

(1982) (the reduction in overtime resulting from decisions to cease filling odd hours and to reduce minimum manning levels did not constitute a mandatory subject of bargaining).

Here, the Union maintains that this transfer of unit work deprived the unit members of the opportunity to perform the work on an overtime basis. This loss of overtime opportunities is in the nature of unscheduled overtime resulting directly from the City's public safety deployment decision and, therefore, does not constitute a term and condition of employment. The record contains no other identifiable impacts on bargaining unit members' terms and conditions of employment. Under the narrow circumstances present in this case, because neither the City's decision to transfer a portion of riot control work to non-unit detectives nor the impact of that decision triggered a statutory bargaining obligation, the City did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it deployed non-unit detectives to provide riot control functions during the Biotech conference, the presidential debate, and the Mayor's state of the City address.²⁰

Conclusion

For the reasons stated above, we conclude that the City did not fail to bargain in good faith in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law as alleged in the complaints of prohibited practice. Accordingly, the cases are dismissed.

SO ORDERED.

* * * * *

20. Because we have decided that the City had no obligation to bargain over either the decision to transfer a portion of the riot control work to non-unit detectives or the impacts of that decision, it is unnecessary to address the City's other defenses or its Motion to Dismiss.

In the Matter of TOWN OF BOLTON

and

BOLTON DISPATCHERS ASSOCIATION, LOCAL 268A,
MASSACHUSETTS COALITION OF POLICE, AFL-CIO

Case No. MUP-01-3255

62.3 *discrimination*
65.2 *concerted activities*
65.6 *employer speech*

June 27, 2005

Allan W. Drachman, Chairman

Hugh L. Reilly, Commissioner

John M. Becker, Esq.

Representing the Bolton
Dispatchers Association, Local
268A, Massachusetts Coalition of
Police, AFL-CIO

James T. Masteralexis, Esq. Representing the Town of Bolton

DECISION¹

Statement of the Case

The Bolton Dispatchers Association, Local 268A, Massachusetts Coalition of Police, AFL-CIO, (Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) on December 5, 2001, alleging that the Town of Bolton (Town) had engaged in a prohibited practice within the meaning of Sections 10(a)(1), 10(a)(3), and 10(a)(5) of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a Complaint of Prohibited Practice on August 15, 2002. The Complaint alleged that the Town had respectively violated Sections 10(a)(1), 10(a)(3), and 10(a)(5) of the Law by: 1) issuing a memorandum that tended to interfere, restrain, and coerce employees in the exercise of their rights under the Law; 2) discriminating against Union members for engaging in concerted, protected activity by issuing oral warning notices for holding a Union meeting; and 3) failing to bargain in good faith by failing to give the Union prior notice and an opportunity to bargain to resolution or impasse over disciplinary procedures.² The Town filed an Answer to the Complaint on September 5, 2002.

On October 30, November 6, and 19, 2002, Dianne E. Rosemark, a duly-designated hearing officer (Hearing Officer) of the Commission, conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. The Union and the Town respectively filed post-hearing briefs on February 20 and 21, 2003. The Hearing Officer issued Recommended Findings of Fact on July 25, 2003. On September 24, 2003, the Un-

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

2. On or about October 25, 2002, the Union withdrew Count III of the Complaint, alleging a violation of Section 10(a)(5) of the Law.

ion filed challenges to the Hearing Officer's Recommended Findings of Fact. The Town did not file any challenges.

Findings of Fact³

The Union challenged portions of the Hearing Officer's Recommended Findings of Fact. 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.

The Town employs full-time and part-time dispatchers at the police station on a twenty-four hour basis. Dispatchers are responsible for handling emergency and 911 calls that come into the station, dispatching police, fire and ambulance services, taking business calls, logging relevant information, and greeting the public. The dispatch area is located in the front of the police station, with an adjoining small conference room located approximately five feet away. A kitchen and a file room are situated in the back of the dispatch area. One dispatcher is on duty for an eight-hour shift. Dispatchers report directly to Donna Hathaway (Hathaway), the Dispatch Supervisor. Hathaway is a member of the Union.⁴

The dispatchers' job description states: "dispatcher(s) must not leave post unattended, and must have coverage by another qualified individual before leaving post." Qualified individuals include other dispatchers,⁵ police officers, supervising officers, Hathaway, and the Chief of Police, Celia Hyde (Chief Hyde).

The Dispatch Center Policy and Procedure Manual (Policy Manual) addresses all policies and procedures for the Police Communications Department. The Policy Manual is kept on the dispatch desk. Under the heading, "Reporting for Duty," the Policy Manual provides in relevant part: "Dispatchers are responsible to report for duty whenever so ordered by proper authorities. Dispatchers are responsible to report for duty at regularly appointed times and [sic] to not absent yourself from duty without leave."

The dispatchers also have a training manual that addresses their daily responsibilities. Under a section entitled, "Dispatch Desk," the training manual states in relevant part: "The dispatch desk is to be manned at all times. If the dispatcher needs relief from the desk and there is no one in the station, the dispatcher may call in an officer. Most officers are good about coming in periodically to be sure the dispatcher is all set." Police officers generally cover the desk for short periods of time.

Dispatchers may leave the dispatch desk to perform duties in the course of their workday. They may pull files from the file room, make copies, greet the public, or go to the kitchen for a meal break.

When dispatchers leave their post for these purposes, they are still responsible for answering the telephones and radio and are not required to obtain relief to cover the dispatch desk.

When dispatchers leave the dispatch desk for short breaks, for example, to go to the restroom, take a cigarette break outside the police station, go to their car to retrieve an item, or go upstairs in the police station, they must obtain coverage for the dispatch desk. Dispatchers are not required to obtain permission from a supervisor to leave their post for these purposes.

If dispatchers need to leave the dispatch desk for longer periods of time, for example, to run an errand or go out for lunch, they are required to obtain proper coverage for the dispatch desk and request permission from a supervisor.⁶ Only supervisors are authorized to change a dispatcher's schedule and direct coverage for the dispatch desk. Supervisors include Hathaway, a supervising officer, or Chief Hyde. In no case may a dispatcher leave the dispatch desk without coverage.

Union meetings are usually held at the police station in the small conference room adjoining the dispatch area. Dispatchers may attend Union meetings by standing in the doorway of the conference room and answering the phones and dispatch radio at the same time. However, if the Union needs to have a closed-door meeting, a supervising officer covers the dispatch desk. Chief Hyde regularly granted permission to the Union to hold Union meetings at the police station.

During 2001, the Union and the Town had a tense labor-management relationship. In July 2001, the parties met to discuss several issues that had arisen between the parties, and how they could improve their relationship in the future. During that time, Union President Mary Ann McLaughlin⁷ (McLaughlin) informed Union members that they should bring a Union representative to any meetings with Chief Hyde, even if the meeting did not concern disciplinary matters.⁸ In late 2001, the Chief expressed to Sergeant Andrew Bagdonis (Bagdonis) that, if the dispatchers did not like the way something had been handled in the department, they could grieve it.⁹

At some point in 2001, the Police Department conducted a survey of employees' attitudes toward the department in an effort to determine how it could better serve its employees. After the deadline for returning the surveys, six or seven surveys came in late. The surveys were in the same handwriting and contained negative comments. Chief Hyde learned from McLaughlin that McLaughlin had written the surveys for other employees. Chief

3. The Commission's jurisdiction is uncontested.

4. The Town police officers are members of the Massachusetts Coalition of Police, Local 268 (Police Union).

5. Although only one dispatcher is on duty at any given time, other dispatchers may be at the police station to pick up paychecks or check their e-mail, and may cover the desk for the dispatcher on duty if needed.

6. If dispatchers need to request sick time, vacation or bereavement leave, if they are swapping a shift or a part of a shift, or filling in for another dispatcher, they are re-

quired to complete a Shift Swap Form. In these cases, a supervisor must approve the leave in advance.

7. McLaughlin has been president of the Union for two years.

8. Chief Hyde did not object to Union members bringing a representative to meetings.

9. The record does not establish the context of Chief Hyde's comment or what she was referring to when she made the comment.

Hyde refused to include them in the initial count because the results of the survey had already been tallied.

Kathy Straitt (Straitt) worked as a dispatcher for the Town from December of 2000 to 2002. Straitt began working for the Town as a part-time dispatcher.¹⁰ When Straitt began her employment in 2000, her dispatch training lasted approximately six months. She began working shifts in May 2001. However, the Union did not consider Straitt as a Union member until her dispatch training was complete. In early August 2001, Straitt became a full-time dispatcher for the Town.

Straitt did not attend any Union meetings until 2001. At her first Union meeting, a Union official produced a plate of cheese and declared that there was a rat in the room, that this was a war, and that he was going to find out who the rat was. Union officials in attendance included McLaughlin and Union Vice President Jon Mead (Mead). John Wilcox (Wilcox), an executive board member of the Police Union, was also present at the meeting. At a subsequent Union meeting, Union officials presented a stuffed toy of a rat and a block of swiss cheese and indicated again that there was a rat amongst the members, that the Union would find out who the rat was, and that the rat would be dealt with accordingly.¹¹ Thereafter, at yet another Union meeting, Union officials displayed a toy of a man hanging from gallows and indicated again that there was an informant in the Union, and that the Union would be dealing with that person. At some point, Straitt learned that fellow employees were referring to her as the informant. Straitt further learned that her co-workers gave her the nickname, “Kathy Straitt to the Chief,” as a reference to Straitt allegedly informing Chief Hyde of Union matters.

In July 2001, McLaughlin discovered that several part-time dispatchers were not able to sign up for any shifts because three dispatchers, including Straitt, had signed up for too many shifts. McLaughlin telephoned Straitt and the other two dispatchers and informed them of the problem. McLaughlin did not talk to Hathaway about the scheduling problem prior to contacting the dispatchers. McLaughlin telephoned Straitt at her home and informed her that she had violated the parties’ collective bargaining agreement by signing up for too many shifts, and that she had to relinquish two of the three shifts that she had selected. McLaughlin told Straitt to call the dispatcher on duty and have her remove Straitt’s name from the shifts. Straitt responded that she did not agree with McLaughlin.¹² McLaughlin told Straitt that she was the Union president, she knew what the contract stated, and that Straitt had to do what she said. McLaughlin further informed Straitt that Straitt would be bumped out of her shifts if she did not give them up voluntarily. Straitt then called the dispatcher on duty to remove her name from two shifts.

McLaughlin later realized that she had made a mistake in interpreting the parties’ collective bargaining agreement and left a

message for Straitt on her answering machine informing her of the error. Straitt attempted to get two shifts back to avoid losing any pay, however, she was able to recover only one shift.

After Straitt lost a shift, she attempted to file a grievance against McLaughlin. Straitt contacted Wilcox and informed him that she wanted to file a grievance against McLaughlin, because McLaughlin had caused her to lose a day’s pay when she had to give up a shift. Wilcox informed Straitt that the matter was not grievable under the parties’ collective bargaining agreement.

In July 2001, McLaughlin telephoned Straitt early one morning at her home. Straitt informed McLaughlin that she was tired from working the night shift, and that McLaughlin should call her back later. Straitt then hung up the telephone. A few minutes later, McLaughlin called Straitt back and insisted that they speak. After again informing McLaughlin that she was tired and that she would call McLaughlin later, Straitt hung up the telephone. The following morning, Straitt was awoken by her house guest, who informed her that the Bolton Police Department was calling. When Straitt answered the telephone, she observed from her caller identification box that McLaughlin was calling from her home. Straitt informed McLaughlin that she was sleeping. McLaughlin replied to Straitt that she had used that excuse the previous day. Straitt told her that she would call her later and hung up the telephone. Straitt telephoned McLaughlin that evening and left a message that she was returning McLaughlin’s call. Thereafter, McLaughlin and Straitt did not telephone each other.

While employed as a dispatcher for the Town, Straitt felt harassed by situations that occurred at work. On one occasion, a cartoon was left for Straitt that depicted a business with the name, “ACME Jackets.” On the cartoon, however, Straitt’s name was inserted so that the cartoon read, “ACME Straitt Jackets.” Moreover, during shift changes in July and August 2001, when Straitt came on duty after McLaughlin, Straitt believed that McLaughlin failed to give her necessary information during the shift change or turnover.

At 7:00 p.m. on the evening of August 15, 2001, the Union had scheduled a meeting to take place in the small conference room at the police station. McLaughlin, Mead, and fellow dispatcher, Rick Haimila (Haimila), arrived early at the station. McLaughlin arrived early so she could meet with Straitt before the scheduled Union meeting.¹³ Straitt was the dispatcher on duty working the 3:00 p.m. to 11:00 p.m. shift. When McLaughlin arrived at the station, Straitt was washing her dinner dishes in the kitchen. McLaughlin asked Mead if he would meet with her and Straitt, to which he agreed. McLaughlin asked Haimila to cover the dispatch desk while they met. Neither McLaughlin nor Mead asked a supervisor for permission to meet with Straitt in the small conference room while Straitt was on duty.

10. Straitt previously had worked as a part-time dispatcher for the Town in 1978.

11. The Hearing Officer did not credit McLaughlin’s testimony that the incident with the rat and cheese was meant to be a joke, because the Union displayed a rat and cheese scenario at Union meetings on two occasions and was very concerned that confidential negotiating information was being leaked to Chief Hyde.

12. The Hearing Officer did not credit McLaughlin’s testimony that Straitt was amicable when she agreed to relinquish two shifts, because Straitt was on unemployment at the time and was working as a part-time dispatcher to supplement her unemployment.

13. Straitt had no prior knowledge that McLaughlin wished to meet with her on August 15.

McLaughlin approached Straitt in the kitchen and stated that she wanted to meet with her. Straitt replied that she was on duty, and that they would have to meet while she was working. McLaughlin replied that she wanted to meet with her in private. Straitt repeated that she was working, and that they would have to schedule it another time. Haimila, who was standing near the dispatch desk, told Straitt that he would cover the desk for her.¹⁴ McLaughlin told Straitt that they would meet in the small conference room. Straitt asked whether she would get into trouble for leaving her post. McLaughlin informed Straitt that dispatchers covered for each other all the time, and that she would not get into trouble. Straitt asked if McLaughlin had asked a supervisor for permission for her to leave the dispatch desk. McLaughlin replied that she had not. Straitt, McLaughlin, and Mead proceeded into the small conference room to meet.

In the conference room, Straitt sat near the door while Mead sat on the same side of the table, facing the windows. McLaughlin sat across from her. During the meeting, the conference room door was closed. McLaughlin informed Straitt that if she had any problems with the Union, that she should speak with McLaughlin or Mead.¹⁵ McLaughlin further told Straitt that she should not talk to Wilcox or anyone else about Union matters.¹⁶ McLaughlin informed Straitt that she should not speak with the Chief about anything. McLaughlin also told Straitt that if she had a problem with a Union member, she should speak to that person directly. Mead reiterated to Straitt that if she had any concerns about someone, that she should speak to that individual. Mead also stated that issues that exclusively concerned the Union should not be shared outside of the Union, especially confidential bargaining information. McLaughlin gave Straitt a copy of the current collective bargaining agreement and Union by-laws. When Straitt asked about the collective bargaining agreement, McLaughlin informed her that she should use it as a guide. At that point, the meeting ended, lasting between five and ten minutes.¹⁷

Prior to the 7:00 p.m. Union meeting, Hathaway entered the police station and observed that Haimila was working on the dispatch desk and Straitt was washing dishes in the kitchen. When Hathaway asked Straitt why she was not working at the dispatch desk, Straitt told her that Haimila was covering the desk. Straitt appeared very upset and asked Hathaway not to leave her alone with McLaughlin and Mead, and that she would explain after the Union meeting. At approximately 7:00 p.m., Bagdonis arrived to cover the dispatch desk while the dispatchers attended the Union meet-

ing.¹⁸ At the Union meeting, Straitt participated and asked questions.

The following morning, Straitt spoke to Hathaway about the meeting with McLaughlin and Mead. Straitt stated that she was concerned that McLaughlin, a Union official, had relieved her from duty rather than police personnel. Straitt informed Hathaway that McLaughlin had told her that she would not be in trouble if she left the dispatch desk, and that dispatchers covered for each other all the time. Straitt also told Hathaway that she felt that she was forced into the meeting. Hathaway indicated that she was not comfortable with McLaughlin and Mead removing Straitt from the desk without prior approval, and that she would investigate the matter and get back to her.

A few days later, Hathaway spoke to Straitt and asked her to put her complaint into writing. Hathaway was concerned about McLaughlin and Mead's meeting with Straitt because she believed that: 1) McLaughlin and Mead had intimidated Straitt into attending a meeting that she did not want to attend; and 2) the two Union officials had not obtained permission from a supervisor to remove Straitt from duty at the dispatch desk. Hathaway informed Chief Hyde about Straitt's concerns. Chief Hyde was particularly concerned about Straitt's allegation that McLaughlin had intimidated her because of the effect it could have on Straitt's job performance. Chief Hyde instructed Hathaway to conduct an investigation into the allegations.

On or about August 2, 2001, Straitt filed an internal affairs complaint with the Police Department alleging that McLaughlin was harassing and intimidating her. In her three-page, handwritten complaint, Straitt detailed the telephone calls that McLaughlin had made to her home, including McLaughlin's direction to relinquish two shifts. Straitt maintained in her complaint that McLaughlin was "harassing and intimidating me with phone calls during the application period. I believe this was a deliberate attempt on her part to thwart me from applying for the full-time (dispatcher) position." The last paragraph of the complaint addressed the August 15th meeting between Straitt, McLaughlin and Mead:

Most recently, on Wednesday, August 15, 2001, the Union President again used her position of authority to relieve me from duty and replace me with another dispatcher without prior approval from my supervisor. When I questioned her about this, McLaughlin assured me that I would not be in trouble and that this was done all the time. She had told me that she wanted to meet with me in private, but in actuality it was both her and Vice President Mead who met with me behind closed doors.¹⁹

14. The Hearing Officer did not credit Straitt's testimony that Haimila physically prevented her from returning to the dispatch desk, because Straitt did not include that allegation in her internal affairs complaint.

15. In their testimony, McLaughlin, Mead, and Straitt presented varying accounts of the meeting. The Hearing Officer found, based on the entirety of the testimony and the witnesses' relationships as reflected in the record, that McLaughlin was upset with Straitt and conveyed to her in a deliberate and forceful manner that she should not talk to people outside of the Union, especially the Chief, about Union matters.

16. The Hearing Officer did not credit McLaughlin's testimony that she had no knowledge about Straitt's attempt to file a grievance against her, because Wilcox

was a member of the executive board for the Police Union, and the two unions worked closely together.

17. The Hearing Officer did not credit Straitt's testimony that the meeting lasted one half hour.

18. Chief Hyde previously had approved Bagdonis to cover the dispatch desk for the 7:00 p.m. Union meeting.

19. This paragraph was Straitt's entire account in her complaint of the August 15 meeting with McLaughlin and Mead.

On August 29, 2001, Hathaway met with McLaughlin, who was accompanied by a representative from the Police Union. Hathaway gave McLaughlin Straitt's complaint and asked her to read it. Hathaway asked McLaughlin some prepared questions about McLaughlin's multiple telephone calls to Straitt. McLaughlin responded that she did make the calls, but there were inaccuracies in Straitt's statement. McLaughlin stated that Straitt had called dispatchers at home and had made statements about McLaughlin and the Union.

Hathaway questioned McLaughlin about whether she had caused Straitt to lose two shifts. McLaughlin replied that it did not matter, because another employee with more seniority than Straitt could have bumped her out of the shift. Hathaway further asked McLaughlin who had given her permission to remove Straitt from the dispatch desk. McLaughlin replied that she did not remove Straitt from the desk, and that Straitt had voluntarily attended the meeting. McLaughlin further denied that she had intimidated Straitt. McLaughlin provided Hathaway with a written response to Straitt's complaint and listed several witnesses. Hathaway did not speak with any of McLaughlin's witnesses, except Mead and Haimila, because she believed that the witnesses did not have information that was relevant to the complaint.

On September 14, 2001, Hathaway met with Mead, who had brought a member of the Police Union to witness the meeting. Hathaway asked Mead questions from a typed list. Specifically, Hathaway asked Mead about whether he had removed Straitt from the dispatch desk. Mead responded by reading a two-page statement that he had prepared prior to the meeting.²⁰ Hathaway asked for a "yes" or "no" answer. Mead stated that he could not answer the question with a yes or no answer, and that he and McLaughlin had asked Straitt to attend the meeting. Mead also responded to Hathaway's other questions by reading his statement, informing her that he felt that his written response answered all of her questions.²¹

Hathaway also spoke to Haimila about the August 15 meeting to determine how Straitt was removed from the dispatch desk. Haimila informed Hathaway that McLaughlin and a police officer had asked him to cover the desk while they spoke to Straitt.²² Hathaway did not discipline Haimila for his part in the August 15 meeting.

After her interviews with McLaughlin, Mead, and Haimila, Hathaway spoke to Chief Hyde. Hathaway informed her that she believed that Mead and McLaughlin should be disciplined for removing Straitt from the dispatch desk without prior permission and for intimidating Straitt. Hathaway recommended that the two employees receive oral warnings for their alleged behavior, because it was the least punitive form of discipline.

After conferring with Chief Hyde, Hathaway issued "Oral Notice Warnings" to McLaughlin and Mead on or about September 21, 2001.²³ McLaughlin received three warnings, and Mead received one warning. McLaughlin's first warning was for her alleged "harassment of fellow employee (phone calls)." The warning's corrective action was to "cease repeated phone calls. Respect fellow employee's time off." The second warning was issued to McLaughlin for "[c]ausing a new employee to feel intimidated." The corrective action on the second warning states, "[c]ease any action that could give said employee a feeling of intimidation." Both McLaughlin and Mead received warnings for "[r]emoving a dispatcher from a portion of her shift without supervisor's approval." The corrective action stated, "[s]eek approval from supervisor prior to any change in an employee's work shift."

In addition, Hathaway issued a memorandum to McLaughlin dated September 21, 2001 that provided, "After much thought, I am warning you that Union business cannot interfere with the operations of this department. Do not allow this to happen again. You owe your fellow worker an apology for doing this."

The parties' former collective bargaining agreement, in effect from July 1, 1999 through June 30, 2000, provided in relevant part that: "Written reprimands shall be placed in the employee's personnel file, but all evidence of such reprimands shall be removed after one (1) year has passed with no repeat occurrence of the cause of the reprimands." The parties' successor agreement, dated July 1, 2000 through June 30, 2003, included the following language: "Written reprimands, and oral warnings, shall be placed or documented in the employee's personnel file, but all evidence of written reprimands shall be removed from said file after one (1) year has passed with no repeat occurrence of the cause of the reprimands; and all evidence of oral warnings shall be removed from said file after one (1) year."

After Mead had received the oral notice warning, he argued to Chief Hyde that the parties' successor agreement was not yet in effect, and that the then-current agreement did not permit her to include oral notice warnings in employees' personnel files. Chief Hyde agreed and did not place Mead's oral warning in his personnel file. When Mead mentioned McLaughlin's warnings, Chief Hyde indicated that McLaughlin should speak to her directly. However, McLaughlin never spoke to Chief Hyde about removing the oral notice warnings from her personnel file. McLaughlin's oral notice warnings were placed into her personnel file and were removed one year later.

Opinion

Section 10(a)(3)

A public employer that retaliates or discriminates against an employee for engaging in activity protected by Section 2 of the Law

20. Mead prepared his statement based on information that he had learned from McLaughlin.

21. Hathaway believed that Mead was being insubordinate by not answering her questions directly, but did not take any disciplinary action against him for his alleged insubordination.

22. Hathaway learned that Haimila was mistaken, and that McLaughlin and Mead had asked Haimila to cover the dispatch desk while they spoke to Straitt.

23. Neither Mead nor McLaughlin were actually given verbal warnings for their alleged behavior. Hathaway issued the oral notice warnings in writing to memorialize the discipline.

violates Section 10(a)(3) of the Law. *School Committee of Boston v. Labor Relations Commission*, 40 Mass. App. Ct. 327 (1996); *Southern Worcester Regional Vocational School District v. Labor Relations Commission*, 386 Mass. 414 (1982). To establish a *prima facie* case of discrimination, a charging party must show that: 1) the employee engaged in protected activity; 2) the employer knew of the protected activity; 3) the employer took adverse action against the employee; and 4) the employer took the adverse action to discourage the protected activity. *Town of Dennis*, 29 MLC 79, 83 (2002); *Town of Clinton*, 12 MLC 1361, 1365 (1985); *Boston City Hospital*, 11 MLC 1361, 1365 (1985).

Count I of the Commission's Complaint in this case alleges that the Town violated Section 10(a)(3) of the Law by issuing oral notice warnings to Mead and McLaughlin in retaliation for meeting with Straitt on August 15, 2001 to discuss Union business. The Town admits that Mead and McLaughlin were engaged in protected activity when they met with Straitt on August 15. *See Bristol County Sheriff's Department*, 31 MLC 6 (2004) (discussion of union business is protected activity in the absence of a rule prohibiting discussion of non-work related matters). However, the Town argues that Mead's and McLaughlin's conduct lost the protection of the Law, because it intimidated and harassed Straitt. We address this threshold issue first.

Activity protected by Section 2 of the Law can lose its protected status if it is unlawful, violent, in breach of contract in certain circumstances, disruptive or indefensibly disloyal to the employer. *Bristol County Sheriff's Department*, 31 MLC at 18. Likewise, conduct which is physically intimidating, egregious or disruptive of the employer's business is beyond the pale of protection. *City of Boston*, 7 MLC 1216, 1226 (1980), *citing*, *Harwich School Committee*, 2 MLC 1095, 1100 (1975). When intemperate statements are made within the context of protected activity, the Commission balances the rights of employees to engage in concerted activities, and the rights of employers not to be subjected to egregious, insubordinate, or profane remarks that disrupt the employer's business or demean workers or supervisors. *City of Boston*, 6 MLC 1096, 1097 (1979).

The Union argues that there is no objective basis on which we could determine that Mead's and McLaughlin's behavior was so egregious as to be unprotected. It contends that the only evidence of harassment and intimidation is Straitt's subjective report, and that her allegations are baseless. We disagree, and for the following reasons, find that Mead's and McLaughlin's conduct on August 15 lost the protection of the Law.

First, we do not view the August 15 meeting as an isolated event, but as the culmination of a series of increasingly hostile and intimidating meetings designed to punish Straitt and restrain her from talking about Union matters outside the Union. At the first Union meeting, a Union official produced a plate of cheese and declared that there was a rat in the room. He announced that this was a war,

and that he intended to discover the identity of the rat. At a subsequent meeting, Union officials presented a toy rat and cheese, and reiterated that they would find the rat amongst the Union members and deal with the rat accordingly. At a third Union meeting, Union officials displayed a toy of a man hanging from gallows and indicated that the Union would deal with the informant.

On August 15, Mead and McLaughlin approached Straitt and pressured her to meet with them alone, in advance of the Union meeting. Under the guise of orienting a new employee, Mead and McLaughlin reiterated the message that the Union had previously illustrated with the rat, the cheese, and the gallows: Straitt should not talk to people outside the Union about Union matters and should not talk to the Chief about anything. At the earlier meetings, the Union conveyed this message to all of its members, but on August 15, Mead and McLaughlin singled out Straitt to receive this message. Because Straitt knew that the employees believed her to be the informant, she could reasonably believe that she would suffer the consequences that the Union had alluded to at the prior meetings. Following on the heels of the earlier meetings, Mead's and McLaughlin's communication with Straitt on August 15 was demeaning and intimidating, conveying an implicit threat of unspecified negative consequences for speaking out about work-related matters as well as Union concerns. The fact that Mead and McLaughlin did not use profanity, physical gestures or explicit threats does not ameliorate the ominous implications of their message.

Second, Mead and McLaughlin interfered with Straitt's performance of her duties by pressuring her to leave her shift without permission during work time to discuss Union business. *See generally*, *Commonwealth of Massachusetts*, 8 MLC 1462, 1464 (1981). Straitt raised concerns about leaving the dispatching desk and asked McLaughlin to meet while she was working or to schedule the meeting at another time. McLaughlin overrode Straitt's objections and compelled her to attend the closed-door meeting at that time. Because we find that Mead's and McLaughlin's actions lost the protection of the Law, the Town did not violate Section 10(a)(3) of the Law. *See Id.*²⁴

Section 10(a)(1)

Count II of the Commission's Complaint alleges that the oral notice warnings that the Town issued to Mead and McLaughlin independently violated Section 10(a)(1) as well as Section 10(a)(3) of the Law. In addition, the Complaint alleges that the Town violated Section 10(a)(1) of the Law by issuing a memorandum on September 21, 2001 to McLaughlin. We address each of these issues in turn.

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 Section 2 of the Law. *Quincy School Committee*, 27 MLC 83, 91 (2000), *citing*, *Town of Athol*, 25 MLC 208, 212 (1999);

24. One of the oral warning notices that the Town had issued to McLaughlin contained the following statement: "Reason(s) for the Oral Warning...Harassment of a fellow employee (phone calls)." The Commission's Complaint alleged that the Town had issued the oral warnings in retaliation for McLaughlin's conduct at the

August 15 meeting, and the Union did not seek to amend the Complaint to allege an alternate or additional rationale. Accordingly, we limit our consideration to the issue pleaded in the Complaint.

Town of Winchester, 19 MLC 1591, 1595 (1992). Absent a showing of animus, an employer may still violate the Law, if it discharges or takes other adverse action against an employee while he or she is engaging in protected activity, provided that the employee's own conduct does not remove him or her from the Law's protection. *Whitman-Hanson Regional School Committee*, 9 MLC 1615 (1983), citing, *City of Boston*, 7 MLC at 1224.

In *City of Boston*, *supra*, an employee attempted to represent a co-worker in a grievance. When a supervisor challenged his right to represent his co-worker, the employee directed a series of abusive epithets toward the supervisor and others. The Commission found that, although the employee's efforts to represent his co-worker were protected, his conduct exceeded permissible bounds, and therefore, the employer did not violate Section 10(a)(1) of the Law when it terminated the employee. *Id.* at 1226-7.

Similarly in this case, the Town disciplined Mead and McLaughlin for conduct that occurred in the course of protected activity. As explained in the preceding section, we find that Mead's and McLaughlin's conduct on August 15 removed their actions from the protection of the Law. Thus, the Town did not violate Section 10(a)(1) of the Law by issuing the oral warnings. *See Commonwealth of Massachusetts*, 8 MLC at 1465 (employer did not violate Section 10(a)(1) of the Law by issuing an oral warning to an employee for conversation with union steward that was unprotected); *Exxon Mobil Corporation and Nick Slusher*, 343 NLRB No. 44 (2004) (union steward's harassment of a fellow employee for dissident union activities was unprotected, thus, discharge did not violate Section 8(a)(1) of the National Labor Relations Act).

We next consider whether the Town violated Section 10(a)(1) of the Law by issuing the September 21 memorandum to McLaughlin. The focus of our Section 10(a)(1) inquiry is on the effect of the employer's conduct on a reasonable employee, *Town of Winchester*, 19 MLC at 1596. We do not analyze either 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), or whether the coercion succeeded or failed. *Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1556 (1989). Even without a direct threat of adverse consequences, the Commission has found a violation when an employer makes disparaging remarks toward a union or the exercise of protected activity. *City of Lowell*, 29 MLC 30, 32 (2002).

The Union argues that the Town's actions violated Section 10(a)(1) of the Law, because the memorandum had the reasonable effect of chilling Union members in the exercise of their right to conduct Union business that previously had been permitted in the workplace. We disagree. The memo does not disparage, ridicule, or criticize the Union or the employees' exercise of their protected rights. Moreover, the Town issued the memo in conjunction with the oral warnings that McLaughlin and Mead received for their conduct on August 15, 2001. Because their August 15th conduct lost its protected status, as discussed above, we find that the Town did not violate Section 10(a)(1) of the Law by issuing the Septem-

ber 21 memorandum to McLaughlin. *See Id.* (police superintendent's letter criticizing police officers for conduct following an incident of sexual harassment did not violate Section 10(a)(1) of the Law, because most of the letter referred to matters outside or beyond the protection of Section 2 of the Law).

Conclusion

For the reasons stated above, we conclude that the Town did not violate Sections 10(a)(3) and (a)(1) of the Law by issuing oral notice warnings to Mead and McLaughlin, and issuing the September 21, 2001 memorandum to McLaughlin. Accordingly, we dismiss the Complaint.

SO ORDERED.

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