

In the Matter of TOWN OF MASHPEE

and

STEPHEN R. McDONALD

Case No. MUP-02-3653

63.3 *discrimination—hiring, layoffs, promotion*
63.7 *discrimination—union activity*
83. *Compliance*

April 15, 2010

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Michael C. Gilman, Esq. *Representing the Town of
Mashpee*
James P. Geraghty, Esq. *Representing Stephen R.
McDonald*

DECISION

Statement of the Case

Stephen R. McDonald (McDonald) filed a charge of prohibited practice with the former Labor Relations Commission (Commission)¹ on December 27, 2002 alleging that the Town of Mashpee (Town or Employer) had engaged in prohibited practices within the meaning of Sections 10(a)(1), (3), (4), and (5) of MGL c.150E (the Law). Following an investigation, the Commission issued a two-count complaint of prohibited practice on August 12, 2004 alleging that the Town had discriminated against McDonald for engaging in concerted activity by bypassing him for promotion to sergeant on two separate occasions, in violation of Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law. The Commission dismissed all other allegations in McDonald's charge, and McDonald did not seek a review of the dismissal. The Town filed an answer to the complaint on August 23, 2004. In its answer, the Town asserted as an affirmative defense that the charge was untimely filed. At hearing, the Town withdrew this defense to both counts of the complaint because McDonald was called to active military duty in the United States Coast Guard (Coast Guard) in October of 2002 and remained on active duty sta-

tus at least through May 23, 2006, the last date of hearing in this matter.

A duly designated Commission hearing officer (Hearing Officer) conducted a hearing on October 17, 2005, October 26, 2005, October 27, 2005, October 28, 2005, and May 23, 2006. Both parties filed post-hearing briefs that were postmarked September 11, 2006. The Hearing Officer issued Recommended Findings of Fact on September 15, 2009. Neither party Town filed challenges to the Recommended Findings of Fact. We therefore adopt the Hearing Officer's Recommended Findings of Fact and summarize the relevant portions below.

Findings of Fact²

Police Department - Background

Curtis Frye (Frye) served as the Town's police chief for at least ten years until he retired in 1995. Following Frye's retirement, the Town appointed William C. Przybylek (Przybylek) to the position of police chief. Przybylek resigned in early 2000. After Przybylek resigned, the Town appointed Maurice Cooper (Cooper) police chief. Cooper had started working for the Town as a full-time police officer in May of 1975. During his twenty-nine year tenure with the police department, the Town promoted Cooper through the ranks of sergeant, detective sergeant, deputy police chief, and police chief. Cooper held the position of deputy police chief from about 1985 until May of 2000, when he was appointed the police chief. Cooper held the position of police chief until he retired on October 15, 2004. While he held the positions of patrol officer and sergeant, Cooper served on the union's negotiating team, grievance committee and, at some point between 1975 and 1985, he was the union president.³ After his appointment to the position of deputy police chief, which was not in the uniformed police officers' bargaining unit, Cooper and other Town department heads and assistant department heads organized for the purposes of collective bargaining with the Town.

Albert Todino (Todino) started as a full-time patrol officer with the Town's police department in August of 1995.⁴ Todino served as the Union's secretary for one year in 1996. From about 1997 until June of 2001, Todino served as the administrative officer for the Town's police department.⁵ As the Town's administrative officer in the police department, Todino drafted rules and regulations for review and approval by the police chief and the deputy chief, handled purchase orders, computerized the payroll system, and devel-

1. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the body within the Division charged with deciding adjudicatory matters. References in this decision to the Board include the former Labor Relations Commission (Commission).

2. Neither party contests the Board's jurisdiction in this matter.

3. The record is silent on the identity of the exclusive bargaining representative for patrol officers and sergeants at the time Cooper held these positions. The Hearing Officer took administrative notice of the Division's records in Case No. MCR-3334, *Town of Mashpee*, which reflect that the Commission conducted a secret ballot election to determine the exclusive representative of the patrol officers and sergeants on December 2, 1982. Two employee organizations appeared on the

ballot, the Mashpee Police Employee's Association, Inc., the incumbent, and the International Brotherhood of Police Officers. The Commission certified the International Brotherhood of Police Officers as the employees' exclusive representative on December 10, 1982. Based on the information provided on the petition in Case No. MCR-3334, *Town of Mashpee*, the Town recognized the Mashpee Police Association in November of 1971.

4. From 1992 until 1995, Todino worked as a part-time dispatcher, two days a week, for the Town, while concurrently working full-time for the Babson College Department of Public Safety.

5. While serving as administrative officer, Todino continued to hold the rank of patrol officer and he continued to be in the bargaining unit of patrol officers.

oped software to track the department's expenses. The Town appointed Todino to the rank of deputy police chief, effective June 21, 2001. Todino served as acting police chief for a period of time after Cooper was called up to active military duty with the Coast Guard during the period immediately following September 11, 2001.

McDonald's Appointment and Tenure with the Police Department

The Town hired McDonald as a full-time patrol officer in 1994. Before taking this position, McDonald was employed as a police officer in the United States Department of Defense (DOD) assigned to the Otis Air Force base in Massachusetts from about 1990 to 1994. The DOD police officers at this facility are represented for purposes of collective bargaining, and McDonald served as the DOD police officers' union vice-president from about 1993 to 1994, when McDonald resigned from his position with the DOD to take the patrol officer position with the Town.

At the time the Town hired McDonald, Frye was the police chief and Cooper was the deputy police chief. Cooper reviewed the applications, participated in the interview process, and recommended McDonald for hire. During the hiring process prior to the Town's decision to hire McDonald as a full-time patrol officer, Sergeant Michael Lacava (Lacava) spoke with Cooper and recommended McDonald for hire. Before recommending McDonald for hire, Cooper had been informed by a person with the DOD that McDonald was an "administrator's nightmare." At some point before the Town hired McDonald, Cooper told Lacava about the DOD's characterization of McDonald, adding that "if this guy ends up getting hired here, I [Cooper] don't want any headaches or problems" or words to that effect. Lacava relayed this conversation to McDonald.

In 1995, the employees in the police department elected McDonald to serve as President of the Mashpee Police Relief Association (Association). The Association is not an employee organization within the meaning of Section 1 of the Law. Rather, its purpose is to provide certain benefits, like scholarships and assistance to members of the community. During his five year tenure as the Association's President, McDonald substantially increased the Association's treasury and revived the Association's activities.

In May 1995, McDonald received his first performance evaluation, with the second highest rating of commendable from his immediate supervisor, a sergeant, and Cooper, then deputy chief. In 1995, Przybylek designated McDonald as one of the police department's field training officers.⁶ A field training officer is assigned to work with and mentor newly hired police officers on a

one-to-one basis for about three months, or until the new officer acquires both field experience and a working knowledge of the police department's rules, regulations, policies, and procedures. The field training officer has no independent authority to discipline the new patrol officer he/she is working with, but may recommend discipline. Further, the field training officer rates the new officer in certain categories and may recommend remedial work, if warranted. Przybylek also designated McDonald as one of the department's acting watch commanders in 1995.⁷ An acting watch commander, in the absence of a sergeant, supervises the operation of that shift.

In September of 1996, Cooper recommended McDonald to the Coast Guard for assignment as a special agent with the Coast Guard Investigative Service.⁸ In February of 1997, McDonald received a commendable rating on his performance evaluation from his immediate supervisor and Cooper. At some point in the late 1990s McDonald submitted a Canine Unit Proposal to Cooper. Cooper forwarded it to Przybylek commending the proposal as "very comprehensive and well written," and recommending that the department seek funding to reactivate the unit. Cooper also recommended McDonald and another patrol officer for appointment to the unit, if it was reactivated. Przybylek also expressed his approval with McDonald's work performance, referring to McDonald as one of the police department's outstanding employees in a July of 1998 letter. In June of 2001, Cooper expressed his appreciation to McDonald for his assistance with the police department awards ceremony.

Between 1994 and through 2002, the police chief assigned McDonald other duties, commonly referred to in the police department as collateral duties.⁹ For example, in 1998, Przybylek assigned McDonald the following collateral duties: infection control program coordinator, CPR instructor, marine law enforcement team member, and defensive tactics instructor, in addition to acting watch commander and field training officer. In January of 2002, Cooper assigned McDonald the following collateral duties: warrant team member, field training officer, bicycle patrol unit member, traffic team member, infection control coordinator, marine team member, and civil rights and hate crimes investigator. It is not unusual for the police chief to assign multiple collateral duties to a patrol officer, with some of those assignments to specific teams with multiple members and headed by a supervisory officer, like the traffic team.

6. McDonald was Todino's field training officer.

7. In 1995, the police chief designated an officer as an acting watch commander if he/she had two years of experience and a clean disciplinary record. The criteria for this assignment have since changed in the department.

8. McDonald has been in the Coast Guard since 1977, either on active duty or as part of the reserve force. In October of 2002, the Coast Guard placed McDonald on active duty status and he remained on active duty status until at least June of 2006, while on military leave from his position as patrol officer. At the hearing, Coast Guard Commander John Kondratowicz (Kondratowicz) testified about McDonald's performance in the Coast Guard prior to December of 2002. Although the

Hearing Officer allowed Kondratowicz to testify over the Town's objection, the record in its entirety does not contain any evidence that Cooper, the Town's Board of Selectmen, or the oral interview board members were aware of the specific duties that McDonald had performed in the Coast Guard and the favorable ratings that McDonald had received in the course of his military service, as testified to by Kondratowicz. The Hearing Officer determined that Kondratowicz's testimony about McDonald's military service was not material to the issues in this case and, therefore, made no findings of fact based on that testimony.

9. Collateral duties are also assigned to other police officers.

McDonald's Union Activity

In 1996, McDonald became President of Local 389A, International Brotherhood of Police Officers (Union), the exclusive collective bargaining representative for all patrol officers employed by the Town. The Union continued as the exclusive bargaining representative for all the patrol officers until May 22, 2001, when the former Commission certified the Mashpee Police Association (Union)¹⁰ as the exclusive representative. Notwithstanding the identity of a new representative, McDonald continued to serve as President,¹¹ until about July of 2001. In July of 2001, John Santangelo (Santangelo) became the Union's President. At McDonald's request, Santangelo designated McDonald as the Union's chief steward. Prior to McDonald's appointment, the Union did not designate a member as the chief steward. McDonald continued to serve as the Union's chief steward until he was called to active military duty in the Coast Guard in October of 2002.

McDonald headed the Union's bargaining team for a successor collective bargaining agreement in 1998. During these successor contract negotiations, the Town, through Przybylek, sought a number of changes in the patrol officers' terms and conditions of employment. Over the course of his presidency McDonald also filed numerous grievances on behalf of the Union as a whole, and on behalf of individual bargaining unit members. For example, in response to Union members' internal complaints, McDonald filed a grievance in 1998 alleging that certain conduct of a bargaining unit member, Todino, violated the terms of the light duty provision of the contract. The Board of Selectmen upheld the grievance. Further, in response to some bargaining unit members' concerns that five patrol officers on the traffic team, including team member Todino, received more overtime assignments than other patrol officers, McDonald filed a grievance in 1998 that challenged the distribution of overtime among the bargaining unit members. In response to this grievance and after reviewing the results of an overtime study compiled by McDonald that substantiated the fact that traffic team members received more overtime work than other bargaining unit members, the Town's representative and Przybylek began working with McDonald on an overtime distribution formula that would fairly distribute the overtime work among all bargaining unit members. The drafting and mutual agreement on an overtime assignment procedure took about three years, crossing over Przybylek's tenure and into Cooper's tenure as police chief. The Town and the Union completed the new overtime distribution system in 2001, at the end of McDonald's tenure as Union President.

In or about 1998, the Union membership voted "no confidence" in Przybylek's management of the police department. In his capacity as Union President, McDonald conducted the Union meeting where the "no confidence" vote occurred, with all the members present voting "no confidence" in Przybylek. McDonald communicated the results of the vote to Przybylek. Subsequently, but not at McDonald's direction or with his approval, the Union released the results of the "no confidence" vote to the media. Following this release, the Union's "no confidence" vote was the subject of several newspaper articles, with McDonald's name appearing in the articles. Following the "no confidence" vote, the Union responded to statements credited to Przybylek to the effect that the "no confidence" vote was orchestrated by a few Union members seeking personal gain, by preparing and mailing a survey to all Union members regarding the conditions in the police department. The survey results compiled by the Union contained a negative report about Przybylek's management of the police department. McDonald met with Przybylek and presented the survey's results to him. McDonald also presented the results to the Town's Board of Selectmen. At some point after the "no confidence" vote and the Union's survey results, Przybylek resigned.¹²

On February 2, 2000, McDonald filed a complaint with his immediate supervisor, Sergeant Gerald Umina (Umina), detailing the content of a conversation that he had with Officer Paul Coronella (Coronella).¹³ The complaint alleges that Todino told Coronella that McDonald and a Town fire fighter were conspiring to interfere with Przybylek's upcoming request for funding. McDonald denied the rumor and filed the complaint seeking an investigation of Todino's conduct. By an e-mail sent on February 21, 2000 to Cooper, McDonald requested the status of his complaint. In a responsive e-mail dated February 23, 2000, Cooper advised McDonald that his complaint was under investigation and that he would contact McDonald in the near future for an interview. Cooper also notified McDonald in the same e-mail that once the investigation was completed, it would be forwarded to the police chief for action. McDonald's complaint remained unresolved as of the hearing in the instant case.

By electronic mail (e-mail) sent on October 12, 2001 to Todino, McDonald requested an evaluation of his work performance in accordance with the applicable provision of the collective bargaining agreement. On or about October 23, 2001, McDonald filed a grievance on the Town's failure to abide by the contract regarding performance appraisals. Cooper denied the grievance on November 2, 2001. By letter dated February 4, 2002 to Union President Santangelo, the Town notified the Union that the Board of Select-

10. For case of reference, both of the employee organizations are referred to as the Union.

11. The Hearing Officer took administrative notice of the Division's records in Case Nos. MCR-01-4873, MCR-01-4874, *Town of Mashpee* and the filings under Sections 13 and 14 of the Law regarding the change in the identity of the patrol officers' exclusive representative. See also *Town of Mashpee*, 27 MLC 133 (2001).

12. The record is silent on Przybylek's reasons for resigning from his position as the Town's police chief.

13. Before the Town appointed Todino to the position of deputy chief, Coronella worked with Todino on the traffic team and their friendship extended beyond the workplace. During several of their conversations in or around 2000, Coronella voiced his disagreements with McDonald about Union issues and with Sergeant Matthew Clancy (Clancy), who was his immediate supervisor. Without a specific timeframe and sufficient context, Coronella's testimony that, during one of these several conversations Todino told Coronella that McDonald and Clancy were not going anywhere in the department is not sufficiently reliable to credit his testimony on this point. Therefore, the Hearing Officer found that it was unnecessary to reconcile Coronella's testimony on this point with Todino's denial that he made this specific statement to Coronella.

men had reviewed McDonald's grievance on November 19, 2001 and had voted to adopt the Union's recommendation. The February 4, 2002 letter also informed the Union that the Board of Selectmen "has requested the Chief of Police to take immediate steps to ensure that all Union members have up to date Performance Appraisals" in accordance with the contract.

On March 4, 2002, McDonald received a performance evaluation for the period January 1, 2001 through January 2002 with an overall performance rating of distinguished, the highest overall rating possible under the system used by the Town in the police department. For this period, Clancy¹⁴ prepared the evaluation as McDonald's immediate supervisor and Lieutenant Michael Sexton also signed the evaluation, but not Cooper or Todino.

In his capacity as Union President, McDonald also attended staff meetings conducted by Przybylek and by Cooper after he was appointed police chief in May of 2000. McDonald took minutes of these meetings and circulated them to the other police officers. The deputy chief also attended these meetings as well as all the sergeants, subject to their availability. McDonald continued attending the staff meetings until Cooper discontinued them. Cooper never engaged in any heated discussions with McDonald, and Cooper never personally witnessed any integrity problems with McDonald on the job, nor did he personally question McDonald's loyalty. Cooper did not have any problems with McDonald's productivity or observe any problems with McDonald being overzealous in his work performance. According to Cooper, McDonald was a good police officer.¹⁵ On July 29, 2003, Cooper awarded McDonald and Officer Michael Brown the Chief of Police Distinguished Service Medal, the second highest award in the police department, for their actions on August 8, 2002 that was instrumental in the rescue of a person who had jumped into the bay.

1989 - Police Department Regulation - Procedures for Promotion

On April 20, 1989, the Town and the Union signed a Memorandum of Agreement in which both parties agreed to accept the promotion and performance appraisal system.¹⁶ On May 15, 1989, the Town's Board of Selectmen adopted the parties' agreed-upon system in the form of a police department regulation (Regulation) pursuant to MGL c. 41, Section 97A. The Regulation contains the procedures for promotion to the rank of sergeant and the performance appraisal system for police sergeants and regular full-time police officers. The Regulation provides, in relevant part, as follows:

Police Department Regulation

Subject Regulation: Procedures for Promotion

1) The purpose of this Regulation is to assure all employees a fair and equitable opportunity for advancement.

2) The goal of this Regulation is to identify the most qualified individual available for advancement in an organized and orderly manner.

3) Promotion defined - For the purpose of this Regulation, a promotion shall be defined as: Any change in status that results in an upgrading of salary increments from Patrolman to the rank of Sergeant. ...

4) The following minimum criteria must be met in order to be eligible for a promotion as defined above:

a. Two years of continuous service unbroken by leaves of absence or resignations in the next lowest rank, unless fewer than three (3) individuals are qualified.

b. A passing score on the most recently given professionally developed written examination. Said written examination will consist of questions designed to test the following knowledge, abilities, and skills hereby established as qualifications for the rank in which the written examination is given:

Fifty percent (50%) Supervisory knowledge and ability (Police Supervisory Principles and Practices).

Twenty percent (20%) Administrative knowledge and abilities.

Ten percent (10%) Legal knowledge (knowledge necessary for effective work on patrol and investigating crime).

Five percent (5%) technical police knowledge (investigative).

Five percent (5%) technical police knowledge (patrol related).

Ten percent (10%) (Police related abilities).

The testing company shall be required to provide to the candidates or to the Department information on study materials in sufficient detail to provide for candidates' proper examination preparation.

c. The passing score for each written exam shall be determined by the Chief upon recommendations of the developer of the exam, which recommendations will be made available to the President of Local #389 [Union]. The examination will be of multiple choice or essay type and will be scored by the developer or giver of the exam or by an independent testing or scoring service. The examination will be given at such time or times as are specified by the Chief, provided that if a decision is made to fill a position for which no examination has been given for more than two (2) years after the date on which the list of candidates for a vacancy in the same job title was last presented to the Board of Selectmen for their selection of an appointee, an examination will be scheduled. If there is a valid list less than two years old when a promotional vacancy occurs, that list should be presented to the Board of Selectmen of an appointee.

d. All oral interviews will be conducted and scores awarded prior to opening the results of the written examination.

e. In addition to the above minimum criteria, a point system will be established for the written examination with a maximum of One Hundred (100) percent for a perfect score. A maximum of One Hundred (100) percent will be granted based upon scoring by the oral interview board which may be assisted by previous

14. The Town hired Clancy as a full-time patrol officer in 1986 and promoted him to the rank of sergeant in 1993. In or about 1994, Clancy became an officer for the union that represented the superior officers in the police department, serving as that union's president in or about 1998-1999.

15. The Hearing Officer credited Cooper's testimony about McDonald's work performance, which was based on Cooper's personal assessment and observations of McDonald's work.

16. At the time the Town and the Union negotiated this Agreement, Cooper was the deputy police chief and he, along with the police chief and the Town's executive secretary, constituted the Town's negotiating team that led to the Agreement.

written employee evaluations. Written evaluations will be conducted in accordance with the provisions/procedures of Article VI, Section Four (4) regarding performance evaluations by the candidate's supervisor and kept in the candidate's personnel file.

f. The composition of the Department oral interview board will consist of the Personnel Board Chairman, or his designee, the Chief of Police, the Deputy Chief of Police, a designee of the Mashpee Chief of Police who shall be a Chief of Police from a comparable-sized community as Mashpee, but not bordering the Town of Mashpee, a designee of IBPO Local #389, who shall be a patrolman from a comparable-sized community as Mashpee, not bordering the Town of Mashpee, and a police sergeant from a comparable-sized community as Mashpee, not bordering the Town of Mashpee who shall be designated by the Chief who is designated by the Mashpee Chief of Police and the patrolman who is designated by Local #389.

The numerical scale for evaluating candidates for the oral exam will be based on a scale of one (1) through ten (10) as follows:

Outstanding 10-09

Good 08-07

Fair 06-05

Unsatisfactory 04-03

Very Poor 02-0

g. The areas of evaluation assessment are as follows: (See Appendix A for rating/evaluation form and Appendix B for assessment exercise form).

1. Appearance
2. Oral Communication
3. Job knowledge/job competence
4. Decision making/ability to solve problems
5. Supervisory skills/Leadership
6. Tact/Fairness
7. Loyalty
8. Personal integrity

h. All candidates will be required to respond to questions and exercises during the oral interview. Questions will be uniform for all candidates (See Appendix C for a sample exercise questionnaire).

i. The method for determining the final score is as follows:

Written Examination Oral Examination

Possible Total - 100 Points Possible Total - 100 Points

Formula: Three times written score plus oral score divided by four equals the Subscore

This is based on 75% for written portion of exam and 25% for oral interview. ...

j. Depending on the individual candidate's status/qualifications, a candidate's subscore will be increased in the following manner:

Seniority

One quarter (1/4) of a point for each year of full-time service. Years of service will be computed to the nearest whole number

...

Education

College - Thirty (30) semester hours (Law Enforcement)

¼ Point (.25)

College - Associate's Degree (Law Enforcement/Criminal Justice)... ½ Point (.50)

College - Bachelor's Degree (Law Enforcement/Criminal Justice)

... ¾ Point (.75)

College - Master's Degree (Law Enforcement/Criminal Justice or Jurisdiction) ... 1 Point (1.0)

k. Physical Examination

l. Psychological

m. The final list of fully qualified candidates along with pertinent data will be submitted by the Personnel Board to the Board of Selectmen with or without the recommendation(s), if any, of the Chief. Upon his/her written request, an employee will be provided all the written material provided to the Selectmen, except the recommendation of the Chief. The Selectmen have the sole discretion to decide whether and when to fill a vacancy and to choose which applicant will be selected. If the appointment/promotion is made from one of the top six (6) full qualified candidates on a duly-constituted list, *i.e.*, as prescribed above, the Board's decision shall be non-grievable and non-arbitrable.

n. All examination scores will be kept in a file by the Personnel Board and each candidate will be allowed to view his/her own score, if requested. All examination scores will be available to the President of Local 389.

In 1993, the Board of Selectmen promoted at least two patrol officers to the rank of sergeant from a list of qualified candidates that ranked Clancy first and Officer Randy DeMello (DeMello) second. Umina's name was also on the list of qualified candidates. Frye recommended DeMello to the Board of Selectmen for promotion to the rank of sergeant.¹⁷ The Board of Selectmen promoted Clancy and Umina to the rank of sergeant. Both DeMello and Umina had represented the Union during the negotiations with the Town over the terms of the Regulation and both officers signed the April 1989 Memorandum of Agreement between the Town and the Union agreeing to accept the Regulation. DeMello had also served as the Union's president for about three years at some point between 1986 and 1993.

2001 Written Examination for Promotion to the Rank of Sergeant

The Town contracted with Commonwealth Police Service, an outside vendor, to prepare and score the written examination in 2001 for promotion to the rank of sergeant. McDonald took the written examination for promotion to the rank of sergeant, and he received the second highest score, 92.5 out of a possible 100. Pursuant to the Regulation, the Town did not open the results of the written examination until after the oral examination.

May 20, 2002 Oral Examination for Promotion to the Rank of Sergeant

In the spring of 2002, the Town assembled an oral interview board (board) to interview the candidates to fill three sergeant's positions. The board consisted of: Cooper, Todino, Town Personnel Administrator Marilyn Farren (Farren), Police Chief John A. Ford, Jr. (Ford), the police chief in Bourne, MA, Patrol Officer Andrew D. Popovich (Popovich) from the Dennis Police Department,¹⁸ and

17. It is unclear from the record whether Frye also recommended Clancy for promotion to the rank of sergeant.

18. [See next page.]

Sergeant Donald Bliss (Bliss) from the Wareham Police Department. On May 20, 2002, the board interviewed eleven candidates for promotion to the rank of sergeant. The order of the interviews was arranged alphabetically by last name and scheduled in one-half hour increments, starting at 8:30 a.m., with the last interview scheduled to begin at 3:00 p.m.¹⁹

Cooper developed the questions for the oral interview portion of the examination process and provided each panel member with them.²⁰

²¹ The interview process also provided board members with the opportunity to ask the candidates certain follow-up questions. Cooper did not ask the candidates any questions. Rather, the remaining five board members either selected or were assigned the specific question(s) they asked each of the eleven candidates for promotion. Cooper viewed his role during the interview process as an active observer, listening to the interviews, ensuring that the panel asked each candidate the same questions, verifying the scoring process, and signing each candidate's rating sheet. During the interviews, each board member had a copy of all the interview questions, a blank rating sheet, information sheet(s) from the Massachusetts Civil Service Commission about conducting a structured oral interview, a one page resume provided by each candidate shortly before the interview date, and a pen and paper for note-taking.

After each interview, the board members briefly discussed that candidate's performance during the interview. At the end of all the interviews, the board members again discussed each candidate. At the end of these discussions, the four external board members, Farren, Ford, Popovich, and Bliss, reached a consensus rating for each candidate in each of the nine categories on the rating sheet.²² Neither Cooper nor Todino participated in the external board members' discussions about the candidates' performance during the interviews, nor did they offer a grade or rating for any candidate. The board rated the candidates using the forms appended to the Regulation, except that the category labeled Performance Evaluation was crossed out and the board did not rate any of the

candidates in this category. The score in each of the nine categories was added, with a maximum of 90 as the highest total score. Todino recorded the score on the appropriate forms. All six board members signed the oral interview rating or score sheet. Cooper's signature on each rating sheet reflects his concurrence with the board's assessment of the candidate.

In addition to the information the board acquired about each candidate during the interviews, the board also asked whether there was any other information about each candidate that they should know before assigning a score. In response to this inquiry, either Cooper or Todino provided information about three candidates: Brown, Coronella, and MacDonald.²³ Specifically, either Cooper or Todino told the panel that Brown had submitted his resume late to the interview process, Coronella had failed to timely renew his driver's license while continuing to perform the duties of a police officer, including operating a police vehicle, and MacDonald had failed to respond to a call for back-up assistance.²⁴ After inquiring further about the circumstances surrounding McDonald's failure to respond to a call, the board members gave McDonald lower ratings in both the personal integrity category and the tact and fairness category. The information also negatively impacted Coronella's final oral interview score.²⁵

The oral examination total score for each candidate who participated in the interview process was as follows:²⁶

Officer David Ensko	83
Officer Leo Perry	83
Officer _____	80
Detective Robert Palermo	72
Officer _____	65
Detective John Santangelo	62
Officer _____	60
Officer Stephen McDonald	43
Officer _____	42
Officer _____	42
Officer _____	40

18. Santangelo asked Popovich to participate on the interview panel as the Union's representative. At the time of the interviews, Popovich was employed as a patrol officer for the Town of Dennis. Santangelo had worked with Popovich on the Cape Cod Drug Task Force. At the time of his testimony, Popovich was employed as a state police officer.

19. The panel interviewed McDonald at 1:00 p.m. or shortly thereafter.

20. Cooper had previously developed interview questions as an adjunct professor in the Criminal Justice and Social Science Department at Cape Cod Community College and as a member of a number of other interview panels. After Cooper selected Ford to serve on the board, Cooper asked Ford to provide him with questions for the candidates. From this pool of questions, Cooper developed the final questions for the May 20, 2002 interviews.

21. One of the questions was: "Which three candidates would you recommend for promotion to the rank of sergeant?" The candidate could not recommend himself/herself. In response to this question, three of the ten candidates included McDonald as one of their three recommended candidates. McDonald recommended Santangelo, Leo Perry (Perry), and Robert Palermo (Palermo).

22. The Hearing Officer credited the testimony of Popovich and Todino about the timing and the scope of the board members' discussions about each candidate both at the end of each interview and at the end of all the interviews when the final rating or score for each candidate in each of the nine categories was reached by consensus. The Hearing Officer found that their testimony was consistent on this point and consistent with the interview schedule that reflects the start and end time for each

interview. The Hearing Officer did not credit any contradictory testimony by any other witness on this point.

23. Based on his demeanor, including his straightforward, direct responses to both counsel's questions, and the absence of any motive to obscure the truth, the Hearing Officer credited Popovich's testimony that either Cooper or Todino had provided the information about Brown, Coronella, and McDonald. The Hearing Officer noted that, in addition, Popovich's recollections about the interview process were aided by reference to his notes taken contemporaneously with the interviews. The fact that Popovich took notes during the interviews and retrieved the notes prior to testifying in this case demonstrates the seriousness and importance he attached to both his participation on the board and his testimony during the hearing. The Hearing Officer did not credit any contradictory testimony by any other witness on this point.

24. During a conversation in the police department prior to the oral interviews, Coronella told Cooper and Todino that two patrol officers had told him that McDonald had not responded appropriately to a call for assistance. No police officer filed a report regarding this alleged incident, and the police department did not conduct any inquiry or investigation into this allegation.

25. The Town suspended Coronella for failing to maintain his driver's license at some point prior to the oral interviews. The board rated Coronella as unsatisfactory, with a rating of 3 points, in three categories: Leadership/supervisory Skills, Personal Integrity, and Tact/Fairness.

26. The names of the candidates who were not presented to the Board of Selectmen have been redacted.

The board's score for each of the five candidates, including McDonald, in each of the nine categories is as follows:

Category	Ensko	Perry	Palermo	Santangelo	McDonald
Oral Communication	9	9	7	6	5
Job Confidence/Job Knowledge	9	9	8	6	5
Ability to Solve Problems/Decision Making	9	9	8	7	5
Leadership/Supervisory Skills	9	10	8	6	5
Appearance	9	9	7	8	7
Personal Integrity	9	9	8	8	3
Tact/Fairness	9	9	8	8	3
Enthusiasm	10	9	9	5	5
Loyalty	10	10	9	8	5
TOTAL SCORE	83	83	72	62	43

2002 Promotions to the Rank of Sergeant

At the conclusion of the interviews, the rating sheets for all eleven candidates were forwarded to the Town's personnel office. Pursuant to the Regulation, the written examination scores previously sent by the vendor to the Town's Personnel Administrator were then opened. Five of the eleven candidates received a passing grade on the written examination. The personnel office forwarded the overall examination results, incorporating the applicable seniority and education points, for the five candidates for promotion to the rank of sergeant to the Board of Selectmen. The examination results for the five candidates are as follows:

Applicant Score*	Police Sergeant Examination — June 7, 2002					Overall
	Oral	Written Exam	Sub Score	Seniority Points	Education Points	
J. Santangelo	62%	93.75%	85.81	3	0.5	89.31
D. Ensko	83%	85%	84.5	1.25	0	85.75
S. McDonald	43%	92.50%	80.13	2	0.5	82.63
R. Palermo	72%	75%	74.25	1.25	1	76.50
L. Perry	83%	71.25%	74.19	1.5	0.5	76.19

*Written Score Times Three Plus Oral Divided by 4

June 2002 Promotions to the Rank of Sergeant

The Regulation states, in part, that "[t]he Selectmen have the sole discretion to decide whether and when to fill a vacancy and to choose which applicant will be selected." The Regulation does not require that the police chief recommend a candidate(s) to the Board of Selectmen for promotion. However, in response to the Board of Selectmen's request, Cooper recommended David Ensko (Ensko), Robert Palermo (Palermo), and Perry for promotion to the rank of sergeant by a memorandum to the Board of Selectmen dated June 10, 2002.²⁷ Cooper recommended these three candidates for promotion based, in part, on his observations during the interview portion of the examination process, including the interviews and the board's discussions. Cooper enclosed the re-

sumes of all five candidates for promotion with his recommendation. The recommendation, in part, states:²⁸

My recommendation is based upon a thoughtful review of each candidate's qualifications, experience, scores and performance at the oral interview board along with their past work history, relevant training courses, educational background and demonstrated initiative. ...

Moreover, as you know, all promotional opportunities within the police department are filled on the basis of qualifications, ability, and reliability. Pursuant to Massachusetts General Law, Chapter 41, Section 97A and Chapter 41, Section 133, the Board of Selectmen possess a non-delegable duty of appointment and are the sole judge of an applicant's qualifications, ability, and reliability for promotional opportunities, with input and consultations from the Chief of Police. ...

After careful and thoughtful consideration I strongly and respectfully recommend that the Board of Selectmen appoint David M. Ensko, Robert Palermo and Leo F. Perry as the three new Police Sergeants. I respectfully request that the Board of Selectmen at the June 17, 2002 meeting make the appointments of these three outstanding candidates to the position of Police Sergeant. I have made my recommendations to you, as allowed in the Promotional Regulation, after consultation with the other members of the Police Department Command Staff. The Command Staff is in agreement with my recommendation. Enclosed are the professional biographies of all five candidates for your information.

Officers David M. Ensko, Robert Palermo and Leo F. Perry, clearly demonstrated during the structured interview process that they were the superior candidates and therefore deserve to be ranked for my recommendation as the top three candidates and considered for the current vacancies.

All three of my recommendations are highly motivated law enforcement professionals who possess both the capabilities and qualities to serve the citizens of Mashpee as Police Sergeants. I have detailed below just a few of the strengths that each of my recommended candidates possess for your review.

Officer David M. Ensko ...

Officer Robert Palermo ...

Officer Leo Perry ...

In addition to the aforementioned competencies, these candidates have demonstrated through their work performance that they are highly motivated, very dependable and exceedingly reliable. I have personally observed them in situations where they have taken on leadership roles and performed well. I have also observed them mentoring junior officers so they will acquire the skills to succeed in their positions and that they may better serve the citizens of our Town. They are unequivocally the candidates who are the most qualified and best suited to the rank of Police Sergeant.

... As always I am available for consultation at your request. Please contact me with any questions you may have.²⁹ ...

27. In or about May of 2002, Clancy brought certain conduct by Ensko, Palermo, and another patrol officer to Cooper's attention. In Clancy's view, these officers did not fully comply with the police department's regulations regarding the pursuit of a vehicle across Town lines. In response to Lieutenant Michael Sexton's request, Clancy turned over the tapes of the relevant police radio transmissions. It is unclear

from the record whether Clancy filed any written report on the incident with Cooper. Clancy heard nothing further on the issue.

28. The June 10, 2002 recommendation is attached as Appendix A to this Decision.

29. The record is silent on whether any member of the Board of Selectmen contacted Cooper and talked with him about his recommendations or that Cooper oth-

According to Cooper, once promotions reach a certain level of consideration, they become part of the political process. Therefore, in Cooper's view, the weight, if any, assigned to his recommendations by the Board of Selectmen varies from candidate to candidate and among individual members of the Board of Selectmen.³⁰

*Board of Selectmen's June 2002 Promotions to the Rank of Sergeant*³¹

In June of 2002, the Board of Selectmen, the appointing authority under the Town's Charter then in effect, selected Santangelo, Ensko, and Palermo for promotion to the rank of sergeant.³²

Santangelo started working for the Town as a special police officer in 1989. In 1990 he moved to a full-time patrol officer position and became a detective patrol officer in or about 1996. During his Union presidency, July of 2001 until August of 2002, Santangelo processed one grievance, which the Union withdrew after discussion(s) with the Town. For about twelve months of his thirteen month presidency, Santangelo was assigned to the Cape Cod Drug Task Force and, therefore, not physically present in the Town.

December 2002 Promotion to the Rank of Sergeant

In November of 2002, Clancy resigned his position as a sergeant with the police department to take the appointment of police chief in the Town of Plympton. As permitted in the Regulation, the Town used the existing list of candidates for promotion to the rank of sergeant to fill the vacancy.

By memorandum to the Board of Selectmen dated December 3, 2002, Cooper recommended Perry for promotion to the rank of sergeant.³³ At some point between mid-June of 2002 and December 3, 2002, Perry was assigned as a detective performing duty with the Cape Cod Drug Task Force.³⁴ As stated in this memorandum, Cooper enclosed McDonald's resume with his recommendation. This December 3, 2002 recommendation, in part, states:

My recommendation is based upon a thoughtful review of each candidate's qualifications, experience, scores and performance at the oral interview board along with their past work history, relevant training courses, educational background and demonstrated initiative. ...

Moreover, as you know, all promotional opportunities within the police department are filled on the basis of qualifications, ability, and reliability, and in accord with Massachusetts General Law,

erwise communicated with the Board of Selectmen about the promotions at issue in this case.

30. In Cooper's opinion, his recommendation does not carry much weight because the appointment of a candidate lies solely with the elected members of the Board of Selectmen and their decision is not subject to challenge under the applicable collective bargaining agreement, if they promote one of the top six qualified candidates.

31. At some point after the appointments to the rank of sergeant at issue in this case, the Town amended its Charter to grant the Police Chief the authority to promote individuals to the rank of sergeant and lieutenant, removing the decision making authority from the Board of Selectmen.

32. The record contains no evidence about the Board of Selectmen's deliberations or the factors they considered at the time they decided to promote these three candidates to the rank of sergeant.

Chapter 41, Section 97A and Chapter 41, Section 133, by the Board of Selectmen. ...

After careful and thoughtful consideration I strongly and respectfully recommend that the Board of Selectmen appoint Detective Leo F. Perry as the new Police Sergeant, replacing Sergeant Matthew Clancy. I respectfully request that the Board of Selectmen at the December 09, 2002 meeting, make this appointment as recommended. I have made my recommendation to you, as allowed in the Promotional Regulation, after consultation with the other members of the Police Department Command Staff. The Command Staff is in agreement with my recommendation. I have enclosed the professional biography of Detective Leo Perry, and the biography of the remaining candidate, Officer Steven MacDonald for your information.

Detective Leo F. Perry, clearly demonstrated during the structured interview process that he is an excellent candidate and therefore is deserving of my recommendation as the top candidate to be considered for the current vacancy. In addition, it should be noted that Detective Perry was selected by the promotion board as the number three candidate for consideration on the Mashpee Police Department Lieutenant Promotion List. ...

Detective Leo Perry ...

In addition to the aforementioned competencies, Detective Perry has demonstrated through his work performance as a Patrol Officer, Detective and as a Drug Enforcement Task Force Agent that he is a highly motivated, very dependable and exceeding reliable employee. Detective Perry is the candidate who is the most qualified and best suited for promotion to the rank of Police Sergeant at this time.

... As always I am available for consultation at your request. Please contact me with any questions you may have.³⁵...

Board of Selectmen's December 2002 Promotion to the Rank of Sergeant

In December of 2002, the Board of Selectmen, the appointing authority under the Town's Charter then in effect, selected Perry for promotion to the rank of sergeant.³⁶

Opinion

A public employer that retaliates or discriminates against an employee for engaging in activity 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). In cases where there is no

33. The December 3, 2002 recommendation is included in Appendix A.

34. This finding was based on the Hearing Officer's review of the exhibits introduced into the record.

35. The record is silent on whether any member of the Board of Selectmen contacted Cooper and talked with him about his recommendation or that Cooper otherwise communicated with the Board of Selectmen about the promotions at issue in this case.

36. The record contains no evidence about the Board of Selectmen's deliberations or the factors they considered at the time they decided to promote Perry to the rank of sergeant.

direct evidence of union animus, the Board applies the three-step analysis to Section 10(a)(3) discrimination cases set forth in *Trustees of Forbes Library v. Labor Relations Commission*, 384 Mass. 559 (1981). The charging party must first establish a *prima facie* case of discrimination based on protected activity. The burden then shifts to the employer to offer one or more lawful reasons for taking the adverse action. Finally, if the employer produces that evidence, the presumption of discrimination created by the charging party's *prima facie* case is dispelled and the employee must demonstrate, by a preponderance of the evidence, that, "but for" the protected activity, the employer would not have taken the adverse action. *Id.* at 565-566.

The *Forbes* decision noted that in unfair labor practice cases, the elements of a *prima facie* case "might include proof that an employee had a generally good work record, that he had engaged in protected activity, and that this activity was plainly visible to the employer." *Id.* at 565 n.4. Both before and after *Forbes* was decided, however, the Board has required charging parties in Section 10(a)(3) cases to establish a *prima facie* case consisting of the following four elements: 1) that the employee was engaged in activity protected by Section 2 of the Law; 2) that the employer knew of the protected activity; 3) that the employer took adverse action against the employee; and 4) the employer took the adverse action to discourage the protected activity. *See, e.g., Town of Somerset*, 3 MLC 1618 (1977); *Quincy School Committee*, 27 MLC 83, 92 (2000); *Boston School Committee*, MUP-9067 (March 2, 1994), *aff'd. sub. nom., School Committee of Boston v. Labor Relations Commission*, 40 Mass. App. Ct. 327, 329 (1996). In *School Committee of Boston v. Labor Relations Commission*, the Court, noting the differences between the two tests, stated, "the fourth element referred to in the Commission's opinion [unlawful motive] is the inference which the fact-finder may draw from proof of the first three elements" of the *Forbes* test. *School Committee of Boston*, 40 Mass. App. Ct. at 329, n.5. Accordingly, it is well-established that unlawful motivation may be demonstrated through circumstantial evidence and the reasonable inferences drawn therefrom. *Southern Worcester County Regional Vocational School District*, 386 Mass. at 418-419; *Board of Regents*, 12 MLC 1315, 1383 (1985).

Here, there is no dispute that McDonald satisfies the first three elements of both *prima facie* tests. Specifically, there is no dispute that McDonald engaged in protected activity in his capacity as Union president and shop steward, that the Town was aware of his activities, and that the failure to promote him to the rank of sergeant in June and December of 2002 adversely affected his employment. Furthermore, the evidence reflects that McDonald had a good work record and was qualified for promotion to the rank of sergeant. He received good performance evaluations, positive recognition from his superiors and ranked three out of five on the sergeant eligibility list.

The Town submits, however, and we do not disagree, that the record lacks evidence of overt hostility toward the exercise of protected rights or a history of acrimonious or strained labor relations.

Against this backdrop, we have carefully considered the fourth element of the *prima facie* case: whether there is sufficient circumstantial evidence to permit us to draw a reasonable inference that the Town's decision not to promote McDonald was unlawfully motivated. We conclude that there is.

In addition to timing or expressions of animus or hostility toward a union or protected activity, several other factors may suggest unlawful employer motivation, including triviality of reasons given by the employer or an employer's deviation from past practice or established procedure. *Cape Cod Regional Technical High School District Committee*, 28 MLC 332, 335 (2002); *Bristol County*, 26 MLC 105, 109 (2000).

The Town's defense to McDonald's 10(a)(3) charge of discrimination is that he was not promoted because of his low score on the oral part of the promotion exam. As discussed below, the Town offered no testimonial or documentary evidence explaining the deliberations or reasoning of the Board of Selectmen. However, under the negotiated promotion procedure, the oral part of the examination comprises just one quarter of a candidate's weighted score, while the written scores are weighted three times as heavily. McDonald had the second highest written examination score of the five top candidates. The Town's exclusive reliance on McDonald's low oral score to explain why he was bypassed for promotion is therefore inconsistent with the relative weight given to oral and written scores in the negotiated promotion process.

Even assuming that the Town could decide to weigh low interview scores more heavily than the negotiated procedure called for, the Town appears to have weighted them more heavily for McDonald only. That is, in June 2002, the Board of Selectmen disregarded the Chief's recommendation and promoted Santangelo over Perry, even though Santangelo scored lower than Perry on the oral exam. The Town attempts to explain this deviation from its emphasis on low oral interview scores by the fact that Santangelo had the highest *overall* score of all the candidates. This is a plausible explanation, given the fact that in 1993, the Selectmen also selected the highest-ranking candidate for promotion. For this reason, the June 2002 bypass, standing alone, does not support an inference that the failure to promote McDonald was unlawful and we dismiss Count I of the complaint.

However, in December 2002, McDonald had the highest overall score of the remaining two candidates. The Selectmen nevertheless bypassed McDonald in favor of Perry, claiming that McDonald's oral interview scores were lower, a factor they clearly did not apply when they decided to promote Santangelo in June. Thus, in December 2002, the record indicates that the Town shifted its reasons for making promotion decisions, thus giving rise to a reasonable inference that the Town's real reason for not promoting McDonald were his numerous and visible activities on behalf of the Union as president and shop steward over a period of many years.³⁷ *City of Malden*, 5 MLC 1752, 1766 (1979) (where union activist bypassed for promotion on three occasions, Commission

37. [See next page.]

inferred illegal motivation from the third bypass, based on procedural deviations from first two opportunities).

The Town's failure to produce any evidence of the Selectmen's reasons for twice denying McDonald a promotion, as discussed in more detail below, also supports an inference of unlawful discrimination. The Selectmen were uniquely positioned to explain the Town's failure to promote McDonald because they had the sole discretion to make the final decision and did not uniformly rely on the Chief's recommendations. "When a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Bellingham Teachers Association*, 9 MLC 1536, 1548 (1982); *City of Malden*, 5 MLC at 1768. We draw such an inference here based on the lack of record evidence supporting or explaining the Selectmen's decision to bypass McDonald for promotion on the second go-around.

In sum, three pieces of circumstantial evidence support a reasonable inference that McDonald was not promoted due to his Union activities: 1) the Town's exclusive reliance on McDonald's low oral interview scores, in apparent contradiction to the parties' negotiated promotion procedure; 2) the Town's shift in its reasons for promoting Santangelo over Perry in June of 2002 and Perry over McDonald in December 2002, notwithstanding the fact that both Santangelo and McDonald had lower oral interview scores than Perry but higher overall scores; 3) the Town's failure to offer direct evidence of the Selectmen's reasons for bypassing McDonald. Based on these three reasons, we conclude that, as of December 2002, a reasonable inference can be drawn that the decision not to promote McDonald was unlawfully motivated.

Critical to our ultimate finding of unlawful discrimination in this case is the failure of the Town to produce evidence articulating a lawful reason for its decision. At stage two of the *Forbes* analysis, the employer's burden is to produce supporting facts indicating that the stated reasons—here, low interview scores—was actually a motive in the decision. The employer's burden to produce legitimate, non-discriminatory reasons for taking the adverse action is more than simply stating unsubstantiated allegations. *School Committee of Boston v. Labor Relations Commission*, 40 Mass. App. Ct. at 335; *Commonwealth of Massachusetts*, 25 MLC 44, 46 (1998). The employer must produce supporting facts indicating that the proffered reason was actually a motive in the decision. *Trustees of Forbes Library*, 384 Mass. at 566; *School Committee of Boston v. Labor Relations Commission*, 40 Mass. App. Ct. at 335.

The Town has failed to meet its evidentiary burden. Although it claims that McDonald was not selected for promotion because of his low interview scores, it has provided no evidence to substantiate this allegation. Under the parties' negotiated promotion proce-

dures, the Board of Selectmen are vested with the "sole discretion" to choose an applicant for promotion. Thus, although Cooper testified and the Town provided the letters that Cooper wrote to the Board of Selectmen explaining the reasons for his recommendations, Cooper himself testified that his recommendations did not carry much weight because the appointment of a candidate lies solely with the Board of Selectmen. Cooper's observation is borne out by the fact that the Board of Selectmen did not simply approve all of Cooper's recommendations, rejecting his recommendation of Perry in June of 2002 in favor of Santangelo. Under these circumstances, in determining whether the Town has provided supporting facts indicating that McDonald's low scores were actually a motive in the Selectmen's decision not to promote, the Board must examine the Board of Selectmen's explanations for the actions they took. "When persons responsible for discharging an employee have independent reasons for their decision, apart from the recommendation of lower level supervisors, the [Board] must give those reasons due consideration as motives for the discharge." *Trustees of Forbes Library*, 384 Mass. at 569.

We are unable to do that in this case. None of the Selectmen testified and the record is otherwise silent as to whether any of the Selectmen contacted Cooper and talked with him about his recommendation or whether Cooper otherwise communicated with the Selectmen about the promotions at issue.³⁸ Further, there is no evidence that the Selectmen sought any additional information regarding the candidates for promotion from either Cooper or another source, or that the Selectmen directly spoke with any of the candidates during this round of promotions. The record also contains no evidence about the Selectmen's deliberations or the factors they considered at the time they decided to promote Santangelo, Ensko and Palermo to sergeant in June 2002, nor when they decided to promote Perry to the rank of sergeant in December of that year.

Finally and perhaps most significantly, the record contains no evidence as to why the Selectmen chose to ignore Cooper's recommendations and promote Santangelo over Perry in June of 2002 but bypassed McDonald in favor of Perry in December 2002. That is, because the Board of Selectmen did not uniformly adopt Cooper's recommendations, they must provide a reason for deviating from his recommendations. *Id.* The Town's bare assertion that McDonald's lower oral interview scores were the reason he was bypassed is insufficient because it begs the question of why Santangelo, whose oral interview score was lower than Perry's, was selected over Perry in June 2002. Similarly, if the Selectmen were willing to overlook Santangelo's lower oral score in June 2002 in favor of his higher overall score, this does not explain why they bypassed McDonald in favor of Perry in December 2002 because, at that time, McDonald, like Santangelo and Clancy before him, had the highest overall score of the eligible candidates.

37. The fact that Santangelo also served as Union president does not negate this inference because McDonald and Santangelo were not similarly situated Union officials. For twelve of the thirteen months of Santangelo's tenure as Union president, he was assigned to the Cape Cod drug task force and was not physically present in Mashpee. During his brief tenure, Santangelo filed only one grievance, which was subsequently withdrawn following discussions with the Town. McDonald, on the

other hand, served as Union president for about five years and as Chief Steward for the time leading to his promotion bypasses, and, in contrast to Santangelo, was very active and visible in both roles.

38. See footnote 36, *supra*.

By failing to produce any credible evidence that McDonald's low oral interview scores actually played a part in the Selectmen's decision not to promote him, the Employer has failed to meet its evidentiary burden at the second stage of the *Forbes* analysis. It has therefore failed to produce any evidence to dispel the presumption of unlawful discrimination created by McDonald's satisfaction of his *prima facie* case with respect to the December 2002 promotion. The Union has therefore demonstrated that the Town failed to promote McDonald to sergeant in December 2002 in violation of Section 10(a)(3) and (1) of the Law.

Remedy

In failure to promote cases, the Board has, with judicial approval, ordered the employer to offer the discriminatee the promotional position along with seniority, wages, benefits and all rights and privileges from the date that the promotion would have been made. *Town of Clinton*, 12 MLC 1361, 1367 (1985) (citing *City of Malden*, 5 MLC 1752 (1979), *enfd* Civ. No. 79-1995 (Middlesex, August 14, 1981)). The Town seeks to limit the Board's remedy here to an order to promote McDonald to the next available sergeant vacancy in view of what it characterizes as the relatively small size of the Town's police force (27 patrolmen and 5 sergeants). The Town submits that it should not be compelled to artificially create an additional sergeant's position for which there is no actual need at present, or to demote a sergeant to make room for McDonald, particularly since the Town and the Union have negotiated a comprehensive promotion regulation setting out in detail the process for filing vacancies in the position of sergeant.

In this case, however, we found that the Town deviated from its promotion procedures and practices in December 2002, when it promoted Perry over McDonald, notwithstanding the fact that McDonald had the higher overall test scores of the two candidates. Accordingly, we order the Town to offer McDonald the position of sergeant in the Mashpee police force as of the date that Perry assumed this position in December 2002.³⁹ *City of Malden*, 5 MLC at 1769 (ordering City to offer charging party the position of sergeant as of last date bypassed for promotion).

The Town also asks the Board to retain jurisdiction on the matter of money damages given McDonald's active paid duty with the Coast Guard. The Board has a compliance and hearing procedure, set forth in 456 CMR 16.08, at which such issues can be fully litigated. To the extent the parties cannot agree on this or any other issues raised by our remedial order, they are free to institute compliance proceedings. *Commonwealth of Massachusetts*, 21 MLC 1637, 1643 (1995).

Order

WHEREFORE, based upon the foregoing, it is hereby ordered that the Town of Mashpee shall:

1. Cease and desist from:

a. Retaliating against McDonald for engaging in concerted protected activities;

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

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

a. Offer Stephen R. McDonald the position of Sergeant in the Town of Mashpee's police department, which position he shall be deemed in terms of seniority, benefits, and all rights and privileges to have held since the day that the Sergeant position was filled in December 2002;

b. Make Stephen R. McDonald whole for all losses he suffered, if any, as a result of the discriminatory denial of his promotion. He shall be paid a sum equal to the difference between what he would have earned as a Sergeant and his salary as a patrol officer from the date that the Sergeant position was filled in December 2002 to the date of compliance with this order, plus interest on all sums owed at the rate specified in MGL c. 231, Section 6I, compounded quarterly;

c. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of the attached Notice to Employees, including electronically, if the Town of Mashpee customarily communicates with bargaining unit members via intranet or email, and display for a period of thirty (30) days, thereafter signed copies of the attached Notice to Employees;

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

SO ORDERED.

THE COMMONWEALTH OF MASSACHUSETTS DIVISION OF
LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE MASSACHUSETTS DIVISION
OF LABOR RELATIONS

AN AGENCY OF THE COMMONWEALTH OF
MASSACHUSETTS

Massachusetts General Laws, Chapter 150E (the Law) gives public employees the right to form, join or assist a union, to participate in proceedings at the Division of Labor Relations; to act together with other employees for the purposes of collective bargaining or other mutual aid or protection free from interference, restraint or coercion, and to choose not to engage in any of these protected activities.

The Massachusetts Division of Labor Relations, Commonwealth Employee Relations Board (Board) has held that the Town of Mashpee has violated Section 10(a)(3) and Section 10(a)(1) of the Law by failing to promote Stephen R. McDonald to the position of Sergeant in the Mashpee Police Department.

39. The record does not reflect the exact date.

The Town posts this Notice to Employees in compliance with the Board's order.

WE WILL NOT discriminate in regard to hiring, tenure, promotion or any other term or condition of employment in order to discourage employees from engaging in lawful concerted activities to improve their wages, hours or working conditions.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed under Section 2 of the Law.

WE WILL take the following affirmative action that will effectuate the purposes of the Law:

- 1) WE WILL offer Stephen R. McDonald the position of Sergeant in the Mashpee Police Department.
- 2) WE WILL grant McDonald seniority in his position as Sergeant retroactive to the date that the Sergeant position was filled in De-

cember of 2002 and will make him whole for any rights, benefits, privileges and monies lost by him as a result of the discriminatory denial of his promotion to Sergeant.

[signed]
For the Town of Mashpee

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Division Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

[See Appendix A on the following pages.]