Conclusion

Based on the record and for the reasons stated above, the City has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain to resolution or impasse with the Federation over the impacts of the decision to deploy a beanbag shotgun and supersock ammunition as part of a Less-Lethal Force Rule on employees' terms and conditions of employment.

Order

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that that the City of

Boston shall:

1. Cease and desist from:

a) Failing to bargain in good faith with the Boston Police Superior Officers Federation to resolution or impasse over the impacts of the decision to deploy beanbag shotguns and supersock ammunition as part of a Less-Lethal Force Rule on employees' terms and conditions of employment.

b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights under the Law.

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

a) Within five (5) days from the date of receipt of this decision, offer to bargain in good faith with the Federation to resolution or impasse over the impact of its decision to deploy beanbag shotguns and supersock ammunition as part of a Less-Lethal Force Rule on employees' terms and conditions of employment by proposing to meet at a reasonable time and place.

b) Sign and post immediately in all conspicuous places where employees represented by the Federation usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, copies of the attached Notice to Employees and take reasonable steps to ensure that these notices are not altered, defaced or covered by any other material.

c) Notify the Commission within ten (30) days of receipt of this decision and order of the steps taken to comply with this order.

SO ORDERED.

**NOTICE TO EMPLOYEES**

The Massachusetts Labor Relations Commission has held that the City of Boston (the City) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to bargain to resolution or impasse with the Boston Police Superior Officers Federation (the Federation) over the impacts of the decision to deploy beanbag shotguns and supersock ammunition as part of a Less-Lethal Force Rule on employees' terms and conditions of employment.

WE WILL NOT fail or refuse to bargain in good faith with the Federation to resolution or impasse over the impacts of the decision to deploy a beanbag shotgun and supersock ammunition as part of a Less-Lethal Force rule on employees' terms and conditions of employment.

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

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

Within five (5) days of receipt of this decision, offer to bargain in good faith with the Federation to resolution or impasse over the impacts of the decision to deploy beanbag shotguns and supersock ammunition as part of a Less-Lethal Force Rule on employees' terms and conditions of employment by proposing to meet at a reasonable time and place.

[signed]
For the City of Boston

* * * * * *

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CITY OF CAMBRIDGE

and

CAMBRIDGE POLICE SUPERIOR OFFICERS ASSOCIATION

Case No. MUP-01-3033

| | |
|---|---|
| ***65.22*** | ***filing a grievance*** |
| ***91.71*** | ***relevance of other violations by same employer*** |
| ***92.54*** | ***interlocutory appeals of hearing officer's decision*** |

*September 3, 2003*
*Helen A. Moreschi, Commissioner*
*Hugh L. Reilly, Commissioner*

| | |
|---|---|
| *Philip Collins, Esq.* | *Representing City of Cambridge* |
| *Vida Berkowitz, Esq.* | *Representing Cambridge Police Superior Officers Association* |

**RULING ON INTERLOCUTORY APPEAL**

Statement of the Case

The Cambridge Police Superior Officers Association (Superior Officers Association) filed a charge with the Labor Relations Commission (Commission) on June 19, 2001, alleging that the City of Cambridge (City) had engaged in a prohibited practice within the meaning of Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on June 24, 2002. The complaint alleged that the City had interfered with, restrained, and coerced Sergeant Joseph Frawley, Jr. (Frawley), an employee in a bargaining unit represented by the Superior Officers Association, in violation of Section 10(a)(1) of the Law by denying his sick pay grievance and beginning an internal

affairs investigation into his use of sick time. The City filed an answer on March 21, 2002.

During the first day of hearing on June 6, 2002, the Superior Officers Association moved to introduce the following evidence into the record:

> 1) From approximately mid-April through early June 2002, Sergeant Patrick Nagle (Nagle), an employee in a bargaining unit represented by the Superior Officers Association, was on sick leave and was not calling in daily but was not docked pay, although the City had docked Frawley's pay for failing to call in during his sick leave;
>
> 2) Patrol Officer James McSweeney (McSweeney), a non-bargaining unit employee, had a record of absences comparable to Frawley but was not subjected to an internal affairs investigation; and
>
> 3) A serious incident involving an assault on Detective Stanley Gedaminsky (Gedaminsky), a non-bargaining unit employee, by a member of the Superior Officers Association was not investigated, whereas Frawley was subjected to surveillance and an internal affairs investigation on suspicion that he might have violated an attendance policy.

The City objected to the evidence on the grounds of relevance. After hearing the parties' arguments, the Hearing Officer sustained the City's objections and excluded the proffered evidence from the record.

On August 16, 2002, the Superior Officers Association filed an interlocutory appeal pursuant to 456 CMR 13.03 seeking review of the Hearing Officer's rulings on June 6, 2002 excluding the evidence regarding Nagle, McSweeney, and Gedaminsky from the record. On June 10, 2003, the City filed its opposition to the interlocutory appeal.

## Opinion

After considering the parties' arguments, the Commission has decided to affirm the Hearing Officer's rulings for the reasons stated more fully below.

Section 13.06(12) of the Commission's regulations, 456 CMR 13.06(12), grants hearing officers the authority to rule on the admissibility of evidence. Inherent in that grant of authority is the discretion to exercise the authority responsibly. *See*, *City of Worcester*, 6 MLC 1475, 1476-1477 (1979) (hearing officer did not abuse discretion within the inherent authority granted pursuant to Commission's regulations). Accordingly, when ruling on interlocutory appeals under Section 13.03 of the Commission's regulations, 456 CMR 13.03, the Commission applies an abuse of discretion standard. *Bristol County Sheriff's Office*, 28 MLC 113, 113-114 n. 4 (2001) (on appeal); *Commonwealth of Massachusetts*, 7 MLC 1477 (1980).

### *Proof of Illegal Motivation in Section 10(a)(1) Cases*

The Superior Officers Association argues that unlawful motivation is an element of cases arising under Section 10(a)(1) of the Law, when a public employer takes an employment action against a union or an employee that is seemingly neutral. Specifically, the Superior Officers Association proffers that all of the excluded disparate treatment evidence is relevant to prove that the City was unlawfully motivated when it denied Frawley's grievance and commenced an internal affairs investigation against him, actions that are not unfair labor practices on their face. In support of that argument, the Superior Officers Association cites to *Bristol County House of Correction and Jail*, 6 MLC 1582 (1979).

The Superior Officers Association, however, is mistaken in its belief that unlawful motivation is an element of Section 10(a)(1) cases. Following the *Bristol County House of Correction and Jail* decision, the Commission issued *City of Boston*, 8 MLC 1281 (1980). In *City of Boston*, the Commission decided that proof of unlawful motivation would no longer be required in Section 10(a)(1) cases. In particular, the Commission stated:

> The Commission has recognized that, at least as a general principle, proof of illegal employer motivation is unnecessary to establish a violation of Section 10(a)(1). However, on occasion the Commission has also stated that motivation is a necessary element in a Section 10(a)(1) case where the allegation is that an ostensibly neutral employer action is, in reality, retaliation for protected activity. After much consideration, we conclude that cases of this type are appropriately analyzed under Section 10(a)(3) rather than Section 10(a)(1). We feel confident that such an approach fully protects the vindication of employee rights under the Law while minimizing the possibility of confusing parties in our disposition of their respective contentions.

*Id.* at 1284-1285. (Citations omitted.) Since *City of Boston*, the Commission continues to focus on the effect that an employer's action has upon employees rather than an employer's motivation in taking the action. *See*, *e.g.*, *Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1555 (1989); *Town of Winchester*, 19 MLC 1591, 1596 (1992); *City of Peabody*, 25 MLC 191, 193 (1999); *Commonwealth of Massachusetts*, 26 MLC 218, 219 (2000).

The Superior Officers Association next asserts that the absence of direct evidence regarding the City's motivation means that the Superior Officers Association must submit evidence of "but for" cause pursuant to the burden of proof articulated in *Trustees of Forbes Library* v. *Labor Relations Commission*, 384 Mass. 559 (1981). However, the Commission has stated that cases addressing discriminatory conduct under Section 10(a)(3) of the Law are inapposite when analyzing Section 10(a)(1) cases. *Town of Chelmsford*, 8 MLC 1913, 1916 (1982), *aff'd sub nom. Town of Chelmsford* v. *Labor Relations Commission*, 15 Mass. App. Ct. 1107 (1983).

Because it is unnecessary to ascertain the City's motives for investigating Frawley and denying his grievance, the excluded evidence is not relevant. Although the Superior Officers Association also argues that the excluded evidence is relevant to show the effect of the City's conduct on a reasonable employee, that evidence is inadmissible for the following reasons.

### *Evidence Regarding Non-Unit Employees*

The Superior Officers Association urges us to adopt the NLRB's relevancy standard for non-unit members as articulated in *United States Postal Service*, 289 N.L.R.B. 942 (1988), *enf'd NLRB* v. *USPS*, 888 F.2D 1568 (11th Cir. 1989). However, that case per-

tains to an employer's duty to furnish a union with relevant information upon request and is unrelated to the evidentiary issue currently before us.[1] *Id.*

The Superior Officers Association also contends that the Hearing Officer should not have excluded the evidence regarding McSweeney and Gedaminsky, because the City treated them disparately, although they were similarly situated to Frawley. In particular, the Superior Officers Association asserts that the City did not investigate either patrol officer's sick leave use, despite McSweeney's frequent absences and Gedaminsky's allegedly false excuse for taking sick leave. The Superior Officers Association argues that the mere fact that McSweeney and Gedaminsky are members of a different bargaining unit does not preclude us from treating them as similarly situated. The Superior Officers Association further contends that the sick leave provisions of both unions' collective bargaining agreements are irrelevant, because the duty not to abuse sick leave applies to members of both units.

Despite the Superior Officers Association's assertion to the contrary, the Cambridge Police Patrol Officer's Association's (Patrol Officer's Association) contractual sick leave provision has a direct bearing on whether McSweeney and Gedaminsky are similarly situated to Frawley. For example, if the Patrol Officer's Association's collective bargaining agreement limits sick leave to a certain number of days accrued in a year, patrol officers who take more sick days than they have accrued would abuse sick leave under that contractual provision. In contrast, those patrol officers would not abuse sick leave under the Superior Officers Association's collective bargaining agreement, if the Police Commissioner has discretion under that agreement to grant an unlimited amount of sick leave.[2] Here, however, the Superior Officers Association failed to establish a foundation showing that the sick leave provisions in both unions' collective bargaining agreements are functionally the same. Without that evidentiary foundation, it is uncertain whether the same sick leave rules apply to both bargaining units. Indeed, conduct constituting sick leave abuse under the Patrol Officer's Association's contract might not constitute sick leave abuse under Superior Officers Association's contract. Due to the lack of foundation in the record on that point, we cannot conclude that McSweeney and Gedaminsky are similarly situated to Frawley. Moreover, the Superior Officers Association failed to submit an offer of proof demonstrating that those patrol officers are similarly situated to Frawley. Thus, the Hearing Officer did not abuse her discretion by excluding the evidence relating to McSweeney and Gedaminsky.

*Post-Complaint Evidence*

The Superior Officers Association asserts that the evidence pertaining to Nagle is relevant, because it shows that the City treated Frawley differently than Nagle. Specifically, although Nagle did not call in daily during his medical leave from April 2002 until June 2002, the Superior Officers Association points out that the City did not dock his pay. In contrast, the Superior Officers Association contends that the City docked Frawley a day of pay in January 2001 when he called in seven minutes after his shift began. The Superior Officers Association argues that the Hearing Officer should not have excluded the evidence relating to Nagle, because there is no blanket rule against admitting post-complaint evidence. Further, the Superior Officers Association asserts that the City will not be prejudiced by admitting that evidence, because the City had ample notice of the Superior Officers Association's intention to offer it.

Practically speaking, however, Frawley could not have been chilled from exercising his Section 2 rights between January and June 2001 by the City's treatment of Nagle, because that conduct occurred in the future (i.e., from April 2002 to June 2002). Moreover, it is well within the Hearing Officer's discretion to limit the scope of the hearing to the time period specified in the complaint. Therefore, the Superior Officers Association's argument is unpersuasive.

## Conclusion

For the above reasons, we conclude that the Hearing Officer did not abuse her discretion and affirm her rulings excluding the evidence proffered by the Superior Officers Association from the record.

* * * * * *

1. The Commission applies the same standard under Section 10(a)(5) of the Law in cases where a union requests information concerning non-unit employees. *See, e.g.*, *Commonwealth of Massachusetts*, 21 MLC 1499, 1503 (1994); *Commonwealth of Massachusetts*, 6 MLC 1682, 1684 (1979).

2. The City and the Superior Officers Association are parties to a collective bargaining agreement in effect from July 1, 2000 through June 30, 2003 (Joint Exhibit 4). Article 21, Section 1 of Joint Exhibit 4 states that "the policies and practices relating to sick leave in effect prior to July 1, 1980 shall remain in full force and effect for the duration of this Agreement." Although the parties have not yet entered any evidence into the record explaining those policies and practices, counsel for the City mentioned in his opening statement that members of the Superior Officers Association do not accrue a set number of sick days annually. Rather, sick leave is discretionary with the Police Commissioner.