

a bachelor’s degree. Accordingly, we conclude that the planning coordinator position shares a community of interest with the existing bargaining unit.

*Casual*

The last issue raised by the Town is whether the planning coordinator position is casual and, therefore, inappropriate for inclusion into the bargaining unit. In determining whether a position is casual, the Commission examines continuity of employment, regularity of work, the relationship of the work performed to the needs of the employer, and the amount of work performed by the employees. *Town of Wenham*, 22 MLC 1237 (1995). Here, the planning coordinator regularly works nineteen hours per week. Further, the Town renewed the incumbent’s contract for another fiscal year. See, *Worcester County*, 17 MLC 1352, 1359-1360 (1990). Thus, the planning coordinator position is not casual.

Conclusion

For the foregoing reasons, we conclude that the planning coordinator position is appropriately accreted into the bargaining unit represented by the Union. Accordingly, we amend the Commission’s certification of representatives in Case No. MCR-4233 to include the planning coordinator position.

SO ORDERED.

\* \* \* \* \*

In the Matter of SUFFOLK COUNTY SHERIFF’S DEPARTMENT

and

AFSCME, COUNCIL 93, LOCAL 1134, AFL-CIO

Case No. MUP-1498

- 61.1 *standard of proof*
- 62.3 *discrimination*
- 62.6 *misconduct*
- 63.7 *discrimination - union activity*
- 65.2 *concerted activity*
- 82.12 *other affirmative action*
- 91.11 *statute of limitations*

June 4, 2001

*Helen A. Moreschi, Chairwoman*

*Mark A. Preble, Commissioner*

*Melissa J. Garand, Esq. Representing the Suffolk County Sheriff’s Department*

*Gabriel O. Dumont, Esq. AFSCME, Council 93, Local 1134, AFL-CIO*

**DECISION<sup>1</sup>**

Statement of the Case

On April 18, 1996, AFSCME, Council 93, Local 1134, AFL-CIO (Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) alleging that the Suffolk County Sheriff’s Department (Employer) had violated Sections 10(a)(5), (3) and (1) of Chapter 150E of Massachusetts General Laws (the Law). On October 22, 1996, following an investigation, the Commission issued a Complaint of Prohibited Practice alleging that the Employer had violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by discriminating against Terry Zaferakis (Zaferakis) for engaging in protected, concerted activities.<sup>2</sup>

On January 17, 1997, July 17, 1997 and August 4, 1997, Mark A. Preble conducted a hearing at which both parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties filed post-hearing briefs. Commissioner Preble issued Recommend Findings of Fact on January 16, 2001. Neither party filed challenges to the Recommended Findings of Fact.

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

2. The Commission initially dismissed the charged. However, after the Union filed a request for reconsideration pursuant to 456 CMR 15.03(3), the Commission issued a complaint of prohibited practice alleging that the Employer violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law. The Commission affirmed its prior decision to dismiss those portions of the Union’s charge alleging conduct that occurred outside of the Commission’s six-month period of limitations and the Union did not seek judicial review. See, *Quincy City Hospital v. Labor Relations Commission*, 400 Mass. 745 (1987).

Findings of Fact<sup>3</sup>*A. Background*

The Employer is a public employer within the meaning of Section 1 of the Law. The Union is an employee organization within the meaning of Section 1 of the Law and is the exclusive collective bargaining representative for certain corrections officers at the Nashua Street Jail (Jail). AFSCME, Council 93, AFL-CIO also represents a bargaining unit of superior officers, including the shift commanders, in a separate local. In January 1995, Zaferakis was elected Union vice president and was appointed to the Union Health and Safety Committee.

The Jail is a correctional facility that houses inmates awaiting trial. Inmates are housed on three floors: the second, fourth, and sixth. The fifth floor is a medical unit that houses inmates in need of medical assistance and the remaining floors are administrative areas. Inmates who are classified as “general population” are housed in the second or fourth floors. Inmates who are classified as “high security” are housed on the sixth floor and are governed by different rules than those housed on the second and fourth floors. For example, inmates who are housed on the sixth floor are not permitted to attend school or Alcoholics Anonymous.

Inmates housed on the sixth floor are further divided into one of four units. The 6-1 Unit, referred to as the “lockdown” unit, houses inmates who have had disciplinary problems like fighting with other inmates or corrections officers. The 6-3 Unit houses inmates who were previously in the 6-1 Unit. The 6-2 Unit houses females<sup>4</sup> and the 6-4 Unit houses high security inmates who have not had disciplinary problems. Inmates housed in the 6-1 unit are confined to their cells and are allowed only one (1) hour of recreation each day. Inmates housed in the 6-3 Unit are confined to their cells at 5:30 P.M. following dinner.<sup>5</sup>

The Jail is staffed by corrections officers who are assigned to one of three shifts: 7:00 A.M.-3:00 P.M., 3:00 P.M.-11:00 P.M., and 11:00 P.M.-7:00 A.M. Captain Robert Staffier (Staffier) is the shift commander on the 3:00 P.M.-11:00 P.M. shift and is responsible for assigning corrections officers to one of the several units in the facility.<sup>6</sup> Staffier makes unit assignments on a quarterly basis and forwards a list to the personnel department, where a typewritten “Preliminary Shift Roster” is prepared and reviewed by Deputy Superintendent John Maloney (Maloney) and Special Sheriff John Brassil (Brassil) before it is posted.<sup>7</sup>

In addition to the specific unit assignments, corrections officers can be assigned as a “floater.” A floater is a corrections officer who is assigned on a daily basis to a different assignment. For example, when a corrections officer is absent for any reason, the shift

commander assigns a floater to cover the vacancy and notes the assignment on the Preliminary Shift Roster.

Much of the communication at the Jail is in the form of multi-part “speed letters.” Although shift commanders do not formally discipline corrections officers, they sometimes “write up” officers by sending a speed letter to the deputy superintendent, with a copy to the officer.

One of the assignments at the Jail is an assignment to the Sheriff’s Emergency Response Team (SERT). SERT officers are responsible for diffusing emergency situations involving inmates. Unlike other assignments, an assignment to SERT requires specialized training in the use of force, handcuffs, and cell removal. The assignment also requires the nomination of a shift commander and the final approval of the superintendent and the Investigative Division, who assess whether the candidate would pose a risk of liability.<sup>8</sup> Only about thirty-five (35) of the approximately 135 corrections officers on the 3:00 P.M. – 11:00 P.M. shift have SERT training.

Despite the potential dangers and the lack of extra pay, SERT assignments are considered favorable and prestigious. SERT assignments are different from other assignments because there is no regular contact with inmates and SERT officers have significant freedom to move around the facility. Each shift includes a SERT complement consisting of five (5) corrections officers and one (1) supervisor.

Corrections officers have been removed from SERT for disciplinary reasons. For example, following an incident during which he allegedly head-butted an inmate while wearing a helmet, Corrections Officer Melvin Massuczo (Massuczo) was removed from SERT for three to six months. In another example, following an incident on January 13, 1996<sup>9</sup> during which he allegedly used excessive force on an inmate, Corrections Officer John Grennon (Grennon) was removed from SERT for six months. In that case, another corrections officer reported that Grennon threw a female inmate to the floor and drove his knee into her back, stating “If you move bitch, I will kill you.” The corrections officer further reported that, after escorting the inmate to her cell, Grennon stood over her with his hand grasped tightly around her neck and stated “If you move bitch, I’ll f—ing strangle you to death.” In both of those cases, the decision to remove the corrections officer from SERT came after a written report was submitted about the incident.

Terry Zaferakis (Zaferakis) began his employment at the Jail as a corrections officer in August 1993. Although he was initially assigned to the 7:00 A.M.-3:00 P.M. shift, Zaferakis was assigned to the 3:00 P.M.-11:00 P.M. shift as a floater in October 1993. Zaferakis remained as a floater for an additional quarter and then

3. The parties have not contested the Commission’s jurisdiction over this matter.

4. Although at the time of the incidents that gave rise to this case the 6-2 Unit housed female inmates, the unit now houses male inmates.

5. Although at the time of the incidents that gave rise to this case inmates housed in the 6-3 Unit were confined to their cells at 5:30 P.M., that is no longer the rule.

6. Captain Sidney Chambers (Chambers) or one of several lieutenants cover for Staffier when he not scheduled to work.

7. Neither Maloney nor Brassil decide who is assigned to a specific assignment. Rather, they review the Preliminary Shift Roster to check that corrections officers are properly trained to perform the duties to which they are assigned.

8. Officers and other Jail officials can be held personally liable for inappropriate or excessive force.

9. This incident occurred after the events that gave rise to this case.

was assigned to general population units for two consecutive quarters. Soon after his assignment to the 3:00 P.M.-11:00 P.M. shift, Zaferakis expressed an interest in training for SERT. Staffier nominated Zaferakis for SERT in July 1994<sup>10</sup> and Zaferakis completed his training in early August.<sup>11</sup> Zaferakis was assigned to SERT in mid-September 1994.

In late December 1994 or early January 1995, Staffier spoke with Director of Staff Training and Special Operations John O'Leary (O'Leary) about Zaferakis's performance on SERT. Although Staffier had not witnessed any incidents directly, he told O'Leary that he was concerned about Zaferakis's assignment to SERT.<sup>12</sup> O'Leary suggested that Staffier keep a closer watch on Zaferakis. Despite that suggestion, Staffier re-assigned Zaferakis to SERT for the quarter beginning in mid-January.<sup>13</sup>

#### *B. The Incident on January 29, 1995*

January 29, 1995 was "Super Bowl Sunday." Zaferakis was assigned to SERT on the sixth floor on the 3:00 P.M.-11:00 P.M. shift. Maloney had previously decided to allow inmates housed in the 6-3 Unit to remain out of their cells following dinner that evening to watch the football game.

On February 2, 1995, Zaferakis sent a speed letter to Staffier,<sup>14</sup> Maloney, and Union President Vincent Miller (Miller). The speed letter stated:

The department violated its own policy and procedure jeopardizing officers' safety...On January 29, 1995, the 6-3 unit was allowed rec[reation time] after feeding to watch the Super Bowl. This is a direct violation of the department policy and procedure... As you know, 6-3 is considered a disciplinary unit with limited rec[reation time]. Staffing levels for extra security were not addressed. This Local would like to be notified of any changes in working conditions, especially when officers' safety is involved.

10. Staffier testified that he liked Zaferakis and "took him under his wing, and brought him along." Staffier also testified that Zaferakis was one of the best unit officers he had.

11. Zaferakis also attended SERT 2 training in October or November 1994.

12. Staffier testified that his conversation with O'Leary came after he had received reports from other corrections officers about Zaferakis. However, Staffier was unable to recall who made those reports or when those reports were made. Therefore, although we find that Staffier spoke with O'Leary about Zaferakis's performance on SERT, we do not find that Staffier spoke with O'Leary because he had received reports about Zaferakis from other corrections officers.

13. The quarter beginning in mid-September was extended by one month to realign the quarter system more closely with the calendar year.

14. Staffier did not recall receiving the speed letter.

15. Lieutenant Leslie Boyce (Boyce), who was the SERT supervisor on that shift, testified that, after Salas and Haughey had restrained inmate Dana Smith, Boyce was talking to inmate Gary Smith when Zaferakis and Grennon "jumped the guy, put him on the floor and cuffed him." However, we find that Zaferakis and Grennon only restrained and cuffed inmate Gary Smith after the inmate struck Grennon with the food tray. In addition to reports filed by Zaferakis and Grennon, which both state that inmate Gary Smith struck Grennon, Sergeant Richard Dolan (Dolan) filed a report that corroborated those reports. In his report, Dolan stated that he saw inmate Gary Smith hit Grennon with the tray. Further Boyce later testified that the incident took place away from him. Therefore, we find that it is unlikely that Boyce was in a position to observe the entire incident.

#### *C. The Incident on February 2, 1995*

On February 2, 1995, Zaferakis was assigned to SERT. At just after 5:00 P.M., inmate Dana Smith and Deputy John Haughey (Haughey) become involved in a scuffle in the 2-3 Unit. Corrections Officer Daniel Salas (Salas), who was in the kitchen area at the time, sounded the "mandown" alarm and then went to assist Haughey. Zaferakis, Grennon, and Sergeant Richard Rossetti (Rossetti), who were also assigned to SERT that day, responded.

Upon arriving at the scene, Zaferakis and Grennon observed another inmate, Gary Smith, holding a food tray. At some point during the incident, inmate Gary Smith hit Grennon in the chest with a food tray. Zaferakis and Grennon, with additional help from Corrections Officer Kenneth Joyner, II (Joyner) then placed inmate Gary Smith in handcuffs.<sup>15</sup> Several reports were written about the incident, but none were critical of Zaferakis's conduct.

Shortly after the incident, Boyce spoke with Staffier and expressed displeasure with the way that Zaferakis and Grennon handled the situation. Later that evening, Staffier spoke with Zaferakis and Grennon.<sup>16</sup> During that meeting, Staffier told both Zaferakis and Grennon that, because of what had happened during the incident involving inmate Gary Smith, he was removing them from SERT. Staffier also indicated that he was making the change for their benefit.<sup>17</sup> Staffier later informed Chambers about what Boyce had reported on February 2, 1995 and added that Chambers should be careful about putting Zaferakis or Grennon on SERT.<sup>18</sup>

#### *D. Assignments after February 2, 1995*

Neither Zaferakis nor Grennon were on duty on February 3, 1995. On February 4, 1995, Lieutenant Harland (Harland), who was covering for Staffier as the shift commander, assigned Grennon to the 6-2-control room but did not reassign Zaferakis from his SERT assignment. On Sunday, February 5, 1995, Chambers was

16. Zaferakis testified that Staffier spoke to him alone. However, both Staffier and Grennon testified that Staffier spoke with Grennon and Zaferakis at the same time. Although it was possible that Zaferakis entered Staffier's office first and, therefore, was alone for some time before Grennon arrived, we find that during the substance of the conversation, both Zaferakis and Grennon were together in Staffier's office.

17. Staffier testified that he told Zaferakis and Grennon that he was going to save their jobs. Zaferakis testified that Staffier told him that he was going to hide him for a while. Grennon testified that Staffier said that he felt that he was making the change for their own good. We find that, although the exact words attributed to Staffier were different, the testimony about the general subject matter of the conversation was consistent.

18. Staffier testified that Grennon had come to him the following day, apologized for his role in the incident, and agreed to accept whatever decision Staffier made concerning his participation in future SERT assignments. However, Grennon denied having that conversation and testified that the only conversation that he had with Staffier following the incident on February 2, 1995 occurred after he was reassigned to SERT. Grennon testified that, after he was reassigned to SERT he told Staffier that he appreciated being put back on SERT and that he would keep a low profile and keep his mouth shut. Commissioner Preble credited Grennon's testimony based in part on his demeanor on the witness stand and in part on the fact that Grennon was off duty on February 3, 1995, the day on which the conversation with Staffier allegedly occurred.

covering for Staffier as the shift commander. He reassigned Zaferakis from SERT to the Medical Unit.<sup>19</sup>

During January 1995, with the exception of January 4 and 26, Zaferakis worked his SERT assignment. From February 3, 1995 through March 14, 1995, when the quarterly shift assignments changed, Staffier reassigned Zaferakis from SERT on ten (10) of the fourteen (14) shifts on which Staffier was the shift commander. Chambers, however, allowed Zaferakis to remain on his SERT assignment with much greater regularity—reassigning him on only four (4) of the ten (10) shifts on which Chambers was the shift commander.

From February 3, 1995 through March 14, 1995, Staffier assigned Grennon to SERT twice: on February 9 and 16, 1995. This pattern was consistent with the assignments during the period just prior to the incident. In January 1995 Staffier assigned Grennon to SERT twice: on January 13 and 16. Chambers assigned Grennon to SERT more frequently than Staffier, both before and after the February 2, 1995 incident. During January 1995, Chambers assigned Grennon to SERT seven (7) of the eight (8) times that Grennon was on duty while Chambers was the shift commander.<sup>20</sup> After the incident, Chambers likewise assigned Grennon to SERT on seven (7) of the eight (8) times that Grennon was on duty while Chambers was the shift commander.

When Staffier made the quarterly assignments for the quarter beginning on March 15, 1995, he assigned Grennon again as a floater and assigned Zaferakis to the 4-1 Unit as an escort officer. Zaferakis was assigned to the 6-1 Unit for the next quarter and then as a floater for the quarter beginning in September 1995.<sup>21</sup>

#### *E. The Incident on April 13, 1995*

On the evening of April 13, 1995, Zaferakis was assigned to the 4-1 Unit with Corrections Officer Daniel Tucker (Tucker) when Zaferakis was assaulted by inmate Peter Wilson. The SERT team responded and escorted inmate Wilson to the 6-1 Unit. Following the incident, both Zaferakis and Tucker submitted incident reports. Although both reports described the incident, Zaferakis's report also included an observation that the inmate was "aggressive and mentally disturbed," and that the response of the SERT team was "est. well over 8 mins." Sergeant Perkins (Perkins) signed both reports. Although Staffier signed Tucker's report, he did not sign Zaferakis's report because he had not seen it.

The next day, Zaferakis was directed to report to the superintendent's office. Zaferakis reported as directed and met

with Brassil, Maloney, Deputy Donovan, and Superintendent Nate Linkoff (Linkoff). Brassil and Linkoff questioned Zaferakis about the report and specifically, why he commented on departmental problems in an incident report.<sup>22</sup> Linkoff then directed Zaferakis to re-write the report to eliminate any references to departmental problems. Zaferakis re-wrote the report as directed and submitted it to Staffier. Staffier then voiced his displeasure to Zaferakis about the report, stating that the report never should have gotten past him.

#### *F. Zaferakis's Conversations with Staffier and Chambers*

Following the incident on February 2, 1995, Zaferakis asked Staffier why he was no longer being assigned to SERT on two occasions. In May or June 1995, Zaferakis asked Staffier why he was no longer assigned to SERT. Staffier responded that it wasn't coming from him.<sup>23</sup> In June 1995, Zaferakis was out of the facility on Union business for the first part of his shift. When he returned, he reported to Staffier for assignment. Staffier directed Zaferakis to relieve Corrections Officer William McLaughlin (McLaughlin) and to tell McLaughlin to report to SERT. When Zaferakis asked Staffier why he could not perform SERT duties, Staffier responded: "I told you, I can't use you."

During the first part of the quarter beginning in September 1995, Chambers assigned Zaferakis to SERT on weekend shifts on which Chambers was the shift commander. However, after three or four weeks, Chambers no longer assigned Zaferakis to SERT. Zaferakis asked Chambers why he was longer being assigned to SERT and Chambers responded: "It is not coming from us."<sup>24</sup> Since September or October 1995, Zaferakis has not been assigned to SERT.<sup>25</sup>

#### Opinion

##### *Timeliness*

Section 15.03 of the Commission's regulations states: "Except for good cause shown, no charge shall be entertained by the Commission based upon any prohibited practice occurring more than six (6) months prior to the filing of a charge with the Commission." 456 CMR 15.03. The Commission has held that the six-month period of limitations will not begin to run until the charging party knew or should have known of the alleged violation. *Town of Dennis*, 26 MLC 203 (2000); *City of Boston*, 10 MLC 1120, 1133 (1983).

Here, the Employer points out that, although Staffier removed Zaferakis from SERT on or about February 2, 1995, the Union did not file its charge until April 18, 1996. The Employer argues that the Union's charge is untimely because the Union filed it fourteen

19. Grennon had used some accrued leave time and, therefore, did not work a complete shift. The Preliminary Shift Roster for February 5, 1995 does not indicate where Grennon was assigned.

20. There was also one day on which the record is unclear about Grennon's assignment and two other days on which the Preliminary Shift Roster was unavailable.

21. There is nothing in the record about Grennon's assignments after the quarter beginning on March 15, 1995.

22. Although Brassil denied many of the comments that Zaferakis attributed to him during the meeting, he did not deny that the meeting occurred or that he questioned why Zaferakis would include departmental problems in an incident report.

23. Although we find that Staffier made that comment, we find that the totem pole hearsay contained in the comment is not reliable and, therefore, make no finding concerning whether Staffier was or was not directed to stop assigning Zaferakis to SERT.

24. For the reasons articulated above at n.23, although we find that Chambers made the comment, we make no finding concerning whether Chambers was or was not directed to stop assigning Zaferakis to SERT.

25. Due to unrelated medical conditions, Zaferakis was on light duty and, therefore, unavailable for SERT from August 1996 and continuing to the date of the hearing.

months after the alleged adverse action. However, the alleged adverse action extended beyond February 2, 1995. In particular, the Employer refused to assign Zaferakis to SERT from that date up to August 1996 when he went on light duty and was ineligible to perform SERT duties. The Employer's actions had the effect of punishing Zaferakis on a day-to-day basis for having engaged in concerted protected activity. *Compare, Wakefield School Committee*, 27 MLC 9 (2000). Because the Employer had an ongoing obligation not to retaliate against Zaferakis under Section 10 (a) (3) of the Law, the Employer's actions here constitute a continuing violation. *See, Boston Police Superior Officers Federation v. Labor Relations Commission*, 410 Mass. 890 (1991). Therefore, the Union's charge is not time-barred.

#### *Retaliation*

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

Recently, the Supreme Judicial Court articulated the analytical framework to be applied in discrimination cases arising under M.G.L. c. 151B when an employment decision results from a mixture of legitimate and illegitimate motives. *Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination*, 431 Mass. 655 (2000). Under the Court's two-step analysis, the employee must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. The burden of persuasion then shifts to the employer who may prevail by proving that it would have made the same decision even without the illegitimate motive. *Id.* at 669-670. In contrast, under *Forbes Library*, the burden of persuasion remains with the charging party at every stage. *Id.* at 669. Because the Union meets the higher burden of proof set forth in *Forbes Library*, however, it is unnecessary for us to decide in this case whether to adopt the mixed-motive analysis the *Wynn & Wynn* court announced for cases arising under M.G.L. c. 151B.

Here, the Employer asserts that Zaferakis had been elected Union vice president only a few weeks before Staffier removed him from SERT and had not been a vocal Union member prior to the election.

The Employer concludes that Zaferakis was not engaged in concerted protected activity. However, this argument overlooks Zaferakis's speed letter dated February 2, 1995 to Staffier, Maloney, and Miller. In that letter, Zaferakis, in his capacity as Union vice president and member of the Health and Safety Committee, alleged that the lack of extra staffing on January 29, 1995 in the 6-3 unit had impacted officers' safety. He further requested that the Union receive notice of any changes in working conditions. Because Zaferakis wrote the letter protesting working conditions on behalf of the bargaining unit members in his capacity as Union vice president, he engaged in concerted protected activity within the meaning of Section 2 of the Law. *See, Town of Southborough*, 21 MLC 1242 (1994); *City of Haverhill*, 8 MLC 1690 (1981).

The Employer next argues that, even if Zaferakis's February 2, 1995 speed letter constitutes concerted protected activity, Staffier did not know about that letter. However, there is no evidence indicating that Staffier never received the speed letter on or about February 2, 1995. Rather, Staffier testified at the hearing almost two years later that he did not recall receiving the speed letter. Moreover, even if Staffier did not receive the speed letter, Zaferakis also sent that letter to Staffier's direct supervisor, Maloney. Thus, the Employer's argument that it lacked knowledge of Zaferakis's concerted protected activity is unpersuasive.

The Employer took adverse action against Zaferakis by failing to consider him for SERT after February 2, 1995. The record shows that the Employer assigned Zaferakis to SERT for two consecutive quarters after he had completed his SERT training in August 1994. However, Zaferakis was not assigned to SERT for six consecutive quarters after February 2, 1995. We infer from these facts that the Employer's actions were punitive and, therefore, conclude that the Employer acted adversely within the meaning of the Law. *See, Higher Education Coordinating Council*, 23 MLC 91, 93 (1996), *citing Town of Holbrook*, 15 MLC 1221 (1988).

Absent direct evidence of improper motivation, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. Circumstantial factors may include the timing of the adverse action in relation to the protected activity and disparate treatment. *Bristol County*, 26 MLC at 109-110. Here, the Employer contends that it was not motivated by anti-union animus when it removed Zaferakis from SERT. However, Staffier removed Zaferakis from SERT on the same day that he wrote the speed letter. Further, Zaferakis was not reassigned to SERT after the February 2, 1995 incident, although other similarly-situated employees were reassigned to SERT within approximately six months after allegedly using excessive force on inmates. For example, Massuczo was removed from SERT for only three to six months after head-butting an inmate while wearing a helmet. Likewise, Grennon was removed from SERT for six months following an incident on January 13, 1996 when he purportedly threw a female inmate to the floor, drove his knee into her back, and grasped her tightly around the neck while swearing and threatening to kill her. Moreover, Grennon previously had been removed from SERT for using excessive force when he was removed from SERT for six months following the January 13, 1996 incident. In comparison, Zaferakis had not been removed from

SERT for using excessive force prior to February 2, 1995. Accordingly, the preponderance of the circumstantial evidence indicates that the Employer was unlawfully motivated when it took adverse action against Zaferakis.

Under the *Forbes Library* test, once a charging party establishes a *prima facie* case of retaliation, it is the employer's burden to produce legitimate, non-discriminatory reasons for taking the adverse action. The employer must state a lawful reason for its decision and "produce supporting facts indicating this reason was actually a motive in the decision." *Quincy School Committee*, MUP-1986 (slip op. December 29, 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 (1996), *further app. rev. denied*, 422 Mass. 1111 (1996).

Here, the Employer alleges that Staffier removed Zaferakis from SERT for using excessive force during the incident with inmate Gary Smith on February 2, 1995. On that date, Boyce reported to Staffier that he was unhappy with the way Grennon and Zaferakis had handled the situation in the 2-3 unit. Shortly after Boyce made this report, Staffier met with Grennon and Zaferakis and told them that he was removing them from SERT because of the incident with inmate Gary Smith. Thus, the Employer met its burden of proffering a legitimate, non-discriminatory reason for removing Zaferakis from SERT.

Once an employer produces evidence of a legitimate, non-discriminatory reason for taking the adverse action, the case becomes one of "mixed motives" and, under the *Forbes Library* analysis, the Commission considers whether the employer would have taken the adverse action but for the employee's protected activities. *Town of Athol*, 25 MLC at 211; *Town of Belmont*, 25 MLC at 97; *Commonwealth of Massachusetts*, 24 MLC at 118. Under this analysis, the charging party bears the burden of proving that but for the protected activity, the employer would not have taken the adverse action. *Id.*

Here, the Employer asserts that it would have taken the same action against Zaferakis regardless of his Union activity and points out that Staffier had removed both Zaferakis and Grennon from SERT following the February 2, 1995 incident. However, Staffier reassigned Grennon to SERT within three months of that incident, whereas Staffier did not reassign Zaferakis to SERT. The Employer failed to introduce any credible evidence explaining this disparity in its actions. Accordingly, we cannot conclude that the Employer would not have reassigned Zaferakis to SERT "but for" his concerted protected activity.

#### Conclusion

Based on the record before us, we conclude that the Employer retaliated against Zaferakis for engaging in concerted protected activity in violation of Section 10 (a) (3) and, derivatively, Section 10 (a) (1) of the Law.

#### Remedy

In retaliation cases, the Commission's traditional remedy is to restore the status quo by directing the employer to rescind the

adverse action taken against the employee. *See, Commonwealth of Massachusetts*, 24 MLC at 120; *Higher Education Coordinating Council*, 23 MLC at 94; *Town of Holbrook*, 15 MLC at 1228. The record here reflects that the Employer had discretion in assigning correction officers to SERT duty on a quarterly basis, and there is no evidence that Zaferakis or any SERT trained correction officer was entitled to be assigned to SERT duty either permanently or with any particular frequency. Therefore, the adverse action Zaferakis sustained was that he lost the opportunity to be considered for assignment to SERT duty. Therefore, to place Zaferakis in the same position he would have been in but for the Employer's unlawful conduct we direct that the Employer immediately consider assigning him to SERT duty.

#### Order

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

1. Cease and desist from:
  - a. Retaliating against Zaferakis for engaging in concerted protected activities by refusing to consider him for SERT duty.
  - b. In any like manner, interfering, restraining and coercing its employees in any right guaranteed by Law.
2. Take the following affirmative action that will effectuate the purpose of the Law:
  - a. Immediately consider assigning Zaferakis to SERT duty.
  - b. 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.
  - c. Notify the Commission within thirty (30) days after the date of service of this decision and order of the steps taken to comply with its terms.

SO ORDERED.

#### NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has held that the Suffolk County Sheriff's Department has violated Section 10 (a) (3) and, derivatively, Section 10 (a) (1) of M.G.L. c. 150E (the Law) by retaliating against Terry Zaferakis (Zaferakis).

WE WILL NOT retaliate against Zaferakis for engaging in concerted protected activities by refusing to consider him for SERT duty.

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

WE WILL immediately consider assigning Zaferakis to SERT duty.

[signed]

For the Suffolk County Sheriff's Department

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