olation of its duty of fair representation. Accordingly, there is not probable cause to believe that the Union violated the Law in the manner alleged, and this portion of D'Onofrio's charge is dismissed.

Count 4

In this count, D'Onofrio alleges that the Union violated the Law when it refused and failed to investigate his charges against Turnpike managers. Assuming that this count relates to D'Onofrio's May 15, 2006 letter requesting information from the Union, the parties' submissions reflect that the Union requested most or all of this information in letters it wrote the Employer on May 18 and May 22, 2006. Because D'Onofrio filed the instant charge on June 1, 2006, it is reasonable to assume that the Union did not provide any responsive information to D'Onofrio by that date. However, the Union's prompt letters demonstrate that it did not ignore D'Onofrio's requests and, in fact, took affirmative steps to fulfill them. Therefore, there is not probable cause to believe that the Union violated the Law in the manner alleged, and this portion of D'Onofrio's charge is dismissed.

Count 5

Here D'Onofrio alleges that the Union failed or refused to file a claim for Workers Compensation for the work-related injuries that he had sustained. The Union asserts that it has no duty to file Workers Compensation claims for its members. However, D'Onofrio provided no information describing precisely what he had asked the Union to do and what the Union did or did not do in response. Accordingly, regardless of the Union's obligation here, there is not sufficient information to determine whether the Union has violated the Law in the manner alleged, and this aspect of D'Onofrio's charge is dismissed.[12]

Conclusion

For the foregoing reasons, we find that neither the Employer nor the Union has violated the Law in the manner alleged. Therefore, both charges are dismissed in their entirety.

SO ORDERED.

* * * * * *

12. To the extent that any of D'Onofrio's allegations against the Union can be construed as alleging that the Union did not file a grievance on his behalf, it should be noted that Article 19, Section 3 of the Agreement grants the Union the right to file grievances over suspension within five days *after* the disciplinary hearing. D'Onofrio filed the instant charge before the Employer held his hearing. Consequently, any grievance filed by the Union prior to the hearing arguably would have been premature.

In the Matter of NEWTON SCHOOL COMMITTEE

and

NEWTON SCHOOL CUSTODIANS ASSOCIATION

Case No. MUP-04-4131

65.22 filing a grievance
65.62 threat of reprisal

June 25, 2008
Michael A. Byrnes, Chairman
Paul T. O'Neill, Board Member

Daniel C. Brown, Esq.	*Representing the Newton School Committee*
Olinda R. Marshall, Esq.	*Representing the Newton School Custodians Association*

DECISION[1]

Statement of the Case

The Newton School Custodians Association (Union) filed a charge of prohibited practice with the former Labor Relations Commission (Commission) on May 4, 2004, alleging that the Newton School Committee (Employer or School Committee) had engaged in prohibited practices within the meaning of Sections 10(a)(1) and 10(a)(5) of M.G.L. c. 150E (the Law).

Following an investigation, the Board issued a complaint of prohibited practice on September 8, 2005. The complaint alleged that the School Committee had violated Section 10(a)(1) of the Law when Facilities Operations Manager Paul Anastasi (Anastasi) told bargaining unit member David Murphy (Murphy) that, if a grievance were filed, he would cut back or eliminate "man-out" overtime. The Board dismissed the remaining allegations contained in the Union's charge.[2] The School Committee filed an answer to the Board's complaint on or about September 21, 2005.

On December 12, 2005, Susan L. Atwater, Esq., a duly-designated Division Hearing Officer, conducted a hearing at which both parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. The Union and the School Committee filed post-hearing briefs on February 27, 2006 and March 10, 2006, respectively.

1. Pursuant to 456 CMR 13.02(1) of the former Labor Relations Commission's regulations, this case was designated as one in which the former Labor Relations Commission would issue a decision in the first instance. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the Division agency charged with deciding adjudicatory matters. References to the Board include the former Labor Relations Commission.

2. The Union filed a request for review on September 31, 2005. On December 7, 2005, the Board affirmed its prior dismissal. The Union did not appeal this determination.

On August 3, 2006, the Hearing Officer issued Recommended Findings of Fact. The parties filed no challenges. After reviewing the record, we adopt the Hearing Officer's Recommended Findings of Fact and summarize the relevant portions below.

Findings of Fact[3]

The Union is the exclusive representative of certain custodians employed by the School Committee in its public schools. Murphy holds the position of senior building custodian and is a member of the bargaining unit represented by the Union. Murphy began his employment with the Newton School Committee in or about 1980 and worked in different buildings at different times. Murphy reports directly to Anastasi.

Anastasi began his employment at the Newton public schools in June of 2003. In or before September of 2003, Anastasi reviewed the overtime use in all the School Committee's buildings. As a result, Anastasi determined that instituting a practice called "man-out overtime" at a building known as the Education Center would be beneficial. Man-out overtime allows custodians on duty to receive three hours of overtime payment when another member of the custodial staff is absent from work due to a vacation or illness. The overtime payment compensates the on-duty custodian for performing some of the duties of the absent custodian. Anastasi was responsible for bringing man-out overtime to the Education Center, and the custodians who worked there began to receive it in September of 2003.

In 2003, Murphy worked the day shift at the Education Center. His custodial duties at that location included setting up the conference room that the School Committee used for its regular meetings by reconfiguring the tables and chairs into a theater-style seating arrangement and setting up microphones and speaker stands. Murphy did not receive overtime compensation for setting up the conference room for School Committee meetings.

In or before October of 2003, Murphy spoke with the custodians who worked the night shift at the Education Center regarding overtime payment. The night shift custodians told Murphy that the School Committee previously had paid overtime for setting up the conference room for School Committee meetings. As a result of these conversations, Murphy approached Anastasi on November 7, 2003 to inquire about receiving overtime for setting up the conference room for School Committee meetings. Murphy and Anastasi met in Anastasi's office. Murphy told Anastasi that he wanted to resolve the issue of receiving overtime for setting up the School Committee meeting room, and that the set-up work previously had been performed on an overtime basis. Anastasi responded by stating that there was enough time to set up for the meetings during regular work hours. Anastasi explained that former employee Charlie Cronin had performed the set-up duties without overtime. Consequently, Anastasi did not see the need for set-up overtime.

Anastasi also explained to Murphy that he was responsible for bringing man-out overtime to the Education Center and had done so because he believed that the overtime was necessary at that location.[4] Anastasi stated that he would not allow Murphy's request for one hour of set-up overtime, but because Murphy was receiving three hours of man-out overtime, there was a net gain in overtime. Murphy responded that he would take it up with the Union, file a grievance, and that the Union would "back him 100%." Anastasi acknowledged that unit members have the right to file grievances, but he forcefully put his hand on the desk and stated: "When the grievance hits my desk,[5] there goes your man-out overtime."[6] Murphy understood Anastasi's statement to mean that, if he complained about set-up overtime, he would lose man-out overtime. As Murphy left Anastasi's office, Anastasi told Murphy that he had been known to resolve issues with the Union in the past, and that maybe they could meet with the Union and resolve this issue.

One to two weeks later, Murphy filed a grievance over Anastasi's decision to deny set-up overtime pay. Upon receipt of the grievance, Cronin scheduled a hearing for December 11, 2003. Cronin questioned Anastasi about the grievance and related issues prior to the December 11 hearing. Cronin, Anastasi, Murphy, Union President Tim Curry (Curry), and Union Vice President Ernie Peltier (Peltier) attended the meeting. Curry began the meeting by addressing the issue of overtime payment for set-up work.

At some point during the meeting, Murphy told the group that, on November 7, 2003, Anastasi had threatened to suspend man-out overtime if a grievance hit his desk. Cronin asked Anastasi what he had said at the November 7 meeting. Anastasi relayed the conversation and indicated that he did not threaten Murphy at the meeting. Curry stated that the Union wished to receive an apology for

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3. The Board's jurisdiction is uncontested.

4. The precise sequence of Anastasi's statements is not clear from the record.

5. Grievances are not filed directly with Anastasi. However, Anastasi learns of grievances from Chief of Operations Michael Cronin (Cronin) and participates in settlement efforts.

6. Murphy's testimony conflicted with Anastasi's testimony on this point. The Hearing Officer credited Murphy's testimony, finding that Anastasi had told Murphy: "When the grievance hits my desk, there goes your man-out overtime." Murphy's testimony was clear and forthright, including testimony that was arguably damaging to the Union's case. (Contrary to the School Committee's suggestion, the Hearing Officer did not find Anastasi's statement about resolving the grievance to be inconsistent with threatening, minutes earlier, to suspend man-out overtime. It is entirely plausible that a relatively new manager, who has uttered an ill-considered remark, would quickly seek an informal resolution.) Specifically, Murphy admitted that, after threatening to suspend man-out overtime, Anastasi had said that he would be willing to try to resolve the grievance. Second, Cronin's extensive efforts at the December 11 grievance hearing to explain and to apologize for Anastasi's words persuaded the Hearing Officer that Anastasi had made the disputed statement. Although Cronin was not present at the November 7 meeting between Murphy and Anastasi, Cronin discussed the issues related to the grievance with Anastasi prior to the December 11th hearing and did not deny knowing about Anastasi's statements prior to the grievance hearing. It is unlikely that Cronin would have offered multiple apologies and hypothetical illustrations to explain a statement that Anastasi did not make. Moreover, Cronin explained that he analogized Anastasi's comments on November 7 to an honest but misunderstood statement, and this explanation supported Murphy's testimony. Finally, Anastasi was reluctant to admit that he had told Murphy at the grievance hearing that: "You have a fat ass, too." Anastasi's unwillingness to admit unflattering testimony on a minor point suggested an aversion to make a more damaging admission. For these reasons, as well as the Hearing Officer's observations of the witnesses' demeanor, the Hearing Officer concluded that Anastasi had told Murphy that: "When the grievance hits my desk, there goes your man-out overtime."

Anastasi's statement. Cronin offered to apologize to Murphy for "the particular scenario that may have taken place." Murphy and Curry refused to accept the offer, because it did not come from Anastasi. Cronin asked Anastasi if he wished to apologize, and Anastasi chose not to do so. Cronin offered to instruct Anastasi to apologize, but Curry and Murphy declined that offer as well.

Cronin then told Murphy that he did not think that Anastasi had made the statement attributed to him in a threatening manner. In an effort to explain the potential miscommunication and to show that Murphy had taken Anastasi's words out of context, Cronin compared Anastasi's comments to a situation "when you tell your wife that she has a fat ass, although you really do not mean that she has a fat ass." Cronin gave this analogy to explain how an honest answer or statement is capable of different meanings and can be interpreted in ways that the speaker did not intend. Cronin followed this analogy with examples of hypothetical comments that could be misinterpreted.[7] At some point during the meeting, the parties engaged in light banter, and Anastasi said to Murphy: "You have a fat ass too", or words to that effect. The parties subsequently resolved the set-up overtime grievance.

Opinion

A public employer violates Section 10(a)(1) of the Law when it engages in conduct that tends 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); *Town of Athol*, 25 MLC 209, 212 (1999); *Town of Winchester*, 19 MLC 1591, 1595 (1992); *Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1555 (1989).

Section 2 of the Law provides, in pertinent part:

> Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion.

The filing and processing of grievances constitutes concerted, protected activity under Section 2 of the Law. *Quincy School Committee*, 27 MLC at 91, *citing*, *City of Somerville*, 23 MLC 11, 14 (1996); *Massasoit Greyhound Association*, 23 MLC 142, 146 (1996); *Town of Clinton*, 12 MLC 1361 (1985); *Boston City Hospital*, 11 MLC 1065 (1984); *Town of Halifax*, 1 MLC 1486 (1975). Additionally, an employee's statement describing the intention to seek the union's assistance falls within the parameters of Section 2 of the Law. *Quincy School Committee*, 27 MLC at 91, *citing*, *Town of Wareham*, 3 MLC 1334, 1336 (1976).

To determine whether an employer has violated Section 10(a)(1) of the Law, the Board applies an objective test focusing on the impact the employer's conduct would have on a reasonable employee rather than the subjective impact of the employer's conduct on the actual employee involved. *Quincy School Committee*, 27 MLC at 91, *citing*, *City of Peabody*, 25 MLC 191, 193 (1999). Proof of illegal employer motivation is not required. *Quincy School Committee*, 27 MLC at 91, *citing*, *City of Boston*, 8 MLC 1281, 1284 (1981).

The Board has found expressions of employer anger, criticism, and ridicule directed at employees' protected activities to be unlawful. *Athol-Royalston Regional School District*, 25 MLC 28, 31 (1998), *citing*, *Groton-Dunstable Regional School Committee*, 15 MLC at 1556-1557. Specifically, the Board has determined that remarks clearly connecting adverse employment action to protected activity would tend to discourage and intimidate a reasonable employee from engaging in protected activity. *Town of Bolton*, 32 MLC 20, 25 (2005), *citing*, *Town of Dennis*, 29 MLC 79, 83 (2002); *City of Peabody*, 25 MLC 191, 193 (1999). In *City of Peabody*, the city's agent threatened to suspend an employee if that employee brought union representation to the agent's office again in the future. *Id.* at 192. The Board found that the remark by the city's agent clearly conveyed displeasure with the employee's decision to exercise Section 2 rights. *Id.* at 193. The Board determined that the threat of future discipline would deter a reasonable employee in the exercise of those rights. *Id.* at 193-194.

Here, on November 7, 2003, Murphy met with Anastasi to resolve the issue of receiving overtime. During the discussion, Murphy indicated he would seek the Union's assistance in filing a grievance concerning the issue. In response, Anastasi slammed his hand on the desk and stated: "When the grievance hits my desk, there goes your man-out overtime." The Union argues that Anastasi's direct threat to eliminate man-out overtime opportunities for bargaining unit members at the Education Center if Murphy were to file a grievance would interfere with the rights of employees in violation of Section 10(a)(1) of the Law. We agree.

Murphy's statement that he intended to seek the Union's assistance for his potential grievance regarding overtime constituted concerted, protected activity. Anastasi's declaration described above clearly connected adverse employment action to Murphy's protected activity. Anastasi's declaration, coupled with the physical demeanor of slamming his hand on his desk, can only be interpreted as a threat to discourage Murphy from filing a grievance. Therefore, we conclude that Anastasi's statements and actions would interfere with, restrain, and coerce reasonable employees in the exercise of their rights under Section 2 of the Law. Accordingly, we find that the School Committee has independently violated Section 10(a)(1) of the Law.

Conclusion

For the reasons stated above, the School Committee independently violated Section 10(a)(1) of the Law.

Order

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Employer shall:

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7. The witnesses at the hearing did not explain Cronin's hypothetical statements.

1. Cease and desist from:

a. Making statements that would tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 2 of the Law.

b. In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 2 of the Law.

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

a. Refrain from making statements that would tend to interfere with, restrain, and coerce employees in the exercise of their rights guaranteed under Section 2 of the Law.

b. Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate and where notices to these employees are usually posted, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and,

c. Notify the Division in writing within thirty (30) days of receiving this Decision and Order of the steps taken to comply with it.

SO ORDERED.

NOTICE TO EMPLOYEES

The Commonwealth Employment Relations Board has determined that the Newton School Committee (School Committee) has violated Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by interfering with, restraining and coercing employees in the exercise of their rights guaranteed by Section 2 of the Law when Facilities Operations Manager Paul Anastasi told bargaining unit member David Murphy that "when the grievance hits my desk, there goes your man-out overtime." The School Committee posts this Notice to Employees in compliance with the Commonwealth Employment Relations Board's order.

Section 2 of the Law gives public employees the following rights:

To organize,

To form, join, or assist any union,

To bargain collectively through representatives of their own choice,

To act together for other mutual aid or protection,

To choose not to engage in any of these protected concerted activities.

WE WILL NOT make statements that would tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 2 of the Law.

WE WILL NOT in any like or similar manner, interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 2 of the Law.

WE WILL refrain from making statements that would tend to interfere with, restrain and coerce employees in the exercise of their rights guaranteed under Section 2 of the Law.

[signed]
Newton School Committee

In the Matter of AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 93, LOCAL 1700, AFL-CIO

and

GERARD T. SHAUGHNESSY

Case No. MUPL-03-4477

72.21	***duty to inform employee of arbitration grievance hearing***
72.22	***duty to investigate and process grievance***
91.11	***statute of limitations***

June 27, 2008
Michael A. Byrnes, Chairman
Paul T. O'Neill, Board Member

Jennifer Springer, Esq.	*Representing the American Federation of State, County and Municipal Employees, Council 93, Local 1700, AFL-CIO*
Frank J. McGee, Esq.	*Representing Gerard T. Shaughnessy*

DECISION[1]

Statement of the Case

On December 23, 2003, Gerard T. Shaughnessy (Shaughnessy) filed a charge with the Commission, alleging that the American Federation of State, County and Municipal Employees, Council 93, Local 1700, AFL-CIO (AFSCME or Union) had violated Section 10(b)(1) of Massachusetts General Laws, Chapter 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on January 10, 2006, alleging that AFSCME had violated Section 10(b)(1) of the Law by engaging in conduct that was arbitrary, perfunctory, and constituted inexcusable neglect when it failed to: a) notify Shaughnessy that his promotion to supervising foreman was the subject of a grievance that the Union had filed on behalf of Michael Tassinari (Tassinari), that the Union had decided to submit Tassinari's grievance to arbitration, and that the Union had decided to request that the arbitrator award the position to Tassinari; and b) interview or otherwise investigate and evaluate Shaughnessy's ability and qualifications for promotion to supervising foreman before deciding to process Tassinari's grievance through all the steps of the grievance process, including arbitration. The Union filed its answer to the complaint on May 1, 2006.

1. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." References in this decision to the Commonwealth Employment Relations Board (Board) include the former Labor Relations Commission (Commission). Pursuant to Section 13.02(1) of the Commission's Rules in effect prior to November 15, 2007, the Commission designated this case as one in which it would issue a decision in the first instance.