> Should it be found that the disciplinary action taken against [the employee] was linked to the information obtained at the interview at which her request for a union representative denied, the appropriate remedy would be to return [the employee] to the status she enjoyed prior to the Commonwealth's violation of the Law.

18 MLC at 1022.

I agree with my colleagues that the Union's decision not to file a Charge of Prohibited Practice was based on a reasoned judgment that, even if he prevailed, Zorzy would not have been entitled to reinstatement under the circumstances, including the fact that Zorzy was a probationary employee at the time of his discharge. However, in deciding that the Union's judgment was "reasoned," the Commission does not adopt the Union's suggestion that *Taracorp Industries* prevents the Commission from ordering the reinstatement of an employee who is discharged based on information obtained during an unlawful investigatory interview.

Moreover, even if the Commission had not adopted the Union's assessment concerning the applicability of *Taracorp Industries*, Zorzy's claim against the City otherwise lacked merit.[11] On November 13, 1997, prior to the alleged unlawful interview, Duffy presented Mayor McManus with a three-page letter that detailed seventeen separate alleged offenses in support of Duffy's recommendation to discharge Zorzy.[12] Applying the standard set forth in *Commonwealth of Massachusetts*, 18 MLC 1020 (1991), even if those alleged offenses were discussed during the allegedly unlawful interview on November 18, 1997, there is nothing in the record to link the City's decision to discharge Zorzy with any information obtained during the alleged unlawful interview.[13] Accordingly, I agree with my colleagues that Zorzy was not harmed by the manner in which the Union handled his claim against the City.

* * * * * *

11. To succeed in this action against the Union, Zorzy must establish that the Union failed to process a meritorious claim against the City. See, *American Federation of State, County, and Municipal Employees, Council 93, AFL-CIO*, 27 MLC 129 (2001).

12. That letter was introduced into the record as Joint Exhibit #4.

13. In his dissent in *Kraft Foods*, 251 NLRB 598, 105 LRRM 1233 (1980), Member Jenkins argued that reinstatement was appropriate where an employer imposes discipline on an employee for conduct that was merely the *subject* of an unlawful investigation. However, the Commission has not adopted that broader standard. See, *Commonwealth of Massachusetts*, 7 MLC 1936 (H.O. 1981) aff'd 8 MLC 1287 (1981).

In the Matter of COMMONWEALTH OF MASSACHUSETTS/COMMISSIONER OF ADMINISTRATION AND FINANCE

and

MASSACHUSETTS CORRECTION OFFICERS FEDERATED UNION

Case No. SUP-4668

65.6 employer speech
91.1 dismissal

January 30, 2002
Helen A. Moreschi, Chairwoman
Peter G. Torkildsen, Commissioner

Michael Byrnes, Esq.	*Representing Commonwealth of Massachusetts*
Joseph DeTraglia, Esq.	*Representing M.C.O.F.U.*

DECISION[1]

Statement of the Case

The Massachusetts Correction Officers Federated Union (Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) on January 20, 2000, alleging that the Commonwealth of Massachusetts (Commonwealth) had engaged in a prohibited practice within the meaning of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on October 18, 2000. The complaint alleged that the Commonwealth had interfered with, restrained and coerced bargaining unit members in the exercise of their rights under Section 10 (a) (1) of the Law by making a threatening statement to a bargaining unit member represented by the Union. The Commonwealth filed its answer on November 28, 2000.

The Commonwealth filed a motion to dismiss on December 5, 2000. The Union filed an opposition to the motion to dismiss on December 18, 2000. The Commission denied the Commonwealth's motion to dismiss on January 3, 2001.

On February 14, 2001, Cynthia A. Spahl, a duly-designated Commission hearing officer (Hearing Officer), conducted a hearing at

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.

which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. The Commonwealth moved to sequester the witnesses, and the Union did not object. The Hearing Officer allowed the motion to sequester the witnesses. Following the hearing, the Commonwealth and the Union filed post-hearing briefs on March 16, 2001. The Hearing Officer issued Recommended Findings of Fact on March 28, 2001. The Union filed challenges to the Recommended Findings of Fact on April 13, 2001.

Stipulations

1. The Commonwealth, Department of Correction (DOC) is a public employer within the Law.

2. The Union is an employee organization within the Law.

3. The Union is the exclusive collective bargaining representative for employees in statewide bargaining unit 4, including correction officers employed by the DOC at the North Central Correctional Institution (NCCI) in Gardner, Massachusetts.[2]

4. The Commonwealth and the Union are parties to a collective bargaining agreement (Agreement) in effect from January 1, 1998 through December 31, 2000 that governs the terms and conditions of employment for all employees in Unit 4.

5. Article 7, Section 2.H.(iv) of the Agreement provides:

> Each institution shall establish an overtime committee consisting of an equal number of members from both labor and management. This committee shall oversee the implementation of overtime at the institution and shall attempt to rectify any discrepancies or disagreements prior to the issuance of a grievance.
>
> All overtime, voluntary, or forced, shall be a matter of record. All records pertaining to overtime, including the postings, lists, and other records generated as a result of this article, shall be made available to the Union upon request and shall be maintained by the personnel department of each institution. The overtime committee shall help devise the necessary forms to facilitate record keeping.

6. Currently and at all times relevant to this matter, Lynn Bissonnette (Bissonnette) serves as the Superintendent of NCCI.

7. At all times relevant to this matter, Paul Verdini (Verdini) served as the Deputy Superintendent of NCCI.[3]

8. At all times relevant to this matter, Mark Nooth (Nooth) served as the Director of Security of NCCI.

9. Currently and at all times relevant to this matter, Colin Holmes (Holmes) serves as the Director of Food Services at NCCI.[4]

10. Currently and at all times relevant to this matter, Michael Rafferty (Rafferty) is a CO II or sergeant at NCCI. Rafferty is a member of the Union and holds the position of Union steward at NCCI.[5]

11. At all times relevant to this matter, Nooth served as a management representative on the NCCI overtime committee pursuant to Article 7, Section 2.H.(iv) of the Agreement.

12. At all times relevant to this matter, Rafferty served as a labor representative on the NCCI overtime committee pursuant to Article 7 Section 2.H.(iv) of the Agreement.

13. On or about April 29, 1999, by written memorandum to Nooth, Rafferty requested that Nooth "[p]rovide this committee with copies of the Food Service Manager's timecards for a period of the past eighteen months [and] the submitted overtime summaries, as they pertain to the same Food Service Manager, during this same stipulated time period."[6]

14. On or about May 7, 1999, Bissonnette issued internal correspondence to Rafferty in which she stated:

> Please be advised that the Food Service Manager receives overtime on a weekly basis for hours worked above and beyond forty hours. The hours worked are not necessarily at NCCI but may include numerous meetings, audits, and departmental requests as required. I can assure you that our Food Service Director, Mr. Holmes, only receives overtime for hours worked. There are many instances that

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2. Unit 4 also includes sergeants and lieutenants employed by the DOC at NCCI.

3. Verdini served as a management representative on the NCCI overtime committee pursuant to Article 7, Section 2.H.(iv) of the Agreement.

4. Holmes oversees the food service operation at NCCI. At the time of the events here, he supervised eight correction officers and two lieutenants who worked in the kitchen and were members of the bargaining unit represented by the Union. Holmes had the authority to issue verbal warnings and written reprimands to those ten employees and to recommend their suspension and termination to Nooth. Holmes attended monthly management meetings with the Superintendent, deputies, captains, and other directors.

5. Rafferty did not have a reporting relationship with Holmes.

6. The majority of the letter reads:

"As a member of the overtime committee, along with yourself and Chief Steward Mark Girouard, I feel it is our obligation as the committee to . . . *oversee the implementation of overtime at the institution* . . . and to further . . . *attempt to rectify any discrepancies or disagreements prior to the issuance of a grievance* as outlined in the collective bargaining agreement. (Emphasis in original.) It has been a concern of this member that the Food Service Manager has consistently and regularly been receiving overtime on a weekly basis. I had previously raised this concern at a committee meeting prior to our last meeting of Wednesday April 14, 1999. I had asked of you if in fact the Food Service Manager was treated not unlike a captain, allowed the provision of working up to five hours of overtime on a weekly basis. You had assured the committee that he was not treated as a captain and not automatically given this provision.

When the committee convened Wednesday, April 14, 1999, I again raised this concern and further inquired as to the nature of the reports generated by the Food Service Manager that would necessitate his receiving such consistent overtime. You explained to the committee that he works on his quarterly reports, among others.

After a review of the overtime summary dated March 20, 1999 . . . which originally reflects Mr. Holmes was to receive three hours of overtime but was modified and indicates the actual overtime credited was two hours, my concerns have resurfaced. If you would, I make notice of the insert: *per Mark Nooth only at institution 2 days*. (Emphasis in original.) Mr. Nooth, I ask you to please explain why it would matter if Mr. Holmes spent three days or just two days at the institution and how that would differentiate his being credited three or two hours of overtime for the week? I ask, if indeed Mr. Holmes's timecard reflected three hours of overtime worked why you found it necessary to adjust the hours to two based on the number of days Mr. Holmes spent at the institution?

I believe it is the responsibility, as well as the obligation, of this committee to review any possible discrepancies. Therefore, I ask you prior to our next overtime committee meeting to provide this committee with copies of the Food Service Manager's timecards for a period of the past eighteen months. I would also request you provide this committee with the submitted overtime summaries, as they pertain to the same Food Service Manager, during this same stipulated time period."

> he returns from Boston well after his work day and should be compensated as any employee.
>
> Regarding a change on his time card by Nooth, it was determined that Nooth did not, at the time, realize the actual hours Mr. Holmes worked outside the facility.
>
> The overtime committee responsibility, as you stated, is to review any possible discrepancies. *This committee represents the Collective Bargaining Unit 4*. (Emphasis in original.)
>
> The allotted overtime given to this facility is utilized at the discretion of the Superintendent.

15. On or about June 1, 1999, by written memorandum to Nooth, Rafferty requested that Nooth provide "(in addition to [his] original request of Food Service Director Holmes's timecards for the previous eighteen months, January '98) copies of the Food Service Director's itinerary, schedule, as well as any travel vouchers which would reflect these 'meetings, audits and departmental requests' over the same time period."[7]

Findings of Fact[8]

The Union challenged a portion of the Hearing Officer's Recommended Findings of Fact. After reviewing this challenge and the record, we adopt the Hearing Officer's Recommended Findings of Fact and summarize the relevant portions below.

As part of Rafferty's duties on the overtime committee, he received overtime summaries once per week for employees at NCCI in 1998 and 1999.[9] Rafferty ordinarily reviewed these summaries to make sure that overtime was equitably distributed and employees rotated properly on the voluntary overtime list. During this time period, however, the Union representatives on the overtime committee were particularly concerned with potential safety issues resulting from a staffing shortage on the 3:00 p.m. to 11:00 p.m. shift (second shift). For example, some cellblocks that normally operated with two correction officers were reduced to one correction officer, although the number of inmates remained the same. Bissonnette indicated to the members of the overtime committee that she could not afford to hire correction officers on overtime to remedy the staffing shortage because there was an "overtime crunch." As a result, Rafferty began to scrutinize the overtime summaries more closely to ascertain if any overtime funds could be diverted to the second shift to alleviate the staffing shortage.

On July 20, 1999, Rafferty was serving as the west yard sergeant[10] and was standing outside of the chow hall.[11] Rafferty was discussing the distribution of overtime at NCCI with Sergeant Kenneth Sena (Sena), Sergeant Jeffrey Bennett (Bennett), and Officer Jeffrey Klimaszewski (Klimaszewski) when Holmes approached Rafferty and extended his hand to shake Rafferty's hand. Because Rafferty did not consider Holmes to be his friend, Rafferty refused to shake Holmes's hand and told Holmes that he was not a hypocrite. Rafferty also stated that he had Holmes's time cards and was going to "take him down."[12] Holmes asked Rafferty what Rafferty was doing in Holmes's business. Rafferty replied that he was not in Holmes's business but was in the overtime business due to his membership on the overtime committee. Rafferty said that he wanted to know about Holmes's overtime because of the staffing shortage on the second shift and the lack of available overtime to correct that shortage. Holmes responded that he was only concerned about the kitchen and remarked that the Superintendent had a certain amount of overtime monies to allocate each week at her discretion. At some point during their discussion, Holmes told Rafferty to be careful because when you swim with piranhas, you might get bit.[13] Rafferty asked Holmes to repeat his statement, and Holmes complied. Rafferty asked Holmes if that statement meant that all managers were piranhas. Holmes said no, he was just telling Rafferty that Rafferty was swimming with piranhas. Rafferty replied that he felt safe swimming in the same waters as Holmes. Rafferty and Holmes did not yell or speak loudly during the discussion but spoke in a serious, business-like tone.[14] At the end of the conversation, Holmes turned and walked away.

While Rafferty and Holmes were conversing, Lieutenant Gary Robidoux (Robidoux) walked by them and the other correction officers. Based on his observations, Robidoux thought that Rafferty and Holmes were engaged in a casual discussion and did not believe that it was a situation that warranted his intervention as a supervisor. Robidoux did not stop or participate in the conversation.

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7. The letter concluded: "I feel since past overtime summaries submitted for the Food Service Director reflect a consistent notation for report writing and with the recent expansive explanation provided by Superintendent Bissonnette . . . we as the overtime committee are obligated to review, clarify, rectify and possibly address any potential discrepancies."

8. The Commission's jurisdiction is uncontested.

9. Department heads completed overtime summaries each day. These summaries indicated which employees had received overtime and how much overtime they had received.

10. Rafferty's duties as west yard sergeant included monitoring inmate movement in the yard and making rounds at various posts in the prison.

11. The chow hall is the building where inmates eat their meals.

12. Although none of the Union's witnesses testified during the Union's case in chief that Rafferty made this statement, the Hearing Officer credited Holmes's testimony because: a) the Union did not introduce any evidence to rebut Holmes's testimony; and b) the record does not reflect how Holmes would have known about Rafferty's request for his time cards if Rafferty did not make this statement.

13. Although some witnesses were not sure if Holmes used the word sharks or piranhas, because sharks and piranhas are both predatory fishes, that distinction is immaterial.

14. Rafferty initially testified that the tone of the discussion was "basically business," and Klimaszewski initially testified that Holmes's tone was serious. After further questioning from the Union's attorney, however, Rafferty testified that Holmes was irritated, and Klimaszewski testified that Holmes raised his voice somewhat and appeared a little agitated. Because the Hearing Officer found that Rafferty and Klimaszewski's later testimony was an attempt to answer Union counsel's questions in a favorable manner rather than to accurately depict the tone of the conversation, the Hearing Officer credited their initial testimony. Although Sena testified that Holmes was angry and pointing at Rafferty, the Hearing Officer did not credit his testimony because it was not corroborated by any of the other sequestered witnesses. Bennett initially testified that Holmes's tone was conversational but seemed to escalate toward the end of the discussion. Because Bennett later admitted that he did not pay close attention to the tone of the conversation, the Hearing Officer did not credit his testimony on this point.

Opinion

A public employer violates Section 10 (a) (1) of the Law if it engages in conduct that tends to restrain, coerce, or interfere with employees in the free exercise of their rights under Section 2 of the Law. *Quincy School Committee*, 27 MLC 83, 91 (2000). A finding of illegal motivation is not generally required in a Section 10 (a) (1) case. *Commonwealth of Massachusetts*, 26 MLC 218, 219 (2000). Rather, the focus of the Commission's inquiry is the effect of the employer's conduct on a reasonable employee. *City of Boston*, 26 MLC 80, 83 (2000).

Here, the Union alleges that Holmes attempted to threaten and intimidate Rafferty by commenting repeatedly about swimming with piranha. However, when Holmes's comment is considered in the context of the entire conversation, that comment is not chilling. The record reflects that Rafferty immediately put Holmes on the defensive by refusing to shake Holmes's extended hand at the beginning of their conversation on July 20, 1999 and telling Holmes that Rafferty was not a hypocrite because Rafferty did not consider Holmes to be his friend. Rafferty further provoked Holmes by stating that he had Holmes's timecards and was going to "take [Holmes] down." Taking these facts into consideration, Holmes's remark about swimming with piranhas was merely a response to Rafferty's goading. Moreover, Holmes's comment is not chilling because it does not threaten future discipline, *Compare*, *Commonwealth of Massachusetts*, 26 MLC at 219, or express anger, criticism, or ridicule directed at Rafferty's protected activity, *Compare*, *Quincy School Committee*, 27 MLC at 91-92. Therefore, the preponderance of the evidence demonstrates that the Commonwealth did not restrain, coerce, or interfere with employees in the free exercise of their rights under Section 2 of the Law.

Conclusion

Based on the record before us, we conclude that the Commonwealth did not violate Section 10 (a) (1) of the Law because Holmes's comment did not tend to chill reasonable employees from engaging in concerted, protected activity. Therefore, we dismiss the complaint of prohibited practice.

SO ORDERED.

* * * * * *

In the Matter of SUFFOLK COUNTY SHERIFF'S DEPARTMENT

and

SUFFOLK COUNTY JAIL EMPLOYEES, LOCAL 1134, a/w AFSCME, COUNCIL 93

Case No. MUP-2840

28.	*Relationship Between c. 150E and Other Statutes Not Enforced by Commission*
52.122	*grievance procedure*
52.64	*past practices*
54.53	*grievance administration*
54.8	*mandatory subjects*
62.6	*misconduct*
65.91	*request for representation at disciplinary interview*
67.61	*bargaining with individuals*
82.4	*bargaining orders*
91.1	*dismissal*

January 30, 2002
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner
Peter G. Torkildsen, Commissioner

Kathleen M. Cawley, Esq.	*Representing Suffolk County Sheriff's Department*
Gabriel O. Dumont, Esq.	*Representing Suffolk County Jail Employees, Local 1134, AFSCME, Council 93*

DECISION[1]

Statement of the Case

The Suffolk County Jail Employees, Local 1134, AFSCME, Council 93 (the Union) filed a charge of prohibited practice with the Labor Relations Commission (the Commission) on November 10, 2000, alleging that the Suffolk County Sheriff's Department (the Employer) had engaged in a prohibited practice within the meaning of Sections 10 (a)(5) and (1) of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on July 5, 2001. The complaint alleged that the Employer had violated Section 10 (a)(5) and, derivatively, Section 10(a)(1) of the Law by bypassing the Union and negotiating directly with two bargaining unit members, and by failing to process grievances filed pursuant to the parties' collective bargaining agreement. The complaint additionally alleged that the Employer had violated Section 10(a)(1) of the Law by refusing to allow a Union representative to ask a question during an investigatory interview of a bargaining unit member. The Employer filed its answer on July 11, 2001.

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.