In the Matter of CITY OF LAWRENCE

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 888

and

AFSCME, COUNCIL 93, AFL-CIO

Case No. MUP-11-6279

82.13 *reinstatement*

*June 28, 2013*
*Marjorie F. Wittner, Chair*
*Elizabeth Neumeier, Board Member*
*Harris Freeman, Board Member*

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| *David M. Connelly, Esq.*<br>*Colin Boyle, Esq.* | *Representing the City of Lawrence* |
| *David B. Rome, Esq.* | *Representing SEIU, Local 888*[1] |
| *Erin L. DeRenzis, Esq.* | *Representing AFSCME, Council 93, AFL-CIO* |

## DECISION ON APPEAL OF HEARING OFFICER DECISION

### Summary

This is an appeal by the Charging Party, Service Employees International Union, Local 888 (Union) from the remedial portion of a decision that a Department of Labor Relations (DLR) Hearing Officer issued on December 12, 2012.[2] The second and third count of the DLR's complaint alleged that the City of Lawrence (Employer or City) had unlawfully transferred bargaining unit work previously performed by Thomas Knightly (Knightly), who was a member of the bargaining unit represented by the Union.[3] The parties waived their right to a hearing and submitted stipulated facts. The Hearing Officer concluded that the City violated Section 10(a)(5) of the Law by: 1) transferring the district court prosecution duties that Knightly had previously performed to non-bargaining unit employee Roy Hileman (Hileman) without giving the Union prior notice and an opportunity to bargain about the impact of the decision on bargaining unit employees' terms and conditions of employment; and 2) transferring Knightly's non-prosecutorial duties to Hileman without giving the Union prior notice and an opportunity to bargain about the decision and its impacts. As a remedy, the Hearing Officer ordered the City to, among other things, restore to the bargaining unit the non-prosecutorial duties that Knightly performed prior to his layoff until the City satisfied its bargaining obligation. However, because facts outside the stipulations, i.e., the parties' joint motion to defer Count I of the Complaint to arbitration and the Union's

1. AFSCME Council 93 did not file an appeal from the Hearing Officer's decision.

2. The decision is reported at 39 MLC 152 (2012).

3. The first count, which pertained to an alleged change in sick leave payout, was deferred to arbitration after the parties filed a joint motion to defer that count.

charge, indicated that Knightly had retired on November 1, 2010,[4] the Hearing Officer specifically declined to order the City to reinstate Knightly. She also terminated, as of his retirement date, the City's backpay liability for any losses Knightly suffered as a result of the City's unlawful actions.

On January 4, 2013, the Union filed a request for review of the Hearing Officer's remedy, arguing that the fact that Knightly retired should not preclude reinstatement or a full make-whole remedy. The City filed an opposition to the Union's request for review on January 14, 2013.[5] Having reviewed the record and the parties' supplementary statements on appeal, the Board vacates Section 2(c) of the Order and remands this case to the Hearing Officer for further proceedings consistent with this decision.

Facts

The undisputed facts relevant to the Union's appeal are as follows. Knightly had 32 years of service as an Enforcement Officer in the City's Inspectional Services Department. Knightly's regular duties as Enforcement Officer included serving as Prosecuting Officer with respect to sanitary and building code violations and trash tickets. In March 2006, the City also assigned Knightly to perform the duties of the Assistant Commissioner of Health, a non-prosecutorial position. In this capacity, he supervised the sanitary, food, milk and housing inspectors' daily activities, and assisted them with issues that are more complex and in the negotiation of compliance actions.

The City laid Knightly off on June 7, 2010 and transferred his duties to Hileman in July 2010. Knightly retired from his position effective November 1, 2010. Nothing in the record, stipulated or otherwise, reflects when Knightly first decided to retire or his specific reasons for doing so.

Opinion [6]

This appeal requires the Board to decide whether the Hearing Officer properly declined to order the City to offer Knightly reinstatement where facts outside the narrow confines of the stipulations showed that he retired after his work was transferred outside of the bargaining unit. As the Hearing Officer correctly noted, the traditional remedy in Section 10(a)(5) cases is restoration of the *status quo ante*, or the conditions that existed before the prohibited practice took place, and an order to make all affected employees whole for losses suffered as a result of the unlawful action. *City of New Bedford*, 39 MLC 126 (2012); *Massachusetts Board of Regents*, 14 MLC 1469, 1486-1487 (1988). Thus, in this case, had Knightly not retired, the appropriate remedy would have been to order him reinstated to the non-prosecutorial portions of his duties. He retired after the unlawful transfer took place, however, and the question on appeal is what effect, if any, his subsequent retirement had on his reinstatement rights.

Citing *Town of Harwich*, 32 MLC 27 (2005), *Newton School Committee*, 6 MLC 1701 (1980) and a number of federal decisions,[7] the Union contends that reinstatement is required when an employee has lost a job due to the employer's unlawful behavior, unless the employer proves that the employee has voluntarily retired or resigned. The Union claims that this, along with the Hearing Officer's failure to consider other factors in the record that bear on whether Knightly voluntarily retired, i.e., the timing of his retirement - *after* the alleged prohibited practice occurred - and his active pursuit of this charge and a grievance seeking reinstatement, warrant the Board modifying Section 2(c) of the Order to require the City to offer reinstatement to Knightly and make him whole for all lost wages and interest.[8] The Union alternatively asks the Board to remand the matter to the Hearing Officer for further proceedings concerning the effect Knightly's retirement should have on the remedy.

The City opposes the request and contends that, under the Board law that the Union cites, the Union has the burden of demonstrating that Knightly's retirement was for reasons other than the fact that he did not want to work anymore. Because the Union failed to do so, its appeal should be denied. The City further claims that reinstatement would be inappropriate because the Board could only order the City to reinstate Knightly to his non-prosecutorial duties. For reasons discussed below, we disagree.

The Board's goal in fashioning appropriate remedies in cases involving a violation of Section 10 of the Law is to place a charging party in the position it would have been in but for the unfair labor practice. *Commonwealth of Massachusetts*, 14 MLC 1322, 1327 (1988); *City of Gardner*, 10 MLC 1218, 1222 (1983). Where, as here, an employee retires after a prohibited practice results in job loss, the analysis of whether the make-whole remedy includes reinstatement must necessarily turn on whether the employee would have retired even if the employee had not lost her job due to an unfair labor practice. The following cases are instructive as to the evidence to be considered in such circumstances.

In *Town of Harwich*, 32 MLC 27 (2005), a decision that both parties rely on to make their respective points, the evidence showed that the employee had applied for accidental disability retirement *before* the occurrence of the unfair labor practice that resulted in her job loss. *Harwich* does not make clear who introduced this evidence, but the union did not argue that the employee was coerced

4. Pursuant to DLR Rule 15.09, 456 CMR 15.09 (1), the hearing record in a prohibited practice case consists of "the charge, the complaint, notice of hearing, return of service of complaint and notice of hearing, answer, motions, rulings, orders, taped recording or stenographic transcription, stipulations, exhibits, documentary evidence, deposition and amendments to any of the foregoing."

5. The City also filed its own appeal of the Hearing Officer's decision, but subsequently withdrew it.

6. The Board's jurisdiction is not contested.

7. *Augusta Bakery Corp.*, 298 NLRB 58 (1990) *aff'd Augusta Bakery Corp.* v. *NLRB*, 957 F. 2d 1467 (7th Cir. 1992); *NLRB* v. *KSM Industries, Inc.*, 682 F.3d 587 (2012); Sever v. NLRB 231 F.3d 1156 (9th Cir. 2000); *Riccio* v. *Department of the Navy*, 98 MSRP 345 (2005).

8. The Union also argues that any offsets to his gross back pay and benefits from compensation he has received since July 1, 2010 should be addressed in compliance proceedings under 456 CMR 16.08. We address this issue in n. __, below.

into applying for retirement and the Board found that the facts did not suggest coercion. 32 MLC at 32, n.16. The Board's make-whole remedy, therefore, did not include reinstatement. In *Newton School Committee*, 6 MLC 1701 (1980), the employee received a written warning that the Board found violated Section 10(a)(3) of the Law. Although the employee was not terminated by the employer, during the pendency of the case he resigned. *Id.* The Board declined to reinstate as part of its make-whole remedy because the union had not argued that the employee's resignation was, in fact, a constructive discharge and no evidence on the record showed that the School Committee had made life so unbearable for the employee that his only alternative was to resign. *Id.* at 1706.

Another Newton School Committee case is also instructive as it further clarifies that in order for reinstatement to be excluded from a make-whole remedy, evidence must be presented that permits a fact finder to conclude that the employee who was separated from employment as a result of an unfair labor practice did not remain available for re-employment. *Newton School Committee and Newton School Custodians Association, Supplementary Decision and Order*, 8 MLC 1538 (1981) (*Newton Supplementary*), *aff'd. sub nom. School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1982). In that case, after finding a failure to bargain with the union in violation of Section 10(a)(5), the Board ordered seven laid off employees reinstated with back pay "from the date of their terminations ... to the date of the Employer's offer of reinstatement, less net earnings during that period." *Newton Supplementary*, 8 MLC at 1538. Lengthy hearings on the back pay issue addressed, among other things, whether certain employees remained available for reinstatement and whether they should be treated as having abandoned their search for employment for purposes of mitigation of damages. One employee, Carmichael, moved to Prince Edward Island, Canada after he was laid off. The Board concluded that "the mere fact of the move does not establish either *unavailability for re-employment*, or abandonment of the search for interim employment." (Emphasis supplied.) *Id.* at 1564. The Board found no evidence on the record as to the relative availability of jobs for persons with Carmichael's skills as between Canada and Massachusetts and that it was rational to assume that he was able to reduce his living expenses by the move. *Id.* The Board held that as "the Employer has the burden of proof on any issue of mitigation, we decline to disqualify Carmichael or reduce Carmichael's back pay entitlement because of the move." *Id.*[9] In upholding the Board's decision the Supreme Judicial Court specifically held that nothing "about the procedures before the commission made it unfair to place the burden of proof of mitigation of damages on the school committee." *School Committee of Newton vs. Labor Relations Commission*, 388 Mass. 557, 580 (1982).

In *Newton Supplementary* the Board reached the opposite conclusion regarding another employee, Thibault. After being laid off, Thibault left Massachusetts to attend a motorcycle mechanic's school in California. The Board found that Thibault's actions "*amounted to a decision to withdraw from the job market* to return to school and train for another career." Therefore, he "*may no longer be considered as available for reinstatement* or other interim employment."(Emphasis supplied.) *Id.* at 1565.

Based on the foregoing, our case law makes it clear that in order to exclude reinstatement from a make-whole remedy that is warranted because an employee was separated from employment as a result of an unfair labor practice, evidence must be presented that permits a fact finder to find that the employee did not remain available for re-employment. *Id.* at 1564. In this case, the Hearing Officer effectively treated Knightly's retirement, which occurred after he was laid off, as a voluntary decision to withdraw from the workforce. She concluded that an order of reinstatement was not proper and back pay liability would be terminated as of the date of such withdrawal from the workforce. However, the record facts only show that Knightly's retirement occurred *after* the unfair labor practice and the Hearing Officer found no other facts in the record upon which to determine whether Knightly would have retired even if he had not suffered job loss due to the employer's prohibited practice or otherwise did not remain available for re-employment. Therefore, as a matter of law, we disagree with the Hearing Officer's conclusion that an employee's decision to retire following a separation that resulted from a prohibited practice, without more, precludes reinstatement. *See Newton Supplementary*, 8 MLC at 1564. That is, without additional facts, our case law does not support a presumption that Knightly's retirement is the equivalent of a voluntary decision to withdraw from the workforce. And, our case law discussed above and upheld by the Court, did not place a burden on Knightly to present additional evidence to prove entitlement to the full remedy when the employer has violated Section 10(a)(5) of the Law. *See also* NLRB case handling manual at 10560.9, (stating that application for, or the receipt of Social Security or other retirement benefits does not necessarily establish a withdrawal from the labor market).

We therefore agree with the Union and find that where an employee retires after an unfair labor practice occurs resulting in loss of work, the decision to retire and start collecting retirement benefits, absent countervailing evidence, is akin to a decision to seek alternative employment so as to continue receiving a source of income. In other words, the fact of retirement, standing alone, should not preclude an order of reinstatement or toll backpay as part of a make-whole remedy unless the evidence shows that the decision would have been made even if the unfair labor practice had not taken place. In so holding, we also reject the Employer's argument that reinstatement is not appropriate at all in this case because only part of Knightly's duties could be restored to the unit. Section 2(b) of the Order, which we do not disturb, requires the City to restore to the bargaining unit the non-prosecutorial duties that Knightly

9. The Board declined to award expenses for relocation because the employee bears the burden of proof on establishing expenses incurred in interim employment and he failed to meet that burden.

performed prior to his layoff. Reinstating Knightly to perform those duties is therefore not precluded by this Order.

The difficulty with this case on appeal however, is that this case was decided on stipulations and those stipulations contained no information regarding the reasons for Knightly's retirement. While we do not fault the Hearing Officer for going outside the stipulations to discover this fact (the documents were in the official record), we will similarly not fault either party for not making any arguments or presenting evidence on this issue. Without knowing why Knightly retired or when he first submitted retirement papers, we are in no position to rule on this issue.

Under these circumstances, we vacate Section 2(c) of the Order and remand this matter to the Hearing Officer for further fact-finding consistent with this decision. Because the evidence shows that Knightly retired after the Employer engaged in the unlawful activity that caused Knightly to lose his job, the Employer bears the burden of presenting evidence to show that Knightly would have retired even if the unfair labor practice had not occurred or that he otherwise voluntarily withdrew from the workforce.[10]

SO ORDERED.

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10. The issue of whether Knightly's interim income from retirement benefits, or other sources, should offset whatever backpay he may be owed, is separate from the issue presented here, whether the Employer's backpay liability was tolled when Knightly retired. Although offset disputes are ordinarily addressed in compliance proceedings, *see generally*, 456 CMR 16.08, the Board leaves it to the Hearing Officer to decide whether to take evidence on this issue on remand.