In the Matter of BRISTOL COUNTY SHERIFF'S DEPARTMENT

and

MASSACHUSETTS CORRECTION OFFICERS FEDERATED UNION

Case No. MUP-2872

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July 15, 2004
Allan W. Drachman, Chairman
Helen A. Moreschi, Commissioner
Hugh L. Reilly, Commissioner

Matthew E. Dwyer, Esq. *Joseph Fair, Esq.*	*Representing the Massachusetts Correction Officers Federated Union*
Bruce A. Assad, Esq.	*Representing the Bristol County Sheriff's Department*
Robert M. Novack, Esq. *Ronald J. Lowenstein, Esq.*	*Representing the County of Bristol*

DECISION[1]

Statement of the Case

The Massachusetts Correction Officers Federated Union (Union or MCOFU) filed a charge of prohibited practice with the Labor Relations Commission (Commission) on December 21, 2000, allegeing that the County of Bristol (Employer), acting through its Sheriff, Thomas M. Hodgson (Sheriff Hodgson) had engaged in a prohibited practice within the meaning of Sections 10 (a)(1), (2), (3) and (5) of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued an eleven-count complaint of prohibited practice on July 3, 2001. On August 31, 2001, after reconsideration, the Commission issued an amended complaint that included one additional Section 10(a)(1)

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.

allegation, and affirmed its prior dismissal of the remaining allegations. [2]

The amended complaint alleges that the Employer had violated Section 10(a)(1) of the Law by making certain statements to bargaining unit member Timothy Gibney (Gibney)(Count I); prohibiting the discussion of Union business at roll call (Count II); interrogating employees regarding an upcoming Union picket (Count IV); making certain statements during a speech to bargaining unit employees (Count V); prohibiting the discussion of Union business during work hours (Count VI); investigating bargaining unit member Thomas Presby's (Presby) Union activities (Count VIII); and suspending bargaining unit members David Miller (Miller), David Gouveia (Gouveia) and David Davignon (Davignon) for using the Jail's telephones during work hours for Union business (Count XII). The amended complaint further alleges that the Employer had violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by suspending Miller, Gouveia and Davignon for engaging in on-duty discussions pertaining to Union business (Count IX). The amended complaint finally alleges that the Employer had violated Sections 10(a)(5) and derivatively, Section 10(a)(1) of the Law by: prohibiting the transaction of Union business at roll call (Count III); prohibiting discussion of Union business during work hours (Count VII); refusing to provide the Union with certain information (Count X);[3] and violating the parties' ground rules for successor contract negotiations (Count XI).

The Employer filed an answer to the complaint and amended complaint, respectively, on July 27, 2001 and September 21, 2001. On September 28, October 5, October 11, November 9 and November 19, 2001, and January 4 and February 4, 2002, Marjorie F. Wittner, Esq., a duly-designated Commission hearing officer, conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. The Employer and the Union filed post-hearing briefs on April 29, 2002.

On April 14, 2003, the Union filed a motion to reopen the hearing record. The Employer opposed that motion on April 24, 2003. The hearing officer denied that motion in a separate ruling issued on June 23, 2003.

The hearing officer issued Recommended Findings of Fact on June 23, 2003. The Union and Employer both filed challenges to those findings on July 22, 2003. The Union filed objections to the Employer's challenges on August 1, 2003. The Employer did not file objections to the Union's challenges. After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below. [4]

Findings of Fact[5]

Background

The Union has been the exclusive collective bargaining representative for correction officers and lieutenants employed by the Employer at the Bristol County Jail and House of Correction (Jail) since approximately 1996. The Employer and the Union were parties to a collective bargaining agreement that was in effect from July 1, 1997 through June 30, 2000 (Agreement). On or about March 27, 2000, the Union and the Employer entered into negotiations for a successor collective bargaining agreement.

The Jail has the following facilities: the David R. Nelson Correctional Addiction Center (DRNCAC); the Dartmouth House of Correction (Dartmouth); the pre-release center, which is located at Dartmouth; and the Ash Street Facility (Ash Street).

The Ash Street facility, which is arranged in four tiers that overlook a central area, houses fewer inmates than Dartmouth. The inmates at Dartmouth are housed in modular units. There is a total of approximately 200 or more employees at Dartmouth and a total of about 60 employees who work at Ash Street. The correction officers that work at Ash Street have more contact with one another during the course of their workday than those at Dartmouth due to the physical plant at the respective facilities. All correction officers at the Jail work three shifts: 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and 11 p.m. to 7 a.m. The 7 a.m. to 3 p.m. shift at Ash Street is typically staffed with fifteen correction officers, the 3 p.m. to 11 p.m. shift with thirteen to fifteen correction officers and the 11 p.m. to 7 a.m. shift with eight to nine correction officers.

In ascending order of authority, the hierarchy of employees at the Jail is as follows: correction officers; lieutenants; captains, who also serve as watch commanders; major or assistant deputy superintendent; deputy superintendent; Sheriff's Chief of Staff; Special Sheriff; and Sheriff. At the time of hearing, Colonel Romaine Payant (Col. Payant) was the Jail's Deputy Superintendent and the highest-ranking officer at Ash Street. Edmond Talbot (Talbot) was Sheriff Hodgson's Chief of Staff. Attorney Bruce Assad (Assad) was Special Sheriff.

The captains supervise the lieutenants and correction officers and have the authority to issue verbal reprimands and to recommend other levels of discipline. Col. Payant and Major Gary Crowell (Crowell), the Assistant Deputy Superintendent for Security, rely on the captains to make sure that each shift is operating in a manner consistent with the Jail's rules and regulations. The captains have their own bargaining unit, and are represented by the National Association of Government Employees (NAGE).

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2. Pursuant to M.G.L. c. 150E, §11, the Union filed a Notice of Appeal of the Commission's dismissal of those allegations.

3. The Union withdrew Count X during the course of the hearing.

4. Due to the numerous challenges filed by the parties, the Commission has noted its modifications only where it has stricken or materially modified a finding in response to the challenges.

5. The Commission's jurisdiction is uncontested and the Commission finds that it has jurisdiction.

Successor Negotiations and Mediation

On March 27, 2000, the parties met for the first time to negotiate a successor collective bargaining agreement. At that meeting, they agreed to certain ground rules: 1) to appoint a spokesperson for the negotiations;[6] 2) to transmit correspondence or proposals to members of the parties' respective bargaining teams only; and 3) to provide forty-eight hours notice to the other side prior to going public with the specifics of the negotiations.

The parties held five negotiating sessions from April through June 2000, but did not reach agreement on a successor contract. On or about July 5, 2000, approximately one week after both parties had presented their "best offer" to the other side, the Union requested mediation at the state Board of Conciliation and Arbitration. The parties met at Dartmouth for the first mediation session on September 19, 2000. During negotiations and mediation, the parties discussed whether any contractual pay increases would be retroactive to July 1, 2000.

On November 3, 2000, Sheriff Hodgson sent a memorandum to Dwyer, members of the Union's Executive Board and the bargaining unit stewards concerning the issue of retroactive pay. Not all of the stewards who received that memorandum were members of the bargaining team. That memo states in pertinent part:

> I am concerned that members of your bargaining unit may not be clear about the issue of retroactive pay as it pertains to current negotiations. At the outset of our negotiating session I informed you that the State had indicated that they would not be honoring retroactive pay proposals.
>
> While it has not been our proposal to eliminate retroactive pay to our employees, the State continues to insist that they will not entertain any contract that includes retroactive pay proposals. As recently as two weeks ago at a meeting in Boston with the Secretary of Administration and Finance, all Sheriffs were again told that the State's position is carved in stone.
>
> Based on this position by the State, I hope you will work with me in moving as quickly as possible to arrive at a fair and equitable contract for our officers and families. The longer it takes to negotiate the contract the more our families will suffer. I implore you to commit to meet for a sustained period of time over the next week to achieve our goal of providing better benefits and pay, which our employees rightly deserve.

The parties met for another mediation session on November 8, 2000. Dwyer did not have his personal calendar with him that day and was unable to commit to a date for the next session. On November 9, 2000, Sheriff Hodgson sent a letter to Dwyer, which stated in pertinent part:

> I am deeply disturbed at the news that you were unable to commit to the November 29th date for continuing our mediation session. Given the fact that the State has again reiterated its position that ***there will be no retroactive salary adjustments,*** it is critically important that we avoid any further delays in arriving at a better pay and benefits package for our officers and their families. (Emphasis in original.)

The bottom of the November 9 letter indicates that copies had been sent to the Union's Executive Board members and shop stewards. Not all of the Union's shop stewards who received that memorandum were members of the Union's bargaining team.

Roll Call

The Jail conducts roll call three times a day, ten minutes before the beginning of each shift. Roll call is typically called to order by a captain (watch commander) or lieutenant [7] who reviews the Jail's administrative directives and post assignments for the incoming shift. The watch commander or lieutenant then initiates or permits discussion of matters that are unrelated to the Jail's operations, assuming there are any on a given day. The watch commander or lieutenant either reads aloud flyers or announcements that had been sent to the Jail, or permits individuals or outside organizations to address the officers at roll call about these topics. Examples of matters that are commonly discussed at roll call include United Way fundraising drives; food and blood drives and other charitable matters; programs offered by Healthtrax, a nearby, privately owned, health and fitness center that offers discounts to Jail employees; holiday parties and gift programs; and upcoming parades. Sheriff Hodgson pre-screens all flyers and announcements that are sent to the Jail before they are read or discussed at roll call.

Prior to 1997, roll call was held at the start of each shift, instead of ten minutes prior, as called for in the current Agreement. Bargaining unit members therefore did not get paid additional compensation for attending roll call and attendance was not considered mandatory. Nevertheless, the record reflects that correction officers would generally attend roll call unless they had to be elsewhere as part of their work duties.

Since 1997, pursuant to Article XIV, Section 7, of the Agreement, bargaining unit members have been paid $4.00 for each roll call that they attend. Article XIV, Section 7 also states in pertinent part that employees "may be required to attend daily roll call which shall commence ten (10) minutes before the start of their regular shift" and that "[a]n employee who is late or absent from roll call on a work day the employee actually works may be subject to disciplinary action for just cause... ."

The Agreement does not specify what topics can be discussed at roll call or who is or is not permitted to address the Jail's officers during roll call. In addition, the record reflects that prior to October 11, 2000 or thereafter, the Employer maintained no rule or policy that specifies what matters could and could not be discussed by unit members at roll call. [8]

Prior to October 11, 2000, Union stewards addressed the officers attending roll call on a number of occasions regarding Union matters after getting permission from their watch commander or lieu-

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6. Attorney Matthew Dwyer (Dwyer) was appointed as the Union's spokesperson and contact person and Sheriff Hodgson was named as the Employer's spokesperson and contact person.

7. Correction officers have conducted roll call on isolated occasions.

8. We have supplemented this finding in response to a challenge by the Union, which we have found to be supported by the record.

tenant.[9] For example, on September 19, 2000, after attending the parties' first mediation session as a member of the bargaining team, Presby sought and received permission from Captain Stevens,[10] to address the correction officers at roll call. [11] After Captain Stevens finished reviewing the day's administrative matters, he introduced Presby, stating that Presby wanted to talk to them about Union matters, and left the room.[12] Presby told the officers that negotiations and mediation were not going "that great."

During Sheriff Hodgson's administration, there have been at least three other occasions when Union stewards addressed correction officers about Union matters while the officers were still assembled for roll call, but after the individual in charge had finished making the shift's announcements. On one of those occasions, in or around May 2000, the Union steward who spoke to the assembled officers distributed t-shirts in honor of "Correction Officers week." In addition, on various occasions prior to Sheriff Hodgson's administration, then Chief-steward Robert Medeiros (Medeiros) addressed officers at roll call in the course of his duties as steward. The Employer did not discipline or prohibit him from doing so. In late 1997, Medeiros solicited officers to participate in a Union picket at roll call. There were no Jail officials present during those addresses.

Prior to October 11, 2000, shop stewards were unaware of any restrictions on their addressing roll call, and the Jail had never disciplined a shop steward for discussing Union matters at roll call.

On October 11, 2000, Sheriff Hodgson sent a memorandum to Superintendent Glenn Sturgeon (Sturgeon) and five Deputy Superintendents regarding roll call that states: [13]

> It has been and continues to be my expectation that roll call is to be used to convey administrative and operational information to staff. At no time are union representatives or any staff authorized to use roll call to conduct union business.
>
> If posts have been assigned and announcements completed the remaining time should be used for training updates/reminders.
>
> Please be sure your staff are clear on this operating procedure.

Sheriff Hodgson issued the October 11, 2000 memorandum without providing the Union with notice or an opportunity to bargain.

Telephone Use during Work Hours

On April 7, 1999, Sheriff Hodgson sent the following memo, titled "Directive Proper Use of Communications Equipment," to all Bristol County Sheriffs Department Staff:

> All Staff are reminded when utilizing the Bristol County Sheriffs Office Radio Communication System that the conversations are to be conveyed in a professional manner and limited strictly to official departmental business.
>
> While addressing the proper use of communication equipment I thought this would be an appropriate time also to remind all Staff that the utilization of telephones within our facilities is for official business only. There have been numerous documented incidents where Staff members have been utilizing the internal phones to harass other Staff members, or have been spending time communicating with one another about unofficial business. It is my expectation that all Staff Members will adhere to the professional standards of our Department while utilizing communications equipment henceforth. Any future incidents of improper usage will result in disciplinary action.

Paragraph B(35) of the Jail's Employee Conduct and Work Rules states that, "An employee may not use institutional telephones for personal calls during working hours, except for emergency situations." The record testimony demonstrated that one of the purposes of this rule is to ensure that correction officers remain diligent and attentive on the job. Another reason for the rule is to avoid tying up phone lines in the event of an emergency.[14] Proper enforcement of this rule would preclude correction officers in charge of inmates from responding to non-work related (i.e. matters that are not reasonably related to the Jail's operations) [15] e-mails or postings, on work time unless they were relieved from their post.[16] On at least one occasion, the Jail has disciplined an employee for making personal telephone calls using Jail telephones during working time.

Prior to December 2000, bargaining unit members used facility telephones to discuss Union matters. Also prior to December 2000, bargaining unit members distinguished between using the Jail's phones to discuss Union matters as opposed to using Jail phones to discuss personal or family matters and believed that they were not prohibited from engaging in conversations about the former. Moreover, bargaining unit members did not limit their Union-related telephone discussions to investigating or settling grievances. For example, Medeiros routinely used the phone in Central Control in Ash Street to talk to Union officials in Boston or to Union business agent Paul Reynolds (Reynolds). Because the phones at Ash Street did not have a direct outside line, all the calls that Medeiros made were routed through an Ash Street operator, including calls that Medeiros had the operator place to Paul Gomes (Gomes), a steward at Dartmouth.[17] Likewise, an operator would transmit calls to Medeiros from Union officials, although the operator would only know the identity of the person calling and not what was discussed.

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9. Moreover, the record reflects that prior to October 11, 2001, watch commanders in charge of roll call routinely asked Presby or Gibney if they anything to add to roll call.

10. The record does not reflect Captain Stevens's first name.

11. There was no evidence that the Employer disciplined Captain Stevens or any other commanding officer for allowing a Union steward to speak at roll call.

12. The captains who granted permission to the stewards to speak at roll call regarding Union matters typically did not remain in the room once the steward began to speak.

13. The memo was also read aloud at roll call.

14. We have amended this finding to reflect record testimony regarding the purposes of the rule.

15. We have added a definition of "non-work related" in response to a challenge by the Employer.

16. The record reflects that the Jail maintains an internal e-mail system through which correction officers who are assigned to certain posts receive e-mails that are sent by Employer and its administrators.

17. [See next page.]

Similarly, prior to December 2000, Miller had access to and used the phones at Ash Street to discuss Union matters. Although Miller did not keep a record of those calls, they typically were quick calls to discuss grievances or negotiations. Gouveia also had discussions with other officers about Union activities and prior to November 2000 was unaware that the Employer considered those conversations to be inappropriate.

Sometime in November 2000, Internal Affairs Investigator Lieutenant Peter Larkin (Larkin) telephoned Dartmouth and asked Officer Zekus, who answered the phone, if he could speak to Correction Officer Mitzen (Mitzen)[18] about doing some electrical work at his home. Zekus gave the phone to Mitzen. About a week later, Larkin phoned Dartmouth again to speak to Mitzen about this matter. Zekus prepared a report concerning this issue and gave it to Major Ramos.[19] There was no evidence that Larkin was disciplined for making those calls to Mitzen.

For at least ten years prior to Sheriff Hodgson's 1999 directive, Col. Payant was aware that correction officers were using institutional telephones phone for non-work related purposes. However, Col. Payant took no action to prevent this from occurring or to bring it to the attention of other Jail authorities.

Non-Work Related Discussions

Article VIII of the Agreement states in pertinent part that Union representatives "shall, subject to the approval of the Sheriff, be granted reasonable time off during working hours to investigate and settle grievances, attend meetings of state and national bodies, including conventions, without loss of pay." No bargaining unit members have ever been disciplined for investigating or settling grievances during work time.

On at least three occasions prior to December 2000, Union officials sought permission, in writing, to leave the Jail's premises to conduct Union business during working time. However, prior to December 2000, no Union stewards requested permission or relief from their posts to discuss Union matters while on the Jail's premises during work hours, nor did they believe they were required to do so. Moreover, from time to time prior to December 2000, bargaining unit members, including Davignon, Miller and Gouveia, engaged in conversations about non-Jail matters, including Union matters, during work time, freely and without fear of repercussion. The record demonstrates that some of those conversations took place with captains. Col. Payant was not aware of any specific discipline that had been imposed on correction officers for engaging in non-work related discussions during that time.

Article XXI, Section 1 of the Agreement states that "The Union and its authorized representatives shall be permitted to use bulletin boards for notices of an informational nature. It is understood that it would be improper to post material of an inflammatory or denunciatory nature."

Both before and after December 6, 2000, Sheriff Hodgson's administrative staff frequently issued notices via the Jail's e-mail system or on bulletin boards located at the Central control posts at the Dartmouth and Ash Street facilities concerning non-work related matters. For example, on May 10, 2000, Jeffrey Teves (Teves), an administrator in the Sheriff's department, sent an e-mail inviting all employees to march in the "Dartmouth Pride Festival 2000" and directing those interested employees to contact Teves at his Jail telephone extension. Also, on numerous occasions during 2000, Sheriff Hodgson's administrative staff posted flyers or sent e-mails inviting employees to participate in the following parades and events: Memorial Day Parades in North Attleboro, New Bedford and Fall River; 275th Anniversary Parade for the Town of Easton; Cape Verdean Recognition Parade in New Bedford; 4th of July parade in Westport; Feast of the Blessed Sacrament; Fall River Celebrates America Parade; New Bedford Walk on AIDS; Somerset Musictown Festival Parade; Halloween Parade, Town of Norton; Taunton Christmas Parade; New Bedford Veterans Day Parade; Fall River Veterans Day Parade; Healthtrax Kids Night Out (October 28, 2000); Family Holiday Gathering at Healthtrax with Sheriff Hodgson and Santa; holiday sale of poinsettias at the greenhouse.[20] Almost all of the foregoing postings or e-mails directed interested employees to contact Teves or the Personnel Department and listed Teves' four digit Jail telephone extension. A number of other e-mails thanked employees for participating in these events.

Sometime in the fall of 2001, the following items were posted on the Jail's bulletin board at Ash Street: a poster advertising Walt Disney's Magic Kingdom Club that indicated that employees could ask for an enrollment form by contacting "Carol" at her four-digit Jail extension; and a poster advertising a golf conditioning program held by Healthtrax Fitness and Wellness.[21] The Employer does not restrict employees from discussing, in person, or via telephone or e-mail, the subject matter found in the e-mails or flyers described above, during work hours, provided that their discussions do not interfere with other responsibilities.

Sheriff Hodgson's Statements to Gibney

On October 3, 2000, Gibney was the control officer on Ash Street's third tier during the first shift. At some point that morning, Col. Payant observed Gibney speaking to Sandra Nuno (Nuno), an

17. Previously, Medeiros had been using a Jail telephone located in a different part of the facility to make his Union business calls, but was subsequently instructed by Colonel Sturgeon to use the phone in Central Control to make such calls. Colonel Sturgeon did not indicate to Medeiros that his use of the phone was limited to any specific Union topics.

18. The record does not reflect Officer Mitzen's first name.

19. The record does not reflect Major Ramos's first name.

20. The greenhouse is located at the 400 Faunce Corner Road facility and is not staffed. The record does not clearly reflect whether inmates are employed at the greenhouse or who receives the income generated by the plant sales. However, Jail employees received a 10% discount on items they purchase at the greenhouse.

21. On November 27, 2001, the Commission denied the Employer's interlocutory appeal of the Hearing Officer's decision to admit those documents into evidence over the Employer's objection. The Commission found the disputed documents to be probative of the issues addressed in Counts II, VI and XII of the amended complaint.

officer in the third tier administrative segregation department. Col. Payant asked Gibney where he was supposed to be posted. Gibney replied that he was posted to the third floor, and that he had just inquired whether Nuno needed anything. Col. Payant asked Nuno if she needed anything, and she replied that she did not. Col. Payant then directed Gibney to return to his post. A short while later, Col. Payant observed Gibney on the first tier, speaking to Medeiros. Col. Payant paged the block superintendent, Lieutenant Jamie Salgado (Salgado), and asked him whether he knew why Gibney was on the first tier. Salgado replied that he did not. Col. Payant paged Gibney and instructed him to go to the third tier, where Col. Payant proceeded to question him.

Gibney told Col. Payant that he had gone to the first tier to get some supplies and to use the bathroom.[22] Gibney told Payant that, once there, he saw Medeiros and asked him how he was feeling.[23] Salgado, who was also present during Gibney's meeting with Col. Payant, interjected that once inmates are locked down for the morning, Gibney does not have to seek permission to go to the first tier. Col. Payant told Salgado that this was not his concern and instructed Gibney to write a report about the matter. After requesting relief from his post, Gibney called Sandra Pimentel (Pimentel), an Assistant Deputy Superintendent in the Jail's Human Resources Department, and told her that he believed that Col. Payant was harassing him. Pimentel told Gibney to put his complaint in writing, but he never did.

After his meeting with Gibney, Col. Payant called Chief of Staff Edmond P. Talbot (Talbot) to discuss the morning's events. Talbot, along with Sheriff Hodgson, drove to Ash Street where they met with Gibney and Col. Payant. During that meeting, Sheriff Hodgson acknowledged that Gibney was a shop steward, but stressed that it was essential for Gibney to remain at his post. Sheriff Hodgson told Gibney that he spent too much time conducting Union business on work time, and that he was paid to be a correction officer, not a Union representative, or words to that effect.[24] Sheriff Hodgson further indicated that the Jail was his institution, that he had a responsibility to run that institution, and that he was not going to allow the Union to come in and interrupt or preside over his institution, or words to that effect. Sheriff Hodgson also stated that if he observed any employees conducting Union business when it was not appropriate, those individuals might have to look for a new job. The Sheriff indicated that he did not think that Gibney's wife would "appreciate" Gibney having to look for a new job. Finally, Sheriff Hodgson informed Gibney that the Jail's Internal Affairs Department was currently investigating why he and Presby had not returned to training after the September 19, 2000 mediation session. When Gibney tried to explain what had happened that day, the Sheriff stated that he did not want to hear any explanations, but that he was going to the Internal Affairs Department handle the matter. At no point during the conversation did Sheriff Hodgson inquire whether Gibney had been engaged in Union-related activities that morning.[25] Gibney received a verbal warning later that day for abandoning his post.

Internal Affairs Investigation of Presby

Presby is a correction officer on the first shift at Ash Street. He was also a member of the Union's negotiating committee and a shop steward. During the week of September 18, 2000, Presby attended annual training,[26] which was held off-site at the New Bedford Armory. On September 18, during training, Col. Sweeney[27] met with Gibney and Presby to discuss a mediation session scheduled to occur the next day. Col. Sweeney told Presby and Gibney to be at Ash Street by 7:00 a.m. for roll call. He also told them that they could go to the September 19 mediation once they were released from roll call and had obtained appropriate relief from their posts. If the mediation concluded prior to 12:30 p.m., Col. Sweeney directed them to report back to the annual training.

The September 19 mediation session lasted until 1:30 p.m. Presby and Gibney reported back to Ash Street, where, as discussed above, Presby sought and received permission from Captain Stevens to address the second shift roll call about the status of the parties' negotiations and mediation.

Sheriff Hodgson subsequently directed Major Gregory Centeio (Centeio), the major in charge of the Internal Affairs Department, to investigate whether Presby had addressed roll call with respect to an upcoming Union picket and if so, who had authorized him to do so and to leave his post. On October 25, 2000, Gibney and Presby were summoned to meet with Major Centeio and Lieutenant Larkin. Major Centeio and Larkin asked Presby whether he had addressed roll call; whether he had asked the second shift roll call if they were going to picket; whether he had threatened to slash tires if the officers refused to picket; and if he had threatened offi-

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22. The Union requested the following supplemental footnote, which is supported by the record: It was Gibney's daily practice after the inmates had been counted and secured in their cells to proceed to the first floor to retrieve clean out sheets, a trash bag and to use the bathroom. This was consistent with the practice of other officers that were assigned to the Ash Street tiers along with Gibney.

23. Medeiros had just returned from medical leave.

24. In response to a challenge by the Union, we strike the hearing officer's finding that the Sheriff stated to Gibney that if he did not conduct Union business on his own time, then he was expected to do so within the parameters of the Agreement. For the reasons set forth in footnote 25 below the hearing officer fully credited Gibney's version of what occurred during that conversation, which did not include this statement.

25. During the hearing, Col. Payant denied that Sheriff Hodgson told Gibney that he spent too much time conducting Union business. Col. Payant also denied that Sheriff Hodgson stated that there would be repercussions if correction officers engaged in Union business on work time or that Gibney was being investigated. The hearing officer credited Gibney's version of events, finding them to be more convincing than Col. Payant's, based on the level of detail and consistency with which Gibney answered questions about the events that took place on October 3 as compared to Col. Payant's responses. For example, on direct examination, Col. Payant blanketly denied that Sheriff Hodgson had made any of the statements attributed to him in the Commission's Amended Complaint, including that he (Sheriff Hodgson) had a responsibility to run his organization. However, on cross-examination, Col. Payant testified that Sheriff Hodgson had told Gibney that he had a responsibility to run his organization. Gibney's testimony was consistent throughout direct and cross-examination.

26. All correction officers are required to undergo one forty-hour week of training each year.

27. The record does not reveal Col. Sweeney's first name.

cers. Presby denied threatening officer or knowing anything about a picket.

Major Centeio and Larkin met with Presby again later that day, along with Captain Stevens and Union treasurer David Miranda (Miranda) and questioned Presby further about what had occurred at the September 19 roll call. Captain Stevens acknowledged at that meeting that he had given Presby permission to address officers at roll call.

On November 19, 2000, Internal Affairs investigated Presby for a third time about the September 19 roll call. Captain Jonathan Plourde (Plourde) and Larkin were present at that meeting. They asked Presby whether he had gotten relief before he addressed roll call. Ultimately, the Jail did not discipline Presby for either speaking at roll call or leaving his post on September 19, 2000.

November 13-20, 2000

During work hours on November 13, 2000, Miller gave Lieutenant Ed Dufresne a handout regarding the previous week's negotiating session.

On November 14, 2000, the Union held a meeting at a VFW site in New Bedford and voted to conduct an informational picket to express its dissatisfaction with the way that the parties' negotiations were progressing. They decided that the picket would take place on November 24, 2000 at a Stop & Shop supermarket located about two to three miles from Dartmouth.

On November 15, 2000, the Union mailed a form letter from Treasurer Miranda to bargaining unit members, notifying them of the upcoming picket. That letter indicated that the picket would take place on November 24 from 7:30 a.m. to 9:30 a.m. and 3:30 p.m. to 5:30 p.m. The letter asked members to contact their local steward regarding their availability and to obtain additional information about the picket, which they did.

At various times during November 2000, Miller discussed Union matters, including answering bargaining unit members' questions concerning the upcoming picket, while on working time.

While Gouveia was on duty, on or about November 13 and 14, 2000, he told officers when the upcoming picket would take place, adding "if they were available to show up." Although Gouveia did not directly ask the officers if they would picket, Gouveia understood that his statement could be taken as a request to picket, if the officers were available to do so.[28]

In or around November 14-15, 2000, Sheriff Hodgson instructed Major Centeio to conduct an Internal Affairs investigation to determine whether the Union, and, in particular, Davignon, had been soliciting members to participate in the November 24 picket during work hours using Jail telephones. Major Centeio assigned Captain Plourde and Investigator Gail Chasse (Chasse) to conduct the investigations at Dartmouth. Lieutenant Larkin and Investigator Maureen Medeiros (M. Medeiros) conducted the investigation at Ash Street, which took place on November 17, 18 and 20, 2000. Gouveia accompanied about seven officers to the interviews conducted by Larkin and M. Medeiros.

Larkin began each interview by discussing a Supreme Court decision, *Garrity* v. *New Jersey,* 385 U.S. 493 (1967). According to Larkin, *Garrity* held that officers have no Fifth Amendment rights during internal affairs investigations, and that officers were obligated to tell the truth during those investigations. Larkin asked the officers several questions about the upcoming picket, including whether they knew about it, if anyone had approached them about it, whether there was a sign-up sheet or if the Union had mailed them information about it.

Larkin also questioned Miller and asked him if he had solicited Union members to participate in the November 24 picket during the course of his shift. Larkin further asked Miller whether he had used institutional phones to solicit officers; whether, during the course of his shift he had left his post to question the employees; and if he had made a list of who was going to picket. Larkin did not question Miller about Union activities that he had participated in on his own time. Miller told Larkin that after the November 14 Union meeting, officers approached him to tell him whether they could or could not go to the picket, and to ask how the meeting had gone.

Larkin also questioned Gouveia about the picket. Gouveia told Larkin that he had relayed information about the picket to correction officers, "if they were available." Gouveia told Larkin that he did not believe that he had solicited those officers because he had only given the officers information about the picket and because he assumed that the officers wanted to participate in the picket.[29]

From November 17 to November 20, Captain Plourde and Chasse spoke to all Dartmouth officers on the 3 p.m. - 11 p.m. shift. Plourde interviewed approximately sixty (60) officers. He began each interview by explaining how the Employer interpreted the *Garrity* decision. He then asked the officers if they were aware of an upcoming Union picket and how they had found out about it. Depending on the officer's response, Plourde asked whether the officer had received any calls from Officer Davignon while on duty asking him/her to participate in the Union picket.

Plourde also interviewed Davignon and asked if he had called anyone about the pickets.[30] Davignon replied that he had telephoned Officer Michael Estrella (Estrella) during his lunch break. Davignon also stated that he had "jokingly" asked Lieutenant James Lancaster (Lancaster) if he would picket, knowing that he did not support the Union.[31]

After completing his investigation of Davignon, Captain Plourde prepared three reports dated November 17, 20 and 21, 2000 titled

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28. We have modified this finding in response to a challenge by the Union to more accurately reflect the record testimony.

29. We have modified this finding to more accurately reflect the record evidence.

30. Captain Plourde also referenced the *Garrity* decision at the beginning of his interview with Davignon.

31. The record reflects that Davignon's conversation with Lancaster took place in person.

"Internal Investigation David Davignon" (the Investigative Report(s)) for Major Centeio. Paragraph 28 of the November 17, 2000 Investigative Report states in pertinent part:

> On November 18, 2000 at approx. 16:38 hours Officer Ronald Duarte (union) was interviewed. Officer Duarte indicated on November 15, 2000, Officer Davignon called him while he was working in FB unit and asked if he would be attending the picket * * * Officer Duarte indicated he did not indicate to Officer Davignon whether or not he'd be attending. I asked Officer Duarte whom he was working with in FB unit when Officer Davignon called. Officer Duarte stated Officer Bala was the FB control officer. Officer Duarte explained that Officer Bala had originally answered Officer Davignon's phone call and advised him that he (Duarte) had a call. Officer Duarte stated after he spoke with Officer Davignon, he hung up the phone and discussed Officer Davignon's request with Officer Bala...Investigators will be re-interviewing Officer Bala to confirm Officer Duarte's version of the events. [32]

The conclusion of the November 21, 2000 report states:

> [O]fficers Michael Estrella and Ronald Duarte admit that on November 15, 2000 they received phone calls from Officer Davignon regarding the union picket while on duty at their assigned posts. Officers Estrella and Duarte both indicate Officer Davignon asked them if they were going to participate in the union picket during the phone conversation. Officer Davignon indicated during his interview that he never asked Officer Estrella if he was going to participate, he only informed Officer Estrella about the time and place of the union picket. Officer Davignon also indicated Officer Estrella was the "only officer" he called on the phone. However, Officer Duarte indicated he also received a phone call from Officer Davignon. Lt. Lancaster also admits he was approached while on duty in 2 West Unit by Officer Davignon and asked if he would be interested in picketing the day after Thanksgiving. Officer Davignon admitted he asked Lt. Lancaster if he wanted to picket but it was done in a joking manner.

At this time, all investigative avenues have been exhausted.

Plourde submitted a copy of his report to Major Centeio. After Major Centeio reviewed it, Plourde forwarded additional copies of each of the three reports to Sheriff Hodgson, Attorney Novack and Chief of Staff Talbot. [33]

At some point during the investigations described above, Talbot learned that an unnamed officer had been lying when he told Internal Affairs that Davignon had *not* solicited him to participate in the picket. Talbot shared this information with Sheriff Hodgson. The Employer did not impose discipline on the officer who lied.

On November 17, 2000, Sheriff Hodgson addressed the morning[34] and afternoon roll calls at Ash Street. He addressed the afternoon roll call at Dartmouth on November 22. Talbot accompanied Sheriff Hodgson to all three speeches. Sheriff Hodgson made essentially the same speech at all three roll calls. The crux of Sheriff Hodgson's message was that he would not tolerate anyone who did not get on board and join his team or who was constantly negative about his or her job, and any officer conducting Union business during working hours would be disciplined up to and including termination.

Sheriff Hodgson first discussed two Supreme Court decisions.[35] He said the Court had held that he could fire employees who spoke negatively about or brought down the morale of the institution. Sheriff Hodgson said the *Garrity* decision held that officers had no Fifth Amendment rights during internal investigations. Sheriff Hodgson told officers based on *Garrity*, he could discipline, up to termination, officers who failed to be utterly truthful during internal affairs investigations, even though what they said during those investigations could not be used against them in criminal proceedings. Sheriff Hodgson noted that he was aware that some employees had not been truthful during their discussions with Internal Affairs, and he encouraged the employees to cooperate during the investigations or face the consequences.[36] He told the officers that he had been involved in unions before, and that he did not care what they did during non-working hours. However, Sheriff Hodgson stated that the officers were supposed to function in their jobs as correction officers instead of involving themselves in Union conduct, chatter or discussion while they were working. Sheriff Hodgson also stated that he did not want employees to feel pressured or harassed while they were working and that he would discipline any employees who harassed other employees. Sheriff Hodgson added that in the private sector, an employer would want to fire employees who were "negative" every day of the week, or words to that effect. Sheriff Hodgson also discussed proposed retroactive pay provisions and indicated that the state would not approve any retroactive pay. Sheriff Hodgson warned that the longer that the parties' negotiations were drawn out, the less money there would be for correction officers. Sheriff Hodgson stressed that he was trying to make the workplace safer. He said that he knew that there were several troublemakers in the departments and expressed his intention to get rid of them. He also told the officers that he was aware of the upcoming picket, and that it had not deterred him from his plans. [37]

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32. Paragraph 27 of the November 17, 2000 Investigative Report indicates that the investigators interviewed Officer Michael Bala (Bala) on November 18, 2000 about twenty minutes before they interviewed Officer Duarte. Paragraph 27 states that Officer Bala "indicated that he had not received any phone calls from or been approached by Officer Davignon while on duty regarding the union picket" and that "Officer Bala had no relevant information to add to the investigation." This is the only entry in the Investigative Reports concerning Officer Bala. There are no entries reflecting that investigators re-interviewed Officer Bala.

33. In response to a challenge by the Union, we strike the statement that Sheriff Hodgson relied on the Investigative Reports in disciplining Davignon. However, we amend the findings to reflect that Plourde forwarded a copy of his reports to Sheriff Hodgson and the other individuals named above.

34. Sheriff Hodgson required the officers on the 11 p.m. to 7 a.m. shift to stay overtime so that he could address them at the morning shift's roll call.

35. *Waters* v. *Churchill*, 511 U.S. 661 (1994) and *Garrity* v. *New Jersey*, 385 U.S. 493 (1983).

36. The Sheriff did not provide any further details about the Internal Affairs investigations to which he was referring.

37. Miller, Gouveia and Davignon testified that Sheriff Hodgson had stated that he would fire officers who did not get on board and join the team as well as officers who conducted Union business during work hours. Although Talbot denied that Sheriff Hodgson had ever threatened to fire anyone for conducting Union business during working hours, Talbot testified that Sheriff Hodgson had stated that employ-

At the roll call held before the beginning of the 7 a.m. - 3 p.m. shift on November 17, Sheriff Hodgson reminded the officers that he had been elected Sheriff and that the officers should deal with it.

Suspension of Miller and Gouveia

On December 6, 2000, the Employer suspended Gouveia and Miller for thirty days and reassigned them from Ash Street to different shifts at the Dartmouth facility. Gouveia and Miller's suspension notices were essentially identical (except where noted) and stated in pertinent part:

> You are hereby advised that your solicitation of correctional officers to participate in a union picket using departmental telephones while on duty violated *103 CMR 910.09 Code of Ethics,* Employee Conduct and Work Rules, and the Collective Bargaining Agreement. [38]
>
> On or about November 13, 2000, while on duty in the Cage Area of the Ash Street Facility, you [Miller] approached Lt. Ed Dufresne, also on duty at that time, for the purpose of soliciting his participation in a union picket scheduled for November 24, 2000.[39]
>
> On or about November 17, 2000 you admitted to investigators that you had answered questions about what was discussed at the last union meeting but you denied soliciting any correctional officers participating in the union picket while on duty. However, the evidence supports a finding that you solicited Lt. Dufresne's participation in the union picket while both you and he were on duty.[40]
>
> Your actions were unprofessional and highly inappropriate. Your conduct violated departmental rules and regulations regarding employee conduct and work performance.
>
> Your on duty solicitation of correctional officers to participate in a union picket constitutes a willful violation of *Article VII* of the collective bargaining agreement.
>
> Further, your failure to be forthright and completely honest with investigators relative to your misconduct in this matter is highly disturbing.
>
> In addition, your wrongful conduct interfered with other correctional officers' performance of their duties, adversely affecting the efficient operation of the department and potentially the health and safety of all employees. Such misconduct cannot and will not be tolerated at the Bristol County Sheriffs office.
>
> The nature of your misconduct is serious. In light of the potential volatility and dangerous environment of the workplace, the best interests of the Sheriffs Office and the health and safety of its employees and inmates must be paramount. Therefore, it is my decision that you will be suspended without pay for thirty (30) days effective immediately. [41]

Prior to December 6, 2000, Gouveia and Miller had discussed non-work related matters during working time including subjects broached by the Employer at roll call or in e-mails and including Union matters, and were not disciplined for doing so. Further, prior to December 6, 2000, they were not aware of any restrictions on their ability to have such conversations.

Davignon's Suspension

On December 6, 2000, Sheriff Hodgson suspended Officer Davignon for forty-five days and transferred him to the Dartmouth facility "until further notice." As a result of that assignment, Davignon could not bid out to any other facility until he received written notice from the Sheriffs Office restoring the exercise of his seniority rights.

The December 6 suspension letter issued to Davignon was essentially the same as Gouveia and Miller's notices except for the following paragraph:

> On or about November 17, 2000, you admitted to investigators that you utilized departmental telephones when you contacted Officer Michael Estrella relative to his participation in the union picket. You also admitted that while you were on duty you saw Lt. Lancaster and talked to him concerning his participation in the scheduled union picket. Although you denied contacting any other correctional officer while on duty relative to the union picket, the evidence supports a finding that you telephoned Officer Ronald Duarte for the purpose of soliciting his participation in the union picket, while both you and Officer Duarte were on duty.[42]

Prior to December 6, 2000, Davignon had, on several occasions, discussed Union matters during working time, particularly if there were Union meetings coming up. Moreover, Davignon used Jail telephones to inform members about Union meetings if he could not get relief from his post. He never made any effort to conceal those phone calls and was never disciplined for making those calls.

Opinion

The operative facts of this case take place during a six-week period in the fall of 2000 when the parties were in the process of negotiating a successor collective bargaining agreement, and the Union was planning an informational picket to show members' dissatis-

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ees were not supposed to be involved in Union conduct, chatter or discussion during work time; that the election was over; and that Sheriff Hodgson and the officers should work as a team and that he would not tolerate people who did not work as a team or who were constantly negative about their job. Talbot also testified that Sheriff Hodgson stated that in the private sector employees could not be "negative" every day without the boss wanting to dismiss them. Accordingly, even though the witnesses differed as to the exact words used by Sheriff Hodgson, the hearing officer found that the message imparted was essentially the same, as set forth above.

38. The hearing officer found that contrary to the allegations in Miller and Gouveia's suspension letters, neither Miller nor Gouveia had used departmental telephones to discuss the Union picket. Talbot was aware that Miller and Gouveia had not used departmental telephones to discuss the Union picket when he denied Miller and Gouveia's grievances over their suspensions, at Step 2 of the Agreement's grievance procedure.

39. Gouveia's suspension letter states that he solicited Dufresne from November 13 through November 17, 2000.

40. Gouveia's letter indicates that the evidence showed that he had also solicited Officer Victor DaRosa's participation in the picket.

41. The hearing officer credited Miller's unrebutted testimony that he did not solicit Dufresne to participate in the upcoming Union picket on November 13, 2000, but rather gave him a handout that summarized the previous week's negotiating sessions.

42. The unrebutted testimony of Davignon reflects that he did not telephone anyone other than Estrella and did not speak to anyone else about the picket except Lancaster.

faction with the progress of negotiations. All but one of the allegations in this case[43] pertain to the Sheriff's efforts, during that six-week period, to prohibit bargaining unit members from engaging in union-related discussions during working time. Those efforts included speaking to individual employees, making speeches at roll call, issuing directives prohibiting such behavior, launching internal affairs investigations and disciplining employees. Our analysis of whether or not the Sheriff's actions were lawful depends in large part on the extent to which those actions were directed solely at Union activities, and in particular, organizing an informational Union picket, or whether the Sheriff was merely enforcing an existing neutral, non-discriminatory policy or provision of the collective bargaining agreement. As set forth in more detail below, we conclude that for the most part, the Sheriff's actions in the fall of 2000 were neither neutral, nor non-discriminatory and constituted a unilateral change that also chilled and discouraged employees in the exercise of their rights under Section 2 of the Law.

We begin our analysis with the well-established principle that a public employer violates Section 10(a)(1) of the Law when it engages in conduct that may reasonably be said to tend to interfere with, restrain or coerce employees in the exercise of their rights under the Law. *Quincy School Committee*, 27 MLC 83, 91 (2000), *citing Town of Athol*, 25 MLC 208, 212 (1999); *Town of Winchester*, 19 MLC 1591, 1595 (1992), *citing Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1555 (1989). The focus of a Section 10(a)(1) analysis is the effect of the employer's conduct on reasonable employees' exercise of their Section 2 rights, *Town of Winchester*, 19 MLC at 1596, not the motivation behind the conduct, *Id.*; *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), nor whether the coercion succeeded or failed. *Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1555-1556 (1989). The Commission uses an objective test to determine the effect of an employer's conduct on employees' exercise of their statutory rights. The subjective impact of the employer's conduct on employees is not determinative. *Town of Winchester*, 19 MLC at 1596.

Section 2 of the Law affords employees certain rights, including, under some circumstances, the right to distribute union material and the right to observe and read such material. *City of Quincy/Quincy Hospital*, 23 MLC 201, 203 (1997) *citing Massachusetts Board of Regents of Higher Education*, 13 MLC 1697, 1701 (1987); *Clinton Service Corporation d/b/a Great Expectations, Inc.*, 9 MLC 1494, 1498 (1982). Although an employer may promulgate rules regulating the distribution of union literature or employee discussion of union matters using employer premises or equipment, the rules must be neutral and non-discriminatory so that employee access to union information is not improperly restricted. *City of Quincy*, 23 MLC at 203, *citing Quincy School Committee*, 19 MLC 1476, 1480 (1992); *Dighton School Committee*, 8 MLC 1303, 1305 (1981). A rule that is enforced only against union literature or access demonstrates the lack of any legitimate purpose for the rule. *City of Quincy* at 203 (additional citations omitted). Moreover, organizing a lawful picket[44] clearly falls within the realm of concerted activities protected under Section 2 of the Law. *See e.g. Southern Worcester County Regional Vocational School District*, 2 MLC 1488 (1976), *aff'd. sub. nom. Southern Worcester County Regional Vocational School District* v. *Labor Relations Commission*, 377 Mass. 897 (1979).

Counts II, VI, XII -Discussions of Union Matters During Working Time

We first consider whether the Employer violated Section 10(a)(1) of the Law as alleged in Count II of the Amended Complaint by issuing the October 11, 2000 memorandum prohibiting the discussion of Union business at roll call. The record reflects that prior to October 11, 2000, shop stewards addressed roll call with the permission and knowledge of captains. There is no dispute that practice changed after the October 11 memorandum was issued. Moreover, there is no dispute that the Employer allowed organizations such as Healthtrax to speak to and distribute literature to union officers at roll call. As noted above, a rule that is enforced only against union literature or access demonstrates the lack of any legitimate purpose for the rule.

However, the Employer argues that it could lawfully permit the discussion of other events while prohibiting the discussion of Union business at roll call because its policy was not contingent on the Union-related content of the discussion but, rather, whether the subject matter was "employer-sponsored" or not. According to the Employer, employer-sponsored matters are those activities, such as parades or United Way drives that are essential to the business of the Sheriff's Office because they serve to build lines of communication and cooperation with the public.

We are not persuaded by this argument. Regardless of how the Employer characterizes the type of material it routinely allows to be distributed and discussed during work time, the fact remains that the Sheriff's directive, as written and implemented, expressly prohibited the discussion of Union matters at roll call. Because the rule was enforced only against union literature or access, we find the Employer's prohibition on discussion of Union matters at roll call to be discriminatory in violation of Section 10(a)(1) of the Law.

We reach a similar conclusion with respect to Counts VI and XII, which allege that the Employer violated Section 10(a)(1) by prohibiting union conversations during work time and by disciplining Miller, Gouveia and Davignon for using Jail telephones to discuss Union business, in particularly the November 24 picket.

Both before and after December 6, 2000, when the Employer suspended the three shop stewards, the Employer permitted discussion of non-work related and even Union matters during working time. In addition to the topics discussed at roll call, the Employer

43. See discussion of Count XI - Violation of Ground Rules, *infra*.

44. There is no evidence and the Employer does not claim that the November 24, 2000 picket was anything other than a lawful informational picket, protected under Section 2 of the Law.

routinely sent e-mails to employees and posted notices regarding a variety of non-work related matters including trips to Disney World and health club promotions. In addition, prior to December 6, 2000, the shop stewards freely and without fear of repercussion discussed Union business during work hours. However, on or about December 6, 2000, the Employer suspended Miller, Gouveia and Davignon for engaging in Union-related discussions during work time. While we recognize that there is no inherent right to engage in Union activity during working hours, *see e.g. Commonwealth of Massachusetts*, 8 MLC 1462, 1464 (1981), where, as here, the Employer maintained no rule prohibiting, and in fact, encouraged, discussion of non-work related matters, such as Healthtrax and Disney World promotions, the Employer cannot selectively forbid discussion of certain types of Union business without running afoul of Section 10(a)(1) of the Law. *Quincy School Committee*, 19 MLC 1476, 1481 (1992).

Our analysis of Count XII, relating to using telephones to discuss Union matters is slightly different, because the record reflects that the Employer maintained rules that prohibited using telephones for non-official business. Therefore, if this rule were neutrally enforced against all non-official Jail business, we would not find that the Employer violated the Law by disciplining employees for discussing Union matters over the telephone. *See Massachusetts Board of Regents of Higher Education*, 13 MLC 1697, 1701 (1987) and cases cited therein. However, the record here demonstrates that the Employer selectively applied what would otherwise have been a neutral work rule to discipline the shop stewards who were involved in organizing the November 24 picket. The record is replete with evidence that the Employer actively allowed, even encouraged, the use of telephones for non-work related matters. The Jail's e-mails and notices instructed employees to use the Jail's internal phone system to call other Jail employees to let them know whether they would be participating in the advertised activity.

Even Larkin, who conducted the Internal Affairs investigation into the use of Jail telephones for picketing, used Jail telephones to ask a correction officer if he could do some electrical work at his home and was not disciplined even though Major Ramos was informed that Larkin had used the phones for this purpose. Nevertheless on December 6, 2000, the Employer suspended three Union stewards for ostensibly using Jail telephones to discuss the Union picket.[45] Any claims by the Employer that its rule against using Jail telephones for non-official use was not selectively enforced against Union matters rings hollow in light of all the evidence to the contrary.

The Employer's claim that it did not know that the officers were using telephones for Union business is equally unpersuasive; even if it did not know the exact content of the correction officer's conversations, the record reflects that Col. Payant knew for years that Jail employees used Jail telephones for non-work related reasons without taking any action. The evidence also shows that Col. Sturgeon permitted Medeiros to use a Jail telephone for Union business and never told him that it was limited only to grievance processing. For the Employer to permit both non-work related and even Union-related telephone conversations, but to discipline shop stewards for discussing the upcoming Union picket is a clear violation of Section 10(a)(1) of the Law. *Quincy School Committee*, 19 MLC at 1480-1482.

Counts I: Sheriff's Statements to Gibney

Count I of the Amended Complaint alleges that the Sheriff unlawfully reprimanded and threatened Gibney, a known shop steward and member of the Union's bargaining team, for engaging in Union activity. The record reflects that the Sheriff accused Gibney of spending too much time conducting Union business on work time and stating that Gibney was not paid to be a Union representative. The Sheriff warned Gibney that he was not going to allow the Union to come in and interrupt his institution. At the conclusion of their meeting, the Sheriff informed Gibney that he was being investigated for not returning to training after participating in a mediation session.

The record also reflects, however, that on the morning in question, Gibney spoke to two bargaining unit members about matters unrelated to the Union. Although an employer generally has the right to question employees about being away from their post, in this case the Sheriff's remarks were aimed solely at preventing Gibney from performing *Union* activities during work time. *See Massachusetts Board of Regents*, 13 MLC 1697, 1701 (1987) (employer violated the Law by removing union literature from a bulletin board, where the employer's ground for removal was the content of the leaflet, not that it may have been posted on work time). The coercive effect of such remarks is compounded by the fact that the Sheriff never asked Gibney if he had been performing Union business. He simply assumed that he was. In the absence of evidence to the contrary, we infer that the Sheriff made and acted upon this assumption based on Gibney's status as a Union steward and member of the Union's negotiating team.

In its defense, the Employer claims the Sheriff had a right under the Agreement to require Gibney to do work during work time. However, as noted above, the Sheriff's remarks were directed solely at Gibney's perceived Union activity and therefore went beyond mere enforcement of a neutral work rule. That the Sheriff may have genuinely believed that Gibney had been engaging in some type of Union activity that fell outside the realm of the Law's protection[46] does not alter our conclusion that the Sheriff's statements violated Section 10(a)(1) of the Law. A violation through restraint and coercion in the exercise of protected activity does not require intent. *See e.g. Whitman Hanson Regional School Committee*, 9 MLC 1615, 1617 (1983).

The Employer also urges that it did not violate the Law because Gibney was ultimately not disciplined. However, adverse action is not a necessary element of a 10(a)(1) violation. As noted previously, the standard used in Section 10(a)(1) cases is whether the employer or its agent engaged in conduct that "may reasonably be

45. As described below, Miller and Gouveia did not actually use Jail telephones to discuss the picket.

46. The Employer's brief described Gibney as "flaunting the rules by paying social calls to union members on company time."

said to interfere with" the free exercise of employee rights under Section 2 of the Law. *City of Lawrence*, 15 MLC 1162, 1167 (1988) *citing Southern Worcester County Regional Vocational School District* v. *Labor Relations Commission*, 377 Mass. 879 (1979). Thus, whether or not discipline actually resulted from the inquiry is immaterial. *City of Lawrence,* 15 MLC at 1167. In light of all the circumstances, we conclude that the Sheriff's statements to Gibney on October 3, 2000 would tend to chill reasonable employees in the exercise of rights protected under Section 2 of the Law.

Count V - Sheriff's Speeches to Roll Call

On November 17 and 22, 2000, the Sheriff attended several roll calls and delivered substantially the same speech to the assembled employees. The Sheriff began by stating that the Supreme Court had held that he could fire employees who spoke negatively about or brought down the morale of the workplace, and who failed to tell the truth during Internal Affairs investigations. He further stated that he and not the Union ran the institution; that the picketing would not deter him from his goals; that he knew there were several troublemakers in the departments whom he wanted to get rid of, and that he would discipline any employees who harassed other employees. The Sheriff told officers that they were supposed to function in their jobs as correction officers instead of involving themselves in Union conduct while they were working. He noted that in the private sector, an employer would want to fire employees who were "negative" every day of the week.

The Sheriff made these statements in the week before the picket was scheduled to begin and during the same week in which the Internal Affairs investigations were taking place.[47] Given the timing of the addresses, members of the bargaining unit could reasonably have inferred that the Sheriff's references to "troublemakers" and "employees who spoke negatively or brought down the morale of the workplace" were in fact references to the Union representatives who were organizing the upcoming picket. It would therefore have been reasonable for employees to construe the Sheriff's speech as threatening to discipline Union representatives or members for their role in organizing the informational picket or complaining about working conditions, activities that are protected under Section 2 of the Law. Even if the Sheriff had been referring to employees whose actions were outside the realm of protected activities, the Sheriff's criticism was overly broad. The Sheriff failed to make any distinction between permissible Union activity under existing rules and regulations or to define what he meant by people speaking negatively or bringing down the morale of his institution. Under the totality of the circumstances, we conclude that the Sheriff's addresses to roll call violated Section 10(a)(1) of the Law. *See Town of Mashpee*, 11 MLC 1252 (1984); *Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1557 (1989) and cases cited therein.

Counts IV And VIII, Internal Affairs Investigations

In *City of Lawrence*, 15 MLC 1162, 1165, 1167 (1988), the Commission held that an employer had violated Section 10(a)(1) by subjecting three union officials to an administrative inquiry into the underlying sources and significance of a letter they had circulated criticizing the police chief. In *City of Boston*, 10 MLC 1120, 1134-35 (1983), the Commission noted that "[i]nterrogation of an employee is susceptible of abuse, and a point may be reached where it can be said that such a technique is undertaken not to further the employer's legitimate objectives, but rather to harass, coerce, and interfere with an employee's protected concerted actions." 10 MLC at 1135 n.14 (citation omitted).

In this case, the Employer conducted two separate investigations into whether Union members had organized the upcoming Union picket during work time. Larkin, who conducted the investigations at Ash Street, asked officers whether they knew about the upcoming picket, if they had been approached about it, whether there was a sign-up sheet and whether the Union had mailed them information about it. Plourde, at Dartmouth, questioned approximately 60 officers and, after discussing the *Garrity* decision, asked each of them generally whether they knew of an upcoming picket and how they had found out about it.

The Employer claims that the Internal Affairs investigation did not violate the Law because it was aimed solely at ensuring that no picketing, solicitation or planning took place during work hours on the Employer's premises so as to compromise the security of the institution. The Employer asserts that the officers were asked only about union activities performed during work time.

The record demonstrates otherwise. In the context of a comprehensive, formal Internal Affairs investigation, officers at Ash St. and Dartmouth were asked overly-broad questions about the means and methods by which the Union was organizing the upcoming picket without regard to whether that organizing was taking place during working hours or compromised the security of the prison. As noted above, organizing a lawful picket [48] clearly falls within the realm of concerted activities protected under Section 2 of the Law. *Southern Worcester County Regional Vocational School District* v. *Labor Relations Commission*, 377 Mass. 897 (1979). Accordingly, we conclude that both the types of questions posed to the officers coupled with the manner and timing of the investigations violated Section 10(a)(1) of the Law by tending to chill employees in the exercise of protected rights, including but not limited to the right to engage in lawful picketing.

Count VIII alleges that Respondent's Internal Affairs investigation of Presby violated Section 10(a)(1) of the Law. The facts demonstrate that Sheriff Hodgson directed Major Centeio to investigate whether Presby had addressed roll call with respect to the Union picket and, if so who had authorized him to do so and leave his post. The record discloses that the Employer did indeed ask Presby by whose authority he had left his post to address roll call

47. The Sheriff's November 17 roll call address took place only hours before Internal Affairs began questioning officers.

48. There is no evidence and the Employer does not claim that the November 24, 2000 picket was anything other than a lawful picket, protected under Section 2 of the Law.

on September 19 and whether or not he had threatened officers in some way if they refused to picket. The Commission has held that concerted activity can lose its protected status if it is unlawful, violent, in breach of contract in certain circumstances, disruptive or indefensibly disloyal to the employer. *City of Lawrence*, 15 MLC at 1167, quoting *City of Haverhill*, 8 MLC 1690, 1694 (1981). Thus, we find that the Employer, at least at the first meeting with Presby, had a legitimate concern in questioning whether Presby had abandoned his post to address roll call and whether he had threatened employees during the course of that address. The Union claims that once Presby had informed Major Centeio and Lieutenant Larkin that he had addressed roll call on September 19, any further questions regarding the content of Presby's speech exceeded the legitimate bounds of the Employer's inquiry. However, during the first meeting, the Employer only asked Presby whether he had addressed roll call about the upcoming picket. We view this question as a natural precursor to whether Presby had threatened employees for refusing to picket and, accordingly, do not agree with the Union that this question exceeded the bound of the Employer's legitimate concerns. We also find that the Employer's questions during the second and third meetings did not exceed the Employer's legitimate objectives because the questions were focused on whether Presby had been authorized to address roll call and whether he had obtained relief from his post to do so. Accordingly, although requiring Presby to attend three separate meetings concerning this matter might have been somewhat excessive, on balance we conclude that the Employer questions to Presby concerning his addresses to roll call did not violate Section 10(a)(1) of the Law.

Section 10(a)(5) Violations, Counts III And VII

This portion of the opinion considers whether the Employer refused to bargain in good faith when it promulgated the October 11 memorandum and other policies relating to discussing Union business during working hours. For the reasons set forth below, we conclude that the Employer violated Section 10(a)(5) of the Law when it promulgated or sought to enforce such policies.

An employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment that involves a mandatory subject of bargaining, without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983); *Commonwealth of Massachusetts*, 27 MLC 11, 13 (2001); *City of Newton*, 27 MLC 74, 81 (2000); *Commonwealth of Massachusetts* v. *Labor Relations Commission*, 404 Mass. 124, 127 (1989); *City of Boston*, 16 MLC 1429 (1989). To establish a finding of unilateral change, the charging party must demonstrate that: 1) the employer altered an existing practice or instituted a new one; 2) the change affected a mandatory subject of bargaining; and 3) the change was established without prior notice and an opportunity to bargain. *City of Boston*, 26 MLC 177, 181 (2000).

On October 11, 2000, Sheriff Hodgson sent a memorandum that stated in pertinent part, "At no time are union representatives or any staff authorized to use roll call to conduct union business." There is no dispute that the Sheriff issued the October 11 memorandum without first giving the Union notice or an opportunity to bargain to resolution or impasse. Moreover, on-premises access to bargaining unit employees is a mandatory subject of bargaining and the October 11 memorandum prohibiting discussion of non-work related matters during roll call affected the Union's existing access to bargaining unit members. *Town of Marblehead*, 1 MLC 1140, 1145 (1974). *See also City of Boston/Deer Island House of Correction*, 19 MLC 1613, 1616 (1992). Moreover, we have already determined that since at least 1997 and until the Employer issued the October 11, 2001 memorandum, correction officers had, on numerous occasions, obtained permission from the captain or lieutenant in charge of roll call and addressed roll call regarding Union matters. Accordingly, although the October 11 Memorandum indicates it "continued" to be the Sheriff's expectation that roll call was to be used to convey administrative and operational information to staff, there is no evidence that this expectation was based upon an actual policy or practice that prohibited discussion of Union matters at roll call. *See Sheriff of Worcester County* v. *Labor Relations Commission*, 60 Mass. App. Ct. 632, 638 (2004)(commission could find that an unenforced and openly ignored directive is no policy at all). Thus, we conclude that the October 11 memorandum constituted both a change to an existing condition of employment and the imposition of a new one.

The Employer claims that no members of the Jail's top management were aware that correction officers were addressing roll call regarding Union matters, and that knowledge on the part of captains and lieutenants is insufficient to create a binding practice to which it is bound. We disagree. It is well established that a public employer is responsible for the actions of its supervisory employees and agent of the employer who acts within the scope of his or her apparently authority whether or not the employer actually authorized those acts. *Higher Education Coordinating Council*, 25 MLC 69, 71 (1998) *citing Commonwealth of Massachusetts, Commissioner of Administration and Finance*, 11 MLC 1206, 1216 (H.O.1984). Here, the record establishes that captains supervise correction officers and have the authority to issue verbal reprimands and recommend discipline. Moreover, the record is clear that members of the Jail's administration rely on the captains to make sure that each shift is operating in a manner consistent with the Jail's rules and regulations. Thus, we find that captains are both agents of the Employer and supervisory employees. It was therefore reasonable for the correction officers to believe that shift commanders were authorized to allow Union stewards to address roll call. The Employer is therefore bound by the captains' long-standing acquiescence in Union stewards addressing union business at roll call. *See Higher Education Coordinating Council*, 25 MLC at 71;[49] *City of Boston*, 9 MLC 1600, 1603 (1983)(where district commanders had regularly and routinely granted union officers compensation for performing union business on days off, with no complaints or contrary instructions from above, City

49. [See next page.]

could not change that practice without first bargaining with Union). *See also Sheriff of Worcester County*, 27 MLC 103 (2001), *aff'd in part and rev'd on other grounds, Sheriff of Worcester County* v. *Labor Relations Commission*, 60 Mass. App. Ct. 632 (2004)(Sheriff had obligation to give notice and bargain before prohibiting union buttons on uniforms where correction officers had worn union buttons for years without repercussion and there was no evidence that Sheriff enforced policy stating otherwise).

The Employer further argues that there was no practice of allowing Union stewards to address roll call because the discussions contained in the record actually took place *after* roll call was dismissed. The record shows however that for years, Union stewards addressed the corrections officers while they were still assembled for roll call. After the Employer issued and implemented the October 11 memo, this was no longer the case. Thus, regardless of how the Employer characterizes the period of time when Union stewards addressed the officers assembled for roll call, the fact remains, by issuing the October 11 memo, the Employer departed from its prior practice.[50]

Count VII alleges that on December 6, 2000, the Employer began prohibiting discussion of union business during work hours in violation of Section 10(a)(5) of the Law. As discussed above, there is no dispute that rules prohibiting employee discussion of Union matters are a mandatory subject of bargaining. *Town of Marblehead*, 1 MLC 1140, 1145 (1974). *See also City of Boston/Deer Island House of Correction*, 19 MLC 1613, 1616 (1992). There is also no dispute that the Employer imposed discipline on Davignon, Gouveia and Miller for engaging in Union-related discussions during work time without first giving notice or bargaining with the Union to resolution or impasse. Moreover, we have found above that prior to December 6, 2000, the Employer had no practice of prohibiting all types of non-workrelated discussion, with the reasonable caveat that such discussions not interfere with performance of job duties. Furthermore, employees, including Davignon, Miller and Gouveia, freely and without fear of repercussion engaged in discussions while they were at their posts on a variety of non-work related matters, including subjects broached by the Employer at roll call or in e-mails, and including Union-related discussions

The Employer claims however that the language of Article VIII of the Agreement allowed it to impose discipline on unit members for engaging in discussions of non-grievance related Union matters while on duty. Although an employer may assert contractual waiver as an affirmative defense to its failure to bargain before changing employee wages, hours, or working conditions, it bears the burden of proving that the contract clearly, unequivocally, and specifically authorized its action. *Town of Marblehead*, 12 MLC 1667 (1986); *Commonwealth of Massachusetts, Chief Administrative Justice of the Trial Court*, 11 MLC 1440, 1442 (1985); *Town of Andover*, 4 MLC 1086 (1977). In examining contractual clauses, the Commission first determines whether the language unambiguously waives bargaining over the subject matter under consideration. *Town of Marblehead*, 12 MLC 1667, 1670 (1986). Waiver will not be found unless the contract language "expressly or by necessary implication confers upon the employer the right to implement the change in the mandatory subject of bargaining without bargaining with the union." *Commonwealth of Massachusetts*, 19 MLC 1454, 1456 (1992), *citing Melrose School Committee*, 9 MLC 1713, 1725 (1983).

We do not construe Article VIII to unambiguously confer on the Employer the right to discipline employees for engaging in non-grievance related Union discussions during work time. Rather, Article VIII indicates merely that Union representatives will be granted paid time off to investigate or settle grievances or attend Union meetings, subject to the Sheriff's approval. The Employer would apparently have us draw the inference that all Union activities and discussion *not* listed in this provision are by necessary implication forbidden during working hours. However, an employer cannot rely on the mere silence of a provision to prove waiver. The employer must demonstrate that the matter allegedly waived was consciously explored and yielded. *Commonwealth of Massachusetts*, 26 MLC 161,164 (2000), citing *Town of Mansfield*, 25 MLC 14, 15 (1998). The Employer presented no such evidence here and we therefore decline to find that by operation of Article VIII of the Agreement, the Union deliberately waived its right to bargain over this change in the ability to discuss Union related matters during work time.

The Employer again claims that it did not know that employees were discussing Union matters while on work time and therefore, no binding practice was created. However, having already determined that the subject matter at issue was a mandatory subject of bargaining, the pertinent inquiry is not whether the Employer knew that the employees had previously had discussions of Union matters, but whether there existed a policy or practice that prohibited the types of Union discussions at issue prior to December 6, 2001. Having found none, we conclude that the Employer violated Section 10(a)(5) and (1) of the Law when it created a new practice by suspending Davignon, Miller and Gouveia for having Union-related discussions while on-duty. *See City of Boston*, 9 MLC at 1603 (City's claim not to know that it had a practice permitting certain types of compensation for Union leave rejected as a defense to unilateral charge claim, where there was no evidence that practice prohibiting leave was ever enforced).

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49. That the captains belong to another bargaining unit does not automatically relieve the Jail of its responsibility for their actions, in light of other evidence establishing, that at least for roll call purposes, the captains act as the Jail's agent and the Employer is therefore bound and accountable for their actions. See *Commonwealth of Massachusetts, Commissioner of Administration and Finance*, 11 MLC at 1216 (rejecting argument that Commonwealth ought not be held legally responsible for acts of supervisory employee in same bargaining unit under Commission and SJC precedent discussing principles of agency and apparent authority)(citations omitted).

50. In any event, the wording of the October 11 memo (prohibiting discussion of Union matters at roll call) and the fact that Sheriff ordered Internal Affairs to investigate whether Presby had addressed second shift roll call regarding the upcoming Union picket belies the Employer's claim that it considered the roll call discussions at issue in fact occurred after roll call was dismissed.

Count XII - 10(a)(3) allegation

Our penultimate inquiry is whether the Employer violated Section 10(a)(3) and (1) of the Complaint by suspending Gouveia, Miller and Davignon on December 6, 2000, as alleged in Count IX of the Amended Complaint. We have already held that the Employer violated Section 10(a)(1) of the Law when it prohibited bargaining unit members from engaging in Union-related discussions during working time because the Employer's prohibitions were selectively enforced against Union activity, and in particular, discussions about the upcoming picket. Therefore, even though those discussions took place during work time, we conclude that the employees engaging in such discussions were engaged in protected activity because, as noted previously, an employer cannot discriminate against employees for discussing union matters when it allows employees to discuss other non-work related matters on working time. *Commonwealth of Massachusetts*, 8 MLC 1462, 1464, n. 5 (1981)(noting although employees' rights to pursue union affairs during working hours may be limited by the employer, an employer may not discriminate against employees for discussing union matters when it allows employees to discuss other non-work related matters on working time). Accordingly, because Davignon, Gouveia and Miller suspension letters indicate that they were suspended, for among other things, discussing the Union picket during working time, we analyze this case under the two-step analysis articulated in *Wynn & Wynn, P.C.* v. *Massachusetts Commission Against Discrimination*, 431 Mass. 655, 667 (2000) *citing Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 277 (1989).

According to the first step in the *Wynn & Wynn* analysis, a charging party meets its initial burden by proffering direct evidence that proscribed criteria played a motivating part in a respondent's adverse action. *Id.* at 667. Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probably inference that a forbidden bias was present in the workplace." *Id.*, *citing Johansen* v. *NCR Comten, Inc.*, 30 Mass. App. Ct. 294, 300 (1991). Stray remarks in the workplace, statements by people without the power to make employment decision, and statements made by decision makers unrelated to the decisional process itself do not suffice to satisfy a charging party's threshold burden. *Wynn & Wynn, P.C.* at 667 (2000) *citing Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 277 (1989). As noted above, we consider the direct evidence of discrimination here to be the statements made by the Sheriff in the three stewards' suspension letters indicating that they were being suspended for soliciting correctional officers to participate in a union picket using departmental telephones while on duty.

Once a charging party meets its initial burden under the two-step mixed-motive analysis, the burden shifts to the respondent to "show that its legitimate reason, standing alone, would have induced it to make the same decision." *Wynn & Wynn* at 666, *citing Johansen* v. *NCR Comten, Inc.* 30 Mass. App. Ct. at 301. The appropriate question in a direct evidence mixed-motive case is whether the respondent's proffered legitimate reason also motivated the adverse action and, would, by itself, have resulted in discipline. *Id.*

The Employer argues that Article VIII of the Agreement, its telephone policy, as well as the employees' failure to be forthright and completely honest during the Internal Affairs Investigation justified its action against the three employees. The Employer finally claims that the officers here took a substantial amount of time away from their duties to perform union activities that were not allowed by the collective bargaining agreement and thereby compromised the security of the prison.

We have already determined that the Employer's actions were not justified by the terms of the parties' Agreement, particularly where the Employer allowed other non-work related discussions to take place and there is no evidence that the Employer had heretofore enforced its Agreement in that manner. We have also determined that the Employer's telephone policy was selectively enforced against the officers who were discussing the upcoming picket. Accordingly, at least with respect to these business-related justifications, we determine that but for the Union content of the employees' conversations, the Employer would not have disciplined them.

As to the Employer's claim that the employees' conversations about the pickets took a substantial amount of time away from their duties and compromised the security of the provision, the record is devoid of any evidence that the three stewards abandoned their posts, neglected their duties, or otherwise devoted more time to those activities than to any other non-work related discussions that the Employer knowingly allowed. The Employer's claim therefore lacks factual merit.

The Employer finally claims that the officers were disciplined for lying to Internal Affairs. However, the evidence shows that the Jail imposed no discipline on an employee who admitted to having lied during his Internal Affairs interview. Even assuming then, without deciding, that the Employer genuinely believed that the three officers had not been completely honest during their interviews with Internal Affairs,[51] we are unable to conclude that but for the officers' activities in organizing a picket, they would have been suspended. Accordingly, we hold that the Employer violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law

51. We note that the Employer did not call any of the employees whose version of events conflicted with that of the three officers called to testify. We further note that Davignon's suspension letter indicated that he had been untruthful by failing to inform Internal Affairs that he had telephoned Officer Duarte for the purposes of soliciting his participation in the picket. Plourde's reports, which were made available to the Sheriff and upon which the Sheriff's suspension letter appears to have been based, contained an entry indicating that Duarte told Internal Affairs that Davignon had called him. The entry further stated that Duarte told the investigators that he had discussed their conversation with Officer Bala, who had picked up the phone when Davignon ostensibly called. The entry also stated that investigators would be re-interviewing Bala to confirm Duarte's version of events. However, there is no indication in the reports that Bala was in fact re-interviewed. Accordingly, it does not appear that the Employer made reasonable efforts to resolve Duarte's and Davignon's conflicting testimony prior to disciplining Davignon, for, among other things, failing to be truthful and honest.

when it suspended Davignon, Miller and Gouveia for their Union activities.

Violation of Parties' Ground Rules - Count XI

Section 6 of the Law requires a public employer to meet with the exclusive representative and negotiate in good faith with respect to wages, hours and other terms and conditions of employment. Where an employer violates the parties' agreed-upon ground rules for contract negotiations, the Commission has held that such conduct constitutes a refusal to bargain in good faith in violation of Section 10(a)(5) of the Law. Here, the parties' ground rules included an agreement to transmit correspondence or proposals to members of the parties' respective bargaining teams only and to provide forty-eight hours notice to the other side prior to going public with the specifics of the negotiations. One of the topics discussed at negotiations and mediation was the retroactivity of any pay increases ultimately agreed to by the parties. On both November 3 and 9, 2000, the Sheriff sent memos discussing retroactive pay to a number of parties, including shop stewards who were not members of the Union's bargaining team. The parties had discussed the issue of retroactivity at both negotiations and mediation. The Employer argues that neither memo violated the parties' ground rules, because they contained no proposals, did not solicit a response and were merely informational in nature. While that may be true, the parties' ground rules did not merely limit making proposals to, or soliciting responses from, the other side but rather prohibited all correspondence regarding negotiations to individuals who were not members of the parties' respective bargaining teams. The Employer's two memos therefore constituted a violation of the parties' agreed-upon ground rules in violation of Section 10(a)(5), and derivatively, Section 10(a)(1) of the Law.

Conclusion

Based on the record before us and for the reasons stated above, we conclude that the Employer violated Sections 10(a)(1), (3) and (5), in the manner alleged in Counts I-VII, IX, XI and XII of the Amended Complaint. We dismiss Count VIII of the complaint alleging that the Employer violated Section 10(a)(1) of the Law by investigating Presby.

Order

WHEREFORE, on the basis of the foregoing, it is hereby ordered that the Bristol County Sheriff's Office shall:

1. Cease and desist from:

a.Failing and refusing to bargain in good faith with the Union over the decision to prohibit Union representatives from addressing correction officers assembled for roll call and relating to on-premises access to bargaining unit employees where such access had previously been allowed;

b.Failing and refusing to bargain in good faith with the Union by violating agreed-upon ground rules for the negotiation of a collective bargaining agreement;

c.Retaliating against Miller, Davignon and Gouveia for engaging in protected, concerted activity;

d.Interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law by prohibiting Union representatives from addressing officers assembled for roll call while permitting the discussion of other matters not reasonably related to Jail operations;

e.Interfering, restraining or coercing employees in the exercise of their rights under the Law by prohibiting the discussion of Union business during working hours, while permitting the discussion of other non-work related matters not reasonably related to Jail operations;

f.Interfering, restraining or coercing employees in the exercise of their rights under the Law by prohibiting employees from engaging in telephone conversations regarding Union matters during work time, while permitting the discussion of other non-work related matters not reasonably related to Jail operations;

g.Interfering, restraining or coercing bargaining unit members in the exercise of their rights under the Law by unlawfully interrogating them regarding activities protected under Section 2 of the Law;

h.Interfering, restraining or coercing bargaining unit members in the exercise of their rights under the Law by threatening to discipline or discharge them for engaging in activities protected under Section 2 of the Law;

i.In the same or similar manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law.

2. Take the following affirmative action which will effectuate the policies of the Law:

a.Immediately rescind the October 11, 2000 memorandum prohibiting union representatives to use roll call to conduct union business and refrain from unilaterally promulgating a rule prohibiting Union representatives from addressing bargaining unit members assembled for roll call where they had previously been permitted to do so until, upon demand, bargaining obligations are fulfilled;

b. Refrain from unilaterally promulgating a rule prohibiting the discussion of Union business during working hours where they had previously been permitted to do so;

c. Refrain from violating certain ground rules concerning the negotiation of a collective bargaining agreement;

d. Upon request by the Union, bargain collectively in good faith prior to changing the ability of Union representatives to address bargaining unit members assembled for roll call and the ability of bargaining unit members to engage in Union-related discussions during working time;

e. Immediately rescind the December 6, 2000 suspensions of Davignon, Miller and Gouveia and expunge any reference to those suspensions from their respective personnel files;

f. Make Miller, Davignon and Gouveia whole for any loss of wages and benefits suffered as a result of the unlawful suspension, plus interest on any sums owing calculated in the manner approved under M.G.L. c. 231, §6I, compounded quarterly.

g. Post in conspicuous places where employees represented by the Union usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

h. Notify the Commission within ten (10) days of receipt of this decision and order the steps taken to comply with this Order.

SO ORDERED.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission (Commission) has held that the Bristol County Sheriff's Department (Employer) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to bargain in good faith with the Massachusetts Correction Officers Federated Union (Union) over the ability of Union representatives to address correction officers assembled for roll call and over other matters relating to on-premises access to bargaining unit employees and failing and refusing to bargain in good faith with the Union by violating certain ground rules for the negotiation of a collective bargaining agreement. The Commission has also held that the Employer violated Section 10(a)(1) of the Law by interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law by prohibiting Union representatives from addressing correction officers assembled for roll call; by prohibiting the discussion of Union business during working hours generally, in person or by telephone, while permitting the discussion of other non-work related matters; by engaging in unlawful interrogations of employees regarding activities protected under Section 2 of the Law and by threatening to discipline or discharge employees for engaging in activities protected under Section 2 of the Law. The Commission has also concluded that the Employer violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by retaliating again David Miller, David Davignon and David Gouveia for engaging in protected, concerted activity.

WE WILL NOT fail or refuse to bargain in good faith over the decision to prohibit Union representatives from addressing correction officers assembled for roll call or other matter relating to on-premise access to bargaining unit members.

WE WILL NOT fail or refuse to bargain in good faith by violating certain ground rules for the negotiation of a collective bargaining agreement.

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

WE WILL, upon request by the Union, bargain collectively in good faith prior to changing the ability of Union representatives to address bargaining unit members assembled for roll call and the ability of bargaining unit members to engage in Union-related discussions during work time.

WE WILL rescind the December 6, 2000 suspensions of Davignon, Miller and Gouveia and expunge any reference to those suspensions from their respective personnel files.

WE will make Miller, Davignon and Gouveia whole for loss of wages and benefits suffered as a result of the unlawful suspension, plus interest on any sums owing calculated in the manner specified in M.G.L. c 231, §6I, compounded quarterly.

[signed]
Sheriff, Bristol County

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