak on behalf of an employer is governed by the principles of agency, and may be actual, implied or apparent. *Town of Chelmsford*, 8 MLC at 1916. The Employer contends that it never granted Laurenza the actual authority to speak on its behalf. Upon review of the record, we agree.

Next, we consider whether the Employer imbued Laurenza with apparent or implied authority to speak on its behalf. To establish apparent authority, the principal must engage in conduct that causes a third person to reasonably believe that the alleged agent has authority to act on behalf of the principal. *Higher Education Coordinating Council*, 25 MLC 69, 71 (1998); *Massachusetts State Lottery Commission*, 22 MLC 1468, 1473 (1996). Here, Local 888 contends that the Employer imbued Laurenza with apparent authority to speak on its behalf, because the Employer placed him in charge of the graphic arts department, and because Superintendent Laboy had Laurenza report directly to him.[61] However, the record before us does not show that the duties that the Employer assigned to Laurenza as head of the graphic arts department or the decisions that it permitted him to make would cause a reasonable employee to believe that Laurenza had the authority to speak on behalf of the Employer about Latham. *See generally*, *Massachusetts State Lottery Commission*, 22 MLC at 1473 (union formed the reasonable belief that, because an employee performed the duties of acting personnel director, he was an agent of the employer for the purpose of receiving information requests). Thus, because we find that Laurenza was not an agent of the Employer for the purpose of assessing his alleged unlawful statements to Gilbert, we dismiss Count II of the complaint.

Count III-Alleged Interrogation of Employees

An employer who coercively interrogates employees about their union activities or union membership or how employees would vote in a union election violates Section 10(a)(1) of the Law. *Plymouth County House of Correction*, 4 MLC 1555, 1572 (1977). The Commission has held that interrogation, which itself is not threatening, does not constitute an unfair labor practice unless it meets certain standards. *Id.*, *citing*, *Bourne* v. *NLRB*, 332 F.2d 47 (2nd Cir. 1964). In examining whether the interrogation was unlawful, the Commission considers a variety of factors including: 1) the background, whether there [was] a history of employer hostility and discrimination; 2) the nature of the information sought, including whether the interrogator appeared to be seeking information on which to base taking action against individual employees; 3) the identity of the questioners, including their position in the employment hierarchy; 4) the place and method of interrogation, including whether the employee was called into the supervisor's office and whether there was an atmosphere of unnatural formality; and 5) the truthfulness of the reply. *Bourne* v. *NLRB*, 332 F.2d at 50. No single factor is outcome determinative. Rather, it is a totality of the circumstances test. *See*, *Rossmore House*, 269 NLRB 1176, 1178 (1984) (under the totality of circumstances, it was found that certain questions to an employee were not inherently coercive).

Here, the record demonstrates that the Employer's high-level managers, including the human resources director, the budget and finance director, and the transportation manager, individually met with some of their subordinate employees to inquire whether they had engaged in protected activities.[62] We turn to examine the circumstances of each interrogation to determine whether it was unlawful.

Petralia, the human resources director, separately called Hayes and Bonet into his office to inquire whether Hayes had signed a union authorization card and whether Bonet was a member of the Union or involved in the Union organizing campaign. Hayes attempted to dissuade Petralia's questions by joking with him, and Bonet refused to answer his questions. Under the totality of the circumstances, we conclude that the interrogations of Hayes and Bonet were coercive.

Next, the budget and finance director, Collins, separately approached LeBlanc and Callahan, while they were in the office of the accounting manager, Bufagna. After Collins had informed LeBlanc that his name was on a list of Union supporters, Collins inquired whether LeBlanc had attended an organizing meeting and had signed a union authorization card. Collins also questioned Callahan as to whether he was a Union supporter, including whether he had signed a union authorization card and whether he

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61. We note that the issue of supervisory status is not a factor in our consideration of whether Laurenza is an agent. We take administrative notice of the fact that in Case Nos. MCR-02-5009 and MCR-02-5010, the parties stipulated that Laurenza was not a supervisory employee, and his position was subsequently included in a bargaining unit. See, *Town of Chelmsford*, 8 MLC at 1819 (highway superintendent was a supervisory employee, and it was reasonable for employees to conclude that he spoke on behalf of the employer).

62. We dismiss the portions of Count III of the complaint that pertain to Fonseca, Moran, DiStefano, Powell and Roman, because the record contains no evidence showing that they were allegedly unlawfully interrogated. Although the Union called Callahan to testify about his interrogation by Collins, the Union did not move to amend Count III to include him. Nevertheless, the Employer addressed Callahan's testimony in its post-hearing brief. The Hearing Officer subsequently credited Callahan's testimony in her recommended findings of fact, and the Employer did not challenge the findings pertaining to Callahan. Because we find that the alleged unlawful interrogation of Callahan is closely related to the other allegations of unlawful interrogation, and because the Employer had a full and fair opportunity to address this issue, we amend Count III of the complaint to allege that the Employer coercively questioned Callahan about his protected activities in violation of Section 10(a)(1) of the Law. See, *Local 285, SEIU and Irene L. Hueter*, 3 MLC 1646, 1650-1651 (1976) (Commission determined that a union unlawfully coerced an employee, even though the allegation was not specifically alleged in the complaint, because the allegation was related to the general subject matter of the complaint and was fully litigated without objection).

was involved in the organizing campaign. Callahan answered negatively to those inquiries. Additionally, Collins asked whether Callahan was aware that LeBlanc had signed a union authorization card. Upon consideration of the nature and context of Collins's questions to LeBlanc and Callahan, we find that his interrogations of those individuals are coercive.

Additionally, on September 19, 2002, the transportation manager, Clement, questioned his subordinate, Moreno, about whether she had approved the Union's inclusion of her job title on a list of positions that it was seeking to represent. Although Moreno previously had initiated conversations with Clement about the Union, we find their September 19, 2002 conversation to be different than their prior conversations. Moreno previously had not told Clement that she was a Union supporter, but instead feigned curiosity about the Union. On September 19, 2002, Clement directly asked Moreno to admit that she was a Union supporter. Further, earlier in the day, he had interrogated three other employees in her presence about whether they had been approached by the Union. Under the totality of the circumstances, we conclude that Clement's interrogation of Moreno was coercive.

Finally, we address the Employer's contention that the above-referenced interrogations were *de minimis* in nature and did not violate Section 10(a)(1) of the Law due to their brevity. The brief nature of those interrogations does not make them any less coercive or excuse their interference with the employees' rights under Section 2 of the Law. *See, Bristol County House of Correction*, 6 MLC 1582, 1584 (1979) (employer's threats regarding a grievance were inherently coercive and interfered with employees' protected activities, even though employees continued to file grievances after the threat). Thus, concerning Count III of the complaint, we find that the Employer independently violated Section 10(a)(1) of the Law.

Count IV-Alleged Threats of Superintendent Laboy

On September 19, 2002, Petralia informed Superintendent Laboy about the Union's organizing campaign. Several hours later, the superintendent requested that Bonet, Bufagna, Callahan, Clement, Hayes and Nguyen attend a meeting in the conference room. During the meeting, he stated that he had heard rumors about the Union's organizing campaign, and that he wanted to know whether the rumors were true. The superintendent inquired whether the employees had opinions or information about the rumors. He also threatened the employees to obtain information about the organizing campaign by stating that it was better for him to know now, so there would be less bodies later. *See, Town of Dennis*, 29 MLC 79, 83 (2002) (a remark clearly tying adverse employment action to protected activity would tend to discourage and intimidate a reasonable employee from engaging in protected activity).

Additionally, Superintendent Laboy made certain predictions about what would occur if the employees selected the Union as their bargaining representative. It is well settled that employer statements predicting possible negative consequences for engaging in protected activity are proper only if they are supported by demonstrable facts that are outside the employer's control. *Massachusetts Board of Regents of Higher Education*, 13 MLC 1267, 1269 (1986), *citing, N.L.R.B.* v. *Gissel Packing, Inc.*, 395 U.S. 575 (1969); *Town of Chelmsford*, 8 MLC at 1913. An employer's statement predicting adverse consequences for engaging in protected activity that is not supported by any objective basis in fact is an impermissible threat in violation of Section 10(a)(1) of the Law, regardless of the employer's motivation. *Town of Chelmsford*, 8 MLC at 1917; *Watuppa Oil Co.*, 2 MLC 1032 (1975). The factual basis for the employer's prediction must be expressed simultaneously. *Massachusetts Board of Regents of Higher Education*, 13 MLC at 1269; *Town of Chelmsford*, 8 MLC at 1917; *Watuppa Oil Co.*, 2 MLC at 1038.

During the September 19, 2002 meeting, Superintendent Laboy made the prophecy, permissible if supported by evidence, that, for budgetary reasons, he could not respond to salary increases. However, he also predicted that employees who were present might lose their jobs when the Union was formed. There are no demonstrable facts to support his claim that the Union might cause funds to be taken away from certain positions and given to other positions, nor is there any evidence that the funding of positions would be beyond the Employer's control. *See, Massachusetts Board of Regents of Higher Education*, 13 MLC at 1270 (no demonstrable facts to support college dean's prediction that unionization would result in a minimum enrollment requirement, or that the requirement would be beyond the employer's control). Therefore, concerning Count IV of the complaint, we find that Superintendent Laboy's statements, discussed above, interfere with, restrain and coerce employees in the exercise of their Section 2 rights in violation of Section 10(a)(1) of the Law.

Count V-Alleged Interrogation of Gilbert

As part of the written investigation procedure in Case No. MUP-02-3568, Gilbert submitted to the Commission a statement dated September 26, 2002 that referenced her September 11, 2002 conversation with Laurenza. An employee engages in protected activity for the purpose of mutual aid or protection within the meaning of Section 2 of the Law when the employee assists the Commission in enforcing the Law by filing a charge or giving documentary or testimonial evidence in a proceeding before the Commission. *Brockton Education Association*, 12 MLC 1497, 1502-03 (1986). On November 5, 2002, Superintendent Laboy summoned Laurenza and Gilbert to his office. The superintendent read part of Gilbert's statement aloud and asked her to confirm that she had signed the statement. Superintendent Laboy admittedly was angry that Laurenza and Gilbert had discussed Latham's employment situation on September 11, 2002. He then remarked that Laurenza and Gilbert had gotten themselves involved in a mess. The superintendent's interrogation of Gilbert as well as the subsequent anger and criticism that he had expressed concerning the conversation detailed in the affidavit would tend to inhibit a reasonable employee's future willingness to file affidavits with the Commission in violation of Section 10(a)(1) of the Law. *See, City of Lawrence*, 15 MLC 1162, 1167 (1998) (police chief's criticism of and threats to employee regarding protected activity, as well as administrative inquiry into factual circumstances of protected activity, violated the Law). Accordingly, concerning Count V of the complaint, we find that Superintendent Laboy independently violated Section

10(a)(1) of the Law when he chilled Gilbert in her exercise of protected activities.

Conclusion

Based on the record and for the reasons stated above, we conclude that the Employer violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law in the manner alleged in Count I of the complaint and independently violated Section 10(a)(1) of the Law in the manner alleged in Counts III, IV and V of the complaint. We dismiss Count II of the complaint alleging that Laurenza's comments independently violated Section 10(a)(1) of the Law.

Order

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED THAT the Lawrence School Committee shall:

1. Cease and desist from:

a) Retaliating against Latham for engaging in concerted, protected activities.

b) Making statements that would tend to interfere, restrain or coerce employees in the exercise of their rights guaranteed under Section 2 of the Law.

c) Interfering, restraining or coercing employees in the exercise of their rights under the Law by unlawfully interrogating them regarding activities protected under Section 2 of the Law.

d) In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

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

a) Immediately offer to reinstate Latham to her prior position.

b) Make Latham whole for all losses that she has suffered as a result of the Employer's unlawful action, plus interest on all sums owed at the rate specified in M.G.L. c.231, Section 6I, compounded quarterly.

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

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

SO ORDERED.

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In the Matter of TOWN OF CHELMSFORD

and

NEW ENGLAND POLICE BENEVOLENT ASSOCIATION, INC.

and

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS

Case Nos. MCR-06-5182 and MCR-06-5192

35.7 supervisory and managerial employees
35.82 police

December 6, 2006
John F. Jesensky, Chairman
Hugh L. Reilly, Commissioner
Paul T. O'Neill, Commissioner

Marc L. Terry, Esq. and Nicholas Anastasopoulos, Esq.	*Representing the Town of Chelmsford*
James P. Sweeney, Esq.	*Representing the New England Police Benevolent Association, Inc.*
Julia E. Fahey, Esq.	*Representing the International Brotherhood of Police Officers*

DECISION AND DIRECTION OF ELECTION[1]

Statement of the Case

On January 27, 2006, the New England Police Benevolent Association, Inc. (NEPBA) filed a petition with the Labor Relations Commission (Commission) in Case No. MCR-06-5182 seeking to represent a bargaining unit of patrol officers, who are employed by the Town of Chelmsford (Town) and who are currently represented by the International Brotherhood of Police Officers (IBPO). On January 30, 2006, the NEPBA filed a petition in Case No. MCR-06-5192 seeking to represent a bargaining unit of sergeants, who are employed by the Town and who are currently represented by the IBPO. The IBPO filed a motion to intervene in Case Nos. MCR-06-5182 and MCR-06-5192 on March 3, 2006. The Commission allowed that motion on March 9, 2006. On April 6, 2006, the Town filed a motion to consolidate Case Nos. MCR-06-5182 and MCR-06-5192 and a motion to limit the scope of the Commission's inquiry in Case No. MCR-06-5192. The Commission allowed the motion to consolidate but denied the motion to limit the scope of the Commission's inquiry on the grounds that Section 3 of M.G.L. c. 150E (the Law) gives authority to the Commission to inquire about the underlying facts of a representation petition.

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.