in union representation falls to the successor bargaining representative. *See Id*.

It is undisputed that the DLR certified MCOP as the exclusive bargaining representative for the police unit on May 11, 2011. MCOP then stepped into the shoes of the Teamsters and took over further processing of pending grievances and prohibited practice charges, including Case No. MUP-09-5636. *See Id.* (citing *Cincinnati* v. *Newspaper Guild, Local 9* v. *Cincinnati Enquirer, Inc.*, 863 F.2d 439, 445-446 (6th Cir. 1988)). MCOP agreed to withdraw Case No. MUP-09-5636 as part of its negotiations for a successor collective bargaining agreement, negotiations which resulted in additional financial compensation for unit members through cost of living adjustments, increases in detail pay, and payment of an educational incentive. As the successor bargaining representative, MCOP had the right to legitimately evaluate the merits of Case No. MUP-09-5636 and to determine whether the case warranted further processing, even though the Teamsters previously had filed the case, *Commonwealth of Massachusetts*, 20 MLC 1087, 1096 (1993 (ignoring the newly certified union and dealing only with the predecessor union about grievances that predated the certification violates the Law).

Finally, the Teamsters, as the predecessor representative, have no standing to challenge MCOP's decision to withdraw the grievance. Once the DLR certified MCOP as the exclusive representative, MCOP and only MCOP has the right and duty to represent members of the police unit in their dealings with the Town on subjects of collective bargaining. *See Id*. (allowing the predecessor union to control how the new union represented employees' in the grievance process would eviscerate the new union's role as exclusive representative).

CONCLUSION

Accordingly, MCOP's motion to withdraw is allowed, and the DLR will close the case.

APPEAL RIGHTS

The parties are advised of their right, pursuant to MGL c.150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, the decision shall become final and binding on the parties.

* * * * * *

In the Matter of BOSTON SCHOOL COMMITTEE

and

BOSTON TEACHERS UNION

Case No. MUP-09-5543

65.6	***employer speech***
66.	***Municipal Employer Bound by Acts of Its Agents***
82.124	***notices***
92.48	***motions for summary judgment***

June 6, 2013
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Mark J. Esposito, Esq.	*Representing the Boston Teachers Union*
John Foskett, Esq.	*Representing the Boston School Committee*

DECISION ON APPEAL OF HEARING OFFICER DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Statement of the Case

On February 22, 2013, a Department of Labor Relations (DLR) Hearing Officer issued a decision [39 MLC 213] allowing the motion for summary judgment filed by the Boston Teachers Union (Charging Party or Union) and denying the motion for summary judgment filed by the Boston School Committee (Respondent or Committee). The Hearing Officer held that the Committee independently violated Section 10(a)(1) of M.G.L c. 150E (the Law) when Committee member Claudio Martinez (Martinez) made comments in a June 1, 2009 memorandum (Memorandum) concerning the protected activity of bargaining unit member Gilberto Rivera (Rivera) that constituted interference, restraint and coercion of a reasonable employee in the exercise of the employee's rights under Section 2 of the Law. In so holding, citing *City of Cambridge*, 4 MLC 1044, 1050 (1977), the Hearing Officer found summary judgment to be appropriate because there were no genuine issues of material fact and the moving parties were entitled to judgment as a matter of law.

On March 5, 2013, the Committee appealed the Hearing Officer's decision to the Commonwealth Employment Relations Board (Board) pursuant to 456 CMR 13.02 (1)(j) and 456 CMR 13.15 and filed a supplementary statement. On March 19, 2013, the Union filed a supplementary statement opposing the Committee's appeal. Having reviewed the record and the parties' statements, the Board affirms the Hearing Officer's decision for the reasons set forth below.

Background

The material facts are undisputed. We summarize them below.[1]

The Union is the exclusive bargaining representative for teachers in the Boston Public Schools. The Union and the School Committee were parties to a collective bargaining agreement that, by its terms, was in effect from September 1, 2007 through August 31, 2010 (2007-2010 Agreement). The 2007-2010 Agreement provided that certain increases in teachers' base pay would take effect on September 1, 2009 and February 1, 2010.

In mid-January 2009, City Mayor Thomas Menino requested that the various unions representing City and School Committee employees agree to delay negotiated wage increases, i.e., freeze wages, to close an anticipated deficit in the City's Fiscal Year 2010 (FY10) budget and avoid possible layoffs. The proposed wage freeze would defer the teachers' September 1, 2009 and February 1, 2010 base pay increases until August 31, 2010, the final day of the contract. As of March 2009, the Union had not agreed to the wage freeze. At a March 25, 2009 meeting, the School Committee voted unanimously to approve a FY10 budget that included layoffs of 212 teaching positions.

In April 2009, the Union's newsletter published an article by Rivera on its front page.[2] Rivera's article, entitled "Appointed School Committee Lectures BTU on Democracy, Then Demands Wage Freeze" stated, in its entirety:

> I have been attending school committee meetings for over a year now. I observe, listen and sometimes comment on the manipulative tactics they have employed to distort the image of the BTU. The meeting on March 25, 2009 was the most telling meeting of all. Claudio Martinez and Michael O'Neil, as well as Rev. Dr. Gregory Groover called for the BTU to hold an election on the wage freeze. Mr. Martinez went as far as saying:
>
> > "New teachers need to get involved in the BTU to make it the democratic process it should be." These comments came in closing statements before the unanimous vote to accept the balanced budget, which includes 212 teaching position layoffs including vacancies. These comments are being made by members of a school committee that are not elected by citizens of Boston.
>
> The parents, students, teachers and community activists implored the school committee to join the fight in finding new sources of revenue and asked them not to accept a budget that would cut teaching positions. The lack of open democracy in the school committee is apparent when one sees that it has only had one vote that was **NOT** unanimous in seven years. Concern showed by parents and others during public comment are mostly ignored.
>
> This is the same school committee that lectures the BTU about what a democracy should be?
>
> For the new teachers, we the BTU — elect our officers, staff, executive board members, delegates and building representatives. We don't always agree but we hold debates and vote on every issue. Most importantly we collectively bargain our contract and vote to accept it as a membership. The BTU is not separate from the professionals it represents. Each individual member makes up the Boston Teachers Union. We are the essence of a democratic process. The school committee needs to respect and learn from this process.
>
> Let's address the issue of the wage freeze for a moment. We should never open up a legally binding contract without having all relevant and accurate information before us. The February 4, 2009 budget proposal had the school department absorbing $107 Million (76%) of the [city's] $140 Million deficit. We only make up 34% of the total city budget. How could we blindly accept a wage freeze given those figures? The budget that was finally presented at the time of the vote on March 25, 2009 was closer to the actual proportionate numbers. Our leadership can look at cost saving alternatives and additional revenue sources that will save all teaching jobs when true information is provided. At present the number of lay-offs keeps dropping without a wage freeze.
>
> It is worth mentioning that, while we were losing 393 teaching positions in that February 4 budget proposal, the academic portion of the budget proposed 160 new hires. Questioning revealed that the Teach for America (TFA) contract was being honored as well as the Boston Teacher Residency (BTR) program. The BTR contract has long-term sustainability and benefits for our children. The TFA contract does not.
>
> The wage freeze issue also poses an unnecessary dilemma for teachers to bail each other out. The federal government can bail out greedy corporate executives but it is up to teachers to fend for themselves? This is not an equitable trend. That is why we have a contract. We need to lobby legislatures for additional revenue sources and equitable allocations of the American Recovery and Reinvestment Act (ARRA) funding.
>
> The last but not least important issue concerns our senior staff in the retirement window? [sic] A wage freeze adversely affects these members who stand to lose a significant amount of money every month for the rest of their lives. This is on top of any money they may have lost in their retirement savings due to the economic crash. The offer made by the city of a onetime 8% non-retirement worthy incentive is not acceptable.
>
> The school committee presented the wage freeze issue as a shared sacrifice and one of the only options to save the initial 900 jobs. I spoke out on this issue at the Blackstone and McCormack budget hearings. I told the committee that BTU members graciously sacrifice personal spending on their classrooms for misc. spending everyday (every year) in ever on-going budget shortfalls. I polled forty colleagues at my school. The average out of pocket spending this year was $1,500. Our wage increase would average $3,200.00 next year. Do other city employees including the mayor buy their own equipment and supplies? *(Gilberto Rivera is a teacher at the Edwards Middle School and candidate for Secretary-Treasurer of the BTU.)* [Emphasis original.]

On or about June 1, 2009, Martinez drafted a Memorandum to the Union's Executive Board entitled "Response to BTU's April 2009 Newsletter Article." On June 3, 2009, prior to a regularly-scheduled School Committee meeting, Martinez distributed copies of his Memorandum to his colleagues on the School Committee and certain other attendees. On that same date, Martinez sent copies of the Memorandum via his personal email account to members of

1. The Hearing Officer's Opinion included Factual Background based upon the Complaint of Prohibited Practice, the School Committee's Answer to the Complaint, the parties' motions and their supporting memoranda.

2. The Union distributes the newsletter, the Boston Union Teacher, to all Union members.

the Union's Executive Committee, Rivera and some public schools. The memorandum stated:

> To: All BPS Employees
>
> From: Claudio Martinez, BPS School Committee Member
>
> Email: [Martinez's personal email address] Date: June 1st, 2009 Pages: 2
>
> Memo
>
> From: Claudio Martinez
>
> To: Boston Teachers Union Executive Board
>
> Response to BTU's April 2009 Newsletter Article
>
> By Claudio Martinez
>
> Boston Teachers Union (BTU) member Gilberto Rivera's front-page article in BTU's April 2009 newspaper admonishing me for publicly responding ("lecturing" according to Mr. Rivera) to questions raised at public and private meetings by young Black and Latino teachers marks an important moment in this publication's history.
>
> Let me first clarify that my remarks were prompted by the fact that these teachers (and many parents before and after them) testified in front of the school committee to ask why incompetent, disengaged and culturally insensitive teachers would keep their jobs, when apparently more energetic, prepared and committed ones would be the first to go, showing a clear lack of understanding of seniority clauses in their union's contract.
>
> These questions from young teachers and my statement encouraging them "to get involved in their union to make it the democratic institution that it should be," triggered not only BTU's President Richard Stutman's childish booing at the meeting but Mr. Rivera's article accusing me of lecturing the BTU on democracy.
>
> Nevertheless, Mr. Rivera's article is historic, as it appears to be the first time that a Latino teacher/writer makes the front page of the BTU paper and only the third time that a Latino (Mr. Rivera again) writes for the publication (I only had access to the last 26 editions of this newsletter but would venture to speculate that historically writers of color have not been at the forefront of this paper either.)
>
> Given the fact that rants against the school committee have been delivered almost exclusively by white writers, it is peculiarly interesting, and insulting in so many ways, that the BTU leadership picked a Latino to attack me; another Latino. But if this is what it takes for a Latino to have a role in BTU's leadership team I am happy to be attacked time and again.
>
> Given the fact (according to BTU's website) that amongst the BTU Officers (9), Executive Board (19), and 23 other Union Committees made up of over 100 members one would be forced to find 1 or 2 Latinos; Mr. Rivera's ascension within BTU is a welcome sign of progress.
>
> Unfortunately, Mr. Rivera's suggestion that my comments are "manipulative tactics to distort the image of the BTU" rings hollow in the face of his factually inaccurate and conveniently selected portions of my full statement at that meeting.
>
> Mr. Rivera accuses me of (1) not joining with parents and community advocates in the fight for finding new sources of revenue while I have clearly stated my support for new taxes and have done so publicly in the last few months at several meetings and protests (2) Mr. Rivera conveniently fails to mention that I also "lectured" the School Committee about our need to review our own practices so we can become more responsive to students, parents and community and (3) Mr. Rivera states that the School Committee has had only ONE vote that was NOT unanimous (his capitalizing) in the last few years. NOT TRUE. As an observer of School Committee proceedings I can recall at least 8 occasions during this period where the school committee did not vote unanimously.
>
> What's more troubling to me is Mr. Rivera's narrow understanding of democracy and his apparent beliefs that 18th century systems of representation are the most appropriate form of representation in a modern democracy.
>
> So let's get to the center of Mr. Rivera's arguments:
>
> (1) Appointed members to governmental bodies like the school committee shouldn't make comments nor encourage institutions like the teachers union to become more democratic.
>
> Let me remind Mr. Rivera and his mentors that the reason we have an appointed school committee is because Boston residents voted via referendum (one of the most salient vehicle[s] of *direct democracy* in our current system) to dismantle what was a highly dysfunctional elected school committee where corruption and incompetence took priority over education. Is Mr. Rivera suggesting that referendums are anti-democratic or that a return to an elected school committee would be better for teachers and students? Is he suggesting that we should start electing and not appointing our Supreme Courts? Should we weaken the US Constitution so elected majorities can impose their wills without any checks and balances? I sure hope not.
>
> (2) Mr. Rivera states that School Committee members like me should "respect and learn from BTU's democratic process." In his words "BTU elected officers, staff, executive board members, delegates and building representatives are the essence of a democratic process."
>
> Really? I think the current and historic lack of diversity in BTU's leadership team is a clear sign that the "democratic processes" that Mr. Rivera so much wants me to respect and learn from, have been incredibly slow in integrating and encouraging new and important voices in our society and is an outdated form of democracy that requires a radical innovation and a new science. Unions should be at the forefront of these innovations encouraging their members to work alongside parents, students and school committees to develop a successful 21st century public educational system.
>
> Regrettably, Richard Stutman's candidate statement and Mr. Rivera's article are a clear example of the narrow and purely economic worldview of current US union leaders, stuck in defending the economic interests of a limited category of workers, instead of envisioning new forms of labor organizations that can represent the entire network of singularities that collaboratively produce social wealth. It's time to open up trade unions to other segments of society by merging them with growing powerful social movements.
>
> It's time for the Boston Teachers Union leadership to take serious steps to radically diversify its leadership and energetically promote the active involvement of all its members and not just the usual suspects.
>
> Claudio Martinez-School Committee Member-Boston Public Schools [Emphasis original.]

The one-count Complaint alleged that Martinez's criticism of Rivera interfered with the free exercise of Rivera's right to engage in the concerted, protected activity of writing the above-quoted article for the Union newspaper and that, by that conduct, the Committee independently interfered with, restrained and coerced its

employees in the exercise of rights guaranteed under Section 2 of the Law in violation of Section 10(a)(1) of the Law.

The Hearing Officer rejected the Committee's arguments that: 1) Martinez's Memorandum was merely an expression of his personal opinion, finding that it was reasonable for unit members to conclude that Martinez spoke on behalf of the Committee; 2) that each phrase should not be subjected to a litmus test of permissibility, finding the tone of the letter as a whole is angry and demeaning; 3) that Martinez criticized the content of Rivera's article and did not express disapproval of his protected activity in writing the article, finding that Martinez characterized Rivera's act of writing the article as an attack; 4) that the Memorandum could not have chilled reasonable employees in the exercise of their Section 2 rights because Martinez did not make an express or implied threat against Rivera for engaging in protected, concerted activity, finding that under Board precedent a direct threat of adverse consequences is not an essential element of a Section 10(a)(1) violation; and 5) that Martinez had the right to respond to Rivera's article and, in the absence of threatening remarks, the nature of his response does not warrant placing limitations on Martinez's right of expression The Hearing Officer found instead that the prohibition against making statements that would tend to interfere with employees in the exercise of their rights under the Law does not impose a broad "gag rule" that prohibits employers from openly expressing their opinions about matters of public concern, and the ultimate test is whether Martinez's Memorandum would chill a reasonable employee's right to engage in activity protected by Section 2 of the Law.

Opinion[3]

The Hearing Officer properly stated the standard under the Law for summary judgment. That is, summary judgment is appropriate when there are no material facts in dispute and the moving parties are entitled to judgment as a matter of law. *See Boston School Committee*, 36 MLC 48, 49 (2009) (citing *City of Cambridge*, 4 MLC 1044, 1050 (1977)). When considering cross-motions for summary judgment, the moving parties may satisfy their burden of demonstrating the absence of a triable issue either by submitting evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of the case at hearing. *Flesner* v. *Technical Communications Corp.*, 410 Mass.805, 809 (1991).

Here, the Committee does not contest that the underlying facts are undisputed and does not challenge the Hearing Officer's findings regarding material facts. Rather, in its supplementary statement, the Committee challenges: 1) the conclusion that the Memorandum by the individual School Committee member could reasonably be viewed as statements made on behalf of the Respondent, rather than an expression of personal opinion in response to a personal attack; 2) the conclusion that the Memorandum is directed at the act of writing the article instead of at its content; 3) the conclusions that the Memorandum would chill a reasonable employee's right to engage in protected activity and that there are no grounds to place restrictions on the author's right to engage in freedom of speech on the matters raised in the article; and 4) the remedy, to the extent it bars individuals from engaging in the type of speech contained in the Memorandum. We address each argument in turn, below.

Agency

The Hearing Officer correctly stated how, under the Law, the principles of agency govern and that such authority may be actual, implied or apparent. *Town of Chelmsford*, 8 MLC 1913, 1916 (1982), *aff'd.*, 15 Mass. App. Ct. 1107 (1983). The issue of agency may be gauged from the point of view of the employees. *Id.* (citing *J.S. Abercrombie Co.*, 83 NLRB 524, *enf'd*. 180 F.2d 750 (5th Cir., 1950)). In the instant case, the Hearing Officer found that it was reasonable for unit members to conclude that Martinez spoke on the Respondent's behalf because Martinez used his title in the Memorandum's heading, next to his name at the end of it, and when he emailed the Memorandum to various schools and asked that it be distributed. In addition, he handed copies of the Memorandum to members of the School Committee and to others prior to the start of a School Committee meeting. *Citing Town of Bolton*, 32 MLC 20, 25 (2005), the Hearing Officer found it relevant that the content of the Memorandum referenced events at and testimony presented during School Committee hearings.

Respondent contends that the undisputed content of the Memorandum can only be read reasonably as a response by Martinez to what he perceived as a personal attack on himself. We disagree. The bulk of the Memorandum addresses a broad array of issues that were raised at Committee meetings and other public forums involving teachers, the roles teachers play in their Union, and other matters including, notably, who writes articles for the Union newsletter. While Respondent claims the Memorandum was in response to personal attacks in Rivera's Union newsletter article, Rivera's article only mentions Martinez in the first paragraph, along with two other Committee members who also called for the Union to hold an 'election' on the wage freeze. Rivera's article then quotes Martinez telling new teachers to get involved in the Union to make it democratic, making comparisons with the appointed Committee.

We do not find it relevant that Martinez sent the Memorandum from his personal email. Given that he identified himself as a Committee member and, given the method and breadth of distribution, a reasonable employee could view it as an action of Respondent rather than a personal statement. *See Town of Bolton*, 32 MLC at 25 (finding that employees could form a reasonable belief that a selectman was speaking on Town's behalf when, despite the fact that the selectman stated that the letter was from him "personally," it was posted on police department's bulletin board and referenced the selectman's actions on behalf of town in prior dealings with union). While there is no evidence the School Committee or any of its members adopted or ratified the Memorandum, the School Committee has cited no authority for such a requirement

3. The Board's jurisdiction is not contested.

and we find none. To the contrary, the Board has held that the remarks of a school committee chairperson, in a private telephone call, could have reasonably restrained and coerced an employee in the exercise of Section 2 rights, thus constituting an independent violation of Section 10(a)(1) of the Law. *Provincetown School Committee*, 13 MLC 1396, 1400 (1987).

Act of Writing

When conduct is protected by Law, the employer has no right to interfere with it and the "expression of employer anger, criticism or ridicule directed to an employee's protected activity has been recognized to constitute interference, restraint and/or coercion of employees." *Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1557 (1989) (citing *Greater New Bedford Infant Toddler Center*, 12 MLC 1131, 1134-5 (H.O.1985) *aff'd* 13 MLC 1620 (1987); *Commonwealth of Massachusetts*, 8 MLC 1672, 1674-76 (1981)). The legal test is the effect of the employer's conduct on a reasonable employee's exercise of his rights guaranteed under the Law. *See also Sheriff of Suffolk County*, 26 MLC 5, 10 (H.O.1999) (a public employer risks violating the Law if his disparaging remarks, expressions of anger, or criticism directed at an employee's personal characteristics or other issues spill over to criticism directed at the employee's protected activity, or where the lines of distinction are blurred).

With respect to whether the Memorandum was directed at Rivera's act of writing the article rather than its content, the Hearing Officer found most troublesome Martinez's comments regarding Rivera's act of writing the article. That is:

> Given the fact that rants against the school committee have been delivered almost exclusively by white writers, it is peculiarly interesting, and insulting in so many ways, that the BTU leadership picked a Latino to attack me; another Latino. But if this is what it takes for a Latino to have a role in BTU's leadership team I am happy to be attacked time and again.

The Board agrees with the Hearing Officer that these comments particularly when contained in a Memorandum that is written in an angry, sarcastic and demeaning tone, would chill a reasonable employee's right to exercise protected rights in writing articles for a union newsletter and, thus, violate Section 10)(a)(1) of the Law.

Chilling Effect/Restrictions on Speech

We reject the Employer's arguments that Martinez's statements could not have chilled reasonable employees in the exercise in their rights because there is no evidence that the employee's protected activities or the protected activities of any other employees were chilled. As noted above, in determining whether a violation has occurred under Section 10(a)(1) of the Law, the Board applies an objective test that focuses on the impact that the employer's conduct would have on a reasonable employee rather than whether there is actual interference with employee rights. *City of* Peabody, 25 MLC 191, 193 (1999) (citing *Town of Winchester*, 19 MLC 1591, 1596 (1992)). Ultimately, the Law prohibits *any* employer action that reasonably could have a chilling effect on the exercise of employee rights, whether it is threats for engaging in protected activity or, as in this case, expressions of anger, criticism or ridicule directed at such activity. *Commonwealth of Massachusetts*, 28 MLC 250, 253 (2002) (Board found no Section 10(a)(1) violation where it construed employer's statement to union steward, to "be careful because when you swim with piranhas, you may get bit," as neither a threat nor a disparaging statement about steward's protected activity). For the reasons stated above, we agree with the Hearing Officer that Martinez's demeaning and disparaging statements regarding Rivera's writing the article would chill a reasonable employee in their Section 2 rights.[4]

With respect to Respondent's argument that there are no grounds to place restrictions on Martinez's right to engage in freedom of speech on the matters raised in the article, we reiterate the principle articulated above, that the Committee's right of expression does not include making statements that would tend to interfere with employees in the exercise of their Section 2 rights under the Law. This limitation does not impose a broad "gag rule" that prohibits employers from openly expressing their opinions about matters of public concern. *City of Lowell*, 29 MLC 30, 33 (2002); *Town of Winchester*, 19 MLC at 1597. Nevertheless, the Supreme Judicial Court has held that public servants must suffer, from time to time, limits on constitutional rights like speech as are appropriate to the exercise in given situations of their official duties or functions. *In the Matter of Bonin*, 375 Mass. 680, 709 (1978), (citing *Broderick* v. *Police Comm'r of Boston*, 368 Mass. 33, 37, 42-43 (1975); *Boston Police Patrolmen's Ass'n* v. *Boston*, 367 Mass. 368, 374-375 (1975); *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 565, 567 (1973); *Morial* v. *Judiciary Comm'n of La*., 565 F.2d 295 (5th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 1013 (1978); *Perry* v. *St. Pierre*, 518 F.2d 184 (2d Cir. 1975); *In re Gaulkin*, 69 N.J. 185, 191 (1976)). Any limits imposed must, of course, find affirmative justification in the particular facts, having in view the weight and significance of the constitutional values thus temporarily subordinated. *Id.* [5]

Given this standard, we disagree with the Committee's argument that there are no grounds to place restrictions on the author's right to speak on any of the matters raised in the Union newsletter article. The Board may have arguably been faced with a different case had the Memorandum been limited to addressing the substance of Rivera's criticism and the public issues raised therein. As the excerpted portion demonstrates, it went beyond that, however, and criticized the BTU's selection of Rivera to write an article and Rivera's exercise of his rights under Section 2 of the Law in doing so. That speech could chill reasonable employees in their exercise

4. We therefore distinguish *Commonwealth of Massachusetts*, where the Board found no evidence that the employer's statement expressed anger, criticism or ridicule directed at protected activity.

5. We agree with the Committee that *Bonin* is factually distinguishable in that it concerned whether a sitting judge violated the Code of Judicial Conduct and SJC Rules by attending a fundraiser for criminal defendants in certain cases pending in his court. Nevertheless, the general principles articulated therein, that reasonable restrictions on free speech or associational rights may be imposed on public servants, depending on the particular facts of the case, are clearly pertinent to this matter.

of those same rights, and we therefore uphold the Hearing Officer's conclusion that the School Committee violated Section 10(a)(1) of the Law.

The Remedy

It is well established that an appropriate remedy when unlawful conduct interferes with employees' exercise of rights guaranteed under the Law includes posting a Notice to Employees (Notice). This critical remedial tool informs employees of their rights under the Law and the employer's intention to comply with it in the future. The posting of a Notice thus effectuates the purposes and polices of the Law.[6] This remedy does, as the Committee contends on appeal, bar individuals from engaging in certain speech contained in the Memorandum. However, as found above, speech that interferes with employees' exercise of rights guaranteed under the Law violates Section 10(a)(1) of the Law.

Conclusion

For the reasons set forth above, the Board affirms the Hearing Officer's decision that the Committee independently violated Section 10(a)(1) of the Law when Committee member Martinez made comments in the Memorandum concerning the protected activity of Rivera that would constitute interference, restraint and coercion of a reasonable employee in the exercise of the employee's rights under Section 2 of the Law. We therefore issue the following Order.

Order

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED THAT the Boston School Committee:

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 the Law.

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

2. Take the following 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 the Law.

   b) Post immediately in all conspicuous places where members Union's bargaining unit usually congregate, or where notices are usually posted, *including electronically*, if the School Committee customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

   c) Notify the DLR in writing of the steps taken to comply with this decision within ten (10) days of receipt of this decision.

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in *Quincy City Hospital* v. *Labor Relations Commission*, 400 Mass. 745 (1987), this determination is a final order within the meaning of MGL c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to MGL c.150E, §11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision.** No Notice of Appeal need be filed with the Appeals Court.

* * * * * *

In the Matter of TOWN OF PLYMOUTH

and

AFSCME, COUNCIL 93, AFL-CIO

Case No. MUP-07D-5122

52.6 interpretation
67.6 other refusal to bargain

June 21, 2013
Kathleen Goodberlet, Hearing Officer

David Jenkins, Esq.	*Representing the Town of Plymouth*
Karen Clemens, Esq.	*Representing AFSCME, Council 93, AFL-CIO*

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the Town of Plymouth (Town) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law), by repudiating a 1998 Memorandum of Agreement (1998 MOA) that requires the Town to meet with AFSCME, Council 93, AFL-CIO (Union) six months prior to the expiration of a vender's waste management contract with the Town. I dismiss the complaint because the language of the 1998 MOA does not clearly and unambiguously specify the six-month time frame within which the Town was required to meet with the Union, and because there is no evidence that the Town refused a Union demand to meet, or failed to consider a Union proposal pursuant to the 1998 MOA. Accordingly, I do not find that the Town repudiated the 1998 MOA, and I dismiss the complaint.

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6. It is also appropriate to send copies of the Notice to teachers electronically, if the School Committee customarily communicates to unit members via intranet or email, consistent with the Board's practice for the last several years. *See Boston School Committee and Boston Teachers Union*, 37 MLC 214, 223 (2011).