

In the Matter of SHERIFF'S OFFICE OF PLYMOUTH  
COUNTY

and

NATIONAL CORRECTIONAL EMPLOYEES' UNION,  
LOCAL 104

MUP-05-4475

52.36	<i>impact of one unit's contract on another unit</i>
52.64	<i>past practices</i>
54.517	<i>seniority</i>
54.55	<i>past practices</i>
62.42	<i>demotion</i>
63.21	<i>filing a grievance</i>
63.5	<i>seniority</i>
63.7	<i>discrimination – union activity</i>
65.22	<i>filing a grievance</i>
67.12	<i>contract with another union</i>
67.15	<i>union waiver of bargaining rights</i>
67.8	<i>unilateral change by employer</i>

September 10, 2012

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Elizabeth Neumeier, Board Member

Harris Freeman, Board Member

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   Brotherhood of Correctional  
   Officers

### DECISION<sup>1</sup>

#### Summary

The issues in this case are whether the Sheriff's Office of Plymouth County (Employer or Sheriff's Office) violated Sections 10(a)(3) and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by retaliating against Brian Case (Case) for engaging in concerted, protected activity when it did not reappoint him as a lieutenant and then refused to credit him with the seniority that he previously had accrued (Count 1) and whether the Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing the method that it used to calculate Case and Shaun Peterson's (Peterson) accrued seniority (Count 2). Based on the record, and for the reasons explained below, we conclude that the Employer violated

Sections 10(a)(3) and, derivatively, 10(a)(1) of the Law by not reappointing Case as lieutenant. We also find that the Employer violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by unilaterally changing the method that it used to calculate Case's and Peterson's seniority. However, we dismiss the allegation that the Employer retaliated against Case by refusing to credit him with the seniority that he previously accrued.

#### Statement of the Case

On June 27, 2005, the International Brotherhood of Correctional Officers (IBCO or Union)<sup>2</sup> filed a charge with the Commission alleging that the Sheriff's Office of Plymouth County (Employer or Sheriff's Office) had violated Sections 10(a)(1), (2), (3) and (5) of Massachusetts General Laws, Chapter 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on April 5, 2007 alleging that the Employer had violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by retaliating against Case and Peterson for engaging in concerted, protected activity when it did not reappoint them as a lieutenant and a captain, respectively, and then refused to credit them with the seniority that they previously had accrued (Count 1). Further, the complaint alleged that the Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing the method that it used to calculate Case's and Peterson's accrued seniority (Count 2).<sup>3</sup>

On November 20, December 10, and December 11, 2007 and January 11, January 16, February 21, February 28 and February 29, 2008, a duly-designated Commission hearing officer (Hearing Officer) conducted a hearing. Both parties had an opportunity to be heard, to examine witnesses and to introduce evidence. On February 28, 2008, the Union, in response to a request from Peterson, submitted affirmative, written notification that it no longer sought to pursue the allegations in Count I that pertained to Peterson. The parties subsequently submitted their post-hearing briefs post-marked on May 9, 2008.

#### Findings of Fact<sup>4</sup>

NCEU and the Employer both challenged portions of the Hearing Officer's Recommended Findings of Fact, which were issued on May 2, 2011. After reviewing those challenges and the record, we adopt the Hearing Officer's Findings of Fact, as modified where noted, and summarize the relevant portions below.

The Sheriff is an elected official who is responsible for the operation of the Plymouth County House of Correction and Jail (PCCF)

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." Pursuant to Chapter 3 of the Acts of 2011, the Division's name is now the Department of Labor Relations (DLR). The Commonwealth Employment Relations Board (Board) is the body within the DLR charged with deciding adjudicatory matters. References in this decision to the 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.

2. On June 18, 2008 the Department in Case No. SCR-08-2272 certified the National Correctional Employees Union, Local 104 (NCEU) as the successor bargaining representative to the IBCO for the bargaining unit of lieutenants and captains who are employed by the Sheriff's Office. On May 3, 2011, the NCEU filed a motion to substitute itself as charging party in the case. We allow that motion.

3. The Commission dismissed those portions of the Union's charge alleging that the Employer had violated Section 10(a)(2) and, derivatively, Section 10(a)(1) of the Law. The Union did not seek reconsideration pursuant to 456 CMR 15.04(3) of those portions of its charge that the Commission had dismissed.

4. The Board's jurisdiction in this matter is uncontested.

at Long Pond Road in Plymouth, which houses approximately 1600 prisoners, and a civil process department in Brockton. The Sheriff's Office also oversees a communications department, the bureau of criminal investigation, the warrant apprehension unit, and the K-9 unit, all of which provide services to certain cities and towns within Plymouth County. The Sheriff's Office has approximately 700 employees. Many of those employees are members of one of the following five bargaining units: a) a unit of correctional officers below the rank of lieutenant, vocational instructors, lead electricians, electricians, plumbers, HVAC maintenance workers, warehouse supervisors, K-9 unit sergeants and warrant unit sergeants (line officers unit) that the Association of County Employees (ACE) represents; b) a unit of correctional officers with the rank of lieutenant or captain (supervisory unit) that the IBCO represents; c) a unit of employees at the Bureau of Criminal Investigation (BCI unit) that the Massachusetts Correction Officers Federated Union (MCOFU) represents, c) a unit of dispatchers and switchboard operators (communications unit) that MCOFU represents; and e) a unit of non-supervisory employees who perform clerical, administrative or technical functions (administrative unit) that the National Association of Government Employees (NAGE) represents.<sup>5</sup>

#### *Brian Case's Background Information*

In April of 1993, Case began to work for the Sheriff's Office as a temporary custodial officer and was responsible for the care and custody of prisoners in a housing unit.<sup>6</sup> In April of 1994, Case began working as a booking officer.<sup>7</sup> His job duties included noting in a logbook when prisoners arrived or departed and whether they were transported in a van from the Sheriff's Office. When new prisoners arrived at the facility, he searched them, took their personal clothing and issued uniforms to them, booked and fingerprinted them, and created files for them. Also, he processed inmates who were eligible to be released on bail, which included contacting the communications department to run computer checks for outstanding warrants, verifying the inmates' identities, and having them sign release paperwork.

Case worked as a booking officer for more than four years.<sup>8</sup> During that time, he and another booking officer Scott Saccoach

(Saccoach)<sup>9</sup> volunteered to learn how to perform certain job duties in the records department. In particular, Lieutenant Frank Zito (Zito) of the records department trained Case and Saccoach on how to read reports from the Board of Probation (BOP),<sup>10</sup> and the National Criminal Information Center (NCIC)<sup>11</sup> and how to calculate prisoners' sentences in order to determine their release dates.

In December of 1998, then Sheriff Peter Foreman (Sheriff Foreman) promoted<sup>12</sup> Case to the position of lieutenant of records subject to an annual reappointment.<sup>13</sup> Case was subsequently reappointed to the position in 1999, 2000, 2001, 2002, 2003 and 2004. Case's job duties included oversight of the civilian records personnel, including the records clerks and the assistant records keepers, and the employee who calculated the credits that prisoners receive for good behavior (good time credits). Cruz, who was a captain and the supervisor of the booking and records department, also asked Case to supervise the booking officers who worked with him on the 7 AM to 3 PM shift. Case often took telephone calls at home and stopped by the PCCF on his regularly scheduled days off or on his vacation days to answer questions. During Case's six and one-half years as a lieutenant of records, he earned favorable performance evaluations each year and received letters congratulating him for his perfect attendance in fiscal years 1999,<sup>14</sup> 2000,<sup>15</sup> 2001, 2002 and 2004.<sup>16</sup>

In late 1998, early 1999, Case became president of the IBCO unit, and remained president until June 2005. Case was an active local president. He was a member of the Union's executive board and a member of its negotiating committee for several rounds of successor contract negotiations. Case wrote and filed most of the grievances that the Union submitted and was the point person for communications between the Union and the Employer. When then Sheriff Joseph McDonough (Sheriff McDonough) established quarterly meetings between labor and management, Case participated on behalf of the IBCO.<sup>17</sup>

#### *Early Releases of Inmates during the Period from January 2003 to October 2004<sup>18</sup>*

On January 16, 2003, an inmate referred to here as E.M. was released early, because Karen Ottino (Ottino), an assistant records keeper, erroneously entered the start date of E.M.s' sentence into

5. The above-referenced list reflects each unit's exclusive representative at the time of the hearing.

6. As a temporary employee, Case performed the duties of a correctional officer on a full-time basis but did not earn paid leave and was not a member of any bargaining unit.

7. Case was still classified as a temporary employee at that time. However, in June of 1994, the Sheriff's Office granted Case permanent status, and he became a member of the line officers unit.

8. During that four-year period of time, Case earned positive reviews from his supervisors as part of his annual performance evaluations and received no discipline.

9. In response to NCEU's challenge, the Board corrected the spelling of Saccoach's name.

10. BOP reports describe the criminal charges for which an individual has been arraigned in Massachusetts and list any outstanding warrants.

11. The NCIC is a computerized index that indicates whether a law enforcement agency in another state, the federal government or a foreign government has issued an arrest warrant for an individual charged with a felony.

12. Case previously had taken a written examination for promotion to lieutenant and had interviewed with Sheriff Foreman.

13. Case's promotion to lieutenant was subject to his annual reappointment to the position by the Sheriff on or about May 1st of each year.

14. Sheriff Foreman signed the letter congratulating him for his perfect attendance in fiscal year 1999, which was the first year for which the Employer sent out letters.

15. Sheriff Charles Decas signed the letter congratulating Case or his perfect attendance in fiscal year 2000.

16. Sheriff Joseph McDonough signed the letters congratulating Case for his perfect attendance in fiscal years 2001, 2002 and 2004.

17. Four or five representatives of the employer and the members of the Union's executive board attended those quarterly meetings and were known as the labor relations committee.

18. From 1992 or 1993 until January 2003, the Sheriff's Office erroneously released an inmate early on two occasions. In 1992 or 1993, a booking officer named Roger Badore (Badore) released the wrong inmate. Badore received a suspension and was removed from the booking and records department. His supervisor Zito re-

the computer. A records clerk noticed the error when she was closing out the inmate's file and brought it to Case's attention. Case then contacted the court and verified the correct date. Case subsequently notified the warrant unit,<sup>19</sup> and he and Cruz then notified Deputy Superintendent Brian Gillen (Gillen) of the mistake. Assistant Deputy Superintendent of Internal Affairs John Buckler (Buckler) and Sheriff McDonough met with Case and Cruz to investigate E.M.'s improper release and agreed that the assistant records keeper had miscalculated E.M.'s sentence. At some point, Gillen also expressed concern to Case and Cruz about what he perceived as a lack of oversight in the records department. Because the assistant records keeper who made the data entry mistake was no longer working in the records department when E.M. was mistakenly released, she received no discipline for the mistake. Case and Cruz also received no discipline.

At that time, the following procedure existed when an inmate was released.<sup>20</sup> The assistant records keeper: a) would process all the release paperwork, b) go through the inmate's central file, c) review the inmate's BOP, d) run the inmate on the NCIC and the Warrant Management System (WMS), and e) initial the release checklist confirming that steps a-c had taken place. On the top of the release form, the assistant records keeper would then note: a) the date of the release, b) the type of release, including whether the release was a good conduct discharge, the completion of a portion of a sentence, or the maximum expiration of a sentence, and c) the location to which the inmate would be released, i.e. the street, another agency, or an outstanding warrant.<sup>21</sup> As result of E.M.'s premature release, Case and Cruz re-trained all of the record department's employees.

On April 3, 2003, a booking officer, Sean Sullivan (Sullivan), released on bail a prisoner referred to here as C.A. Later that same day, a records clerk was preparing to put C.A.'s file away when she noticed an attached envelope that had warrants for C.A.'s arrest under various aliases that he previously had used. The procedure at the time for releasing an inmate on bail was that a booking officer would provide the communications department with the inmate's name, social security number, date of birth, and any known aliases. The communications department would run that information on the Criminal Justice Information System (CJIS) database as well as the inmate's BOP and would notify the booking officer whether the inmate had any outstanding warrants. However, because

Sullivan apparently missed the aliases in C.A.'s file,<sup>22</sup> the booking officer did not notify the communications department about them. When the records clerk brought those aliases to Case's attention, Case ran C.A.'s information on the WMS, NCIC and Ill, as well as reviewed the inmate's BOP. Because the BOP did not show any of C.A.'s aliases, Case contacted the Criminal History Systems Board (CHSB) to notify them about the aliases. Cruz then notified the warrant unit,<sup>23</sup> and both Cruz and Case visited Gillen to notify him about the improper release. They also informed Gillen that prospectively no booking officer would release a prisoner on bail without first notifying Case or Cruz and obtaining their approval for the release. Additionally, they informed Gillen that they intended to conduct remedial computer training for the booking officers.

Buckler and Sheriff McDonough subsequently met with Case and Cruz to investigate C.A.'s improper release on bail. They discussed whether a new computer system and the absence of any aliases on C.A.'s BOP<sup>24</sup> contributed to the booking officer's mistake. Sheriff McDonough subsequently suspended Sullivan for three days and removed him from the booking department, but neither Case nor Cruz received any discipline as a result of this incident. Approximately one month later, Sheriff McDonough reappointed both Case and Cruz to their positions as supervisors.<sup>25</sup>

On October 25, 2004, booking officer Richard Sussan (Sussan) released an inmate referred to here as R.D. to the street,<sup>26</sup> even though R.D.'s paperwork indicated that he should be released into the custody of the Department of Youth Services (DYS). Shortly thereafter, Sussan realized that he had made a mistake and contacted Case and Cruz. Cruz then contacted the warrant unit<sup>27</sup> and DYS.<sup>28</sup> Case and Cruz also notified Gillen and Director of Security Antone Moniz (Moniz) about R.D.'s release. All of them met the following day to discuss the incident at greater length and agreed that Sussan simply did not see the reference to DYS in the paperwork. Gillen also expressed dissatisfaction that a third early release had taken place. During that meeting, Case and Cruz announced that forthwith Case personally would do all of the release paperwork and sign the release checklist rather than an assistant records keeper. Additionally, no inmate could be released from the facility until Case or Cruz visually identified the inmate. On or about that time, Gillen suspended Sussan and transferred him from

ceived no discipline. In 1993 or 1994, Zito miscalculated the good time credit that an inmate had earned. Zito, who had over twenty-two years of service, received no discipline.

19. The warrant unit located and returned E.M. later that same day.

20. Sheriff's Office Policy No. 493, the Inmate Release Procedure, which was updated and distributed on or about April 29, 2002 states in its Purpose that:

The release of an inmate is a function of the Records Supervisor, under the supervision of the Booking & Release supervisor, or in the absence of the Booking & Release supervisor, the Shift Commander, or senior official on duty or his/her designee. The authority to release an inmate rests ultimately with the Sheriff.

Pursuant to Policy No. 493, an assistant records keeper was the designee, Case was the records supervisor, and Cruz was the Booking & Release supervisor.

21. An assistant records keeper had performed those functions since at least the time that Zito had trained Cruz.

22. C.A.'s file existed in both a hard copy and in a computer database to which the booking officer had access.

23. The warrant unit located and returned the inmate several days later.

24. At one point, Buckler and Case engaged in a heated exchange about whether any aliases existed on C.A.'s BOP prior to Case notifying the CHSB. Case then informed Buckler and Sheriff McDonough that if they felt that he had not done his job, he would take whatever punishment that they felt was necessary.

25. Sheriff McDonough also reappointed Case and Cruz to their positions as superior officers in May 2004.

26. R.D.'s father actually appeared at the facility to pick him up.

27. The warrant unit located and retrieved the inmate later that day.

28. A DYS representative informed Cruz that the agency only wanted to give R.D. certain paperwork and that the Sheriff's Office then could release him to the street, which is what happened after the warrant unit retrieved R.D.

the booking department. On October 26, 2004, Gillen issued a memo stating in pertinent part:

All releases are to be reviewed and signed by the Records Lieutenant and the Booking Release Captain or in their absence, the senior officer on duty. Please see the attached updated copy of the Release checklist.<sup>29</sup>

*November 2004 Election for Sheriff*

In the fall of 2004, Joseph McDonald, Jr. (McDonald) ran against incumbent Sheriff McDonough for the position of Sheriff. ACE endorsed and supported McDonald's candidacy, which included ACE paying for and running campaign advertisements for McDonald, and individual bargaining unit members making financial contributions to the campaign. The IBCO supervisory bargaining unit declined to support a candidate in the election. Unit members were concerned that if they supported a candidate who ultimately lost that the winner might not reappoint them as lieutenants or captains pursuant to Article 23, Section 230 of the collective bargaining agreement<sup>31</sup> between the IBCO and the Sheriff's Office.<sup>32</sup> McDonald (Sheriff McDonald or Sheriff-elect McDonald) won the election in early November 2004 for a term of office that would begin in early January of 2005.

On November 30, 2004, Sheriff McDonough contacted the IBCO's business agent Christopher Murphy (Murphy) and requested that the IBCO add the positions of director and assistant deputy superintendent (ADS)<sup>33</sup> into its supervisory bargaining unit prior to end of Sheriff McDonough's term in office. Case then met with the other IBCO local officers and members of its executive board, Lieutenant Ed Barrett (Barrett), the vice-president, Peterson, a captain and the treasurer, and Lieutenant John Hickey (Hickey),<sup>34</sup> the secretary. Case expressed his opposition to Sheriff McDonough's proposal, because he believed that the additions to the bargaining unit would change the nature of the unit from a security unit to an administrative unit and that the directors and the ADS's would greatly outnumber the lieutenants and captains who

currently were in the bargaining unit. Further, Case felt that the proposal represented a backdoor attempt to protect Sheriff McDonough's<sup>35</sup> supporters and allies and that the Union's acceptance of such a proposal could impair its relations with the incoming sheriff. However, Case suggested a counteroffer that the IBCO would accept those directors and ADS's who held security titles into the bargaining unit, and the other members of the executive board agreed with Case's recommendation. Murphy subsequently conveyed the executive board's decision and its counteroffer to Sheriff McDonough, who declined the counteroffer because he wanted all of the proposed positions included in the bargaining unit.<sup>36</sup>

*December 1st and 3rd Meetings*

On December 1, 2004, Cruz met with Moniz and Gillen in Gillen's office. Gillen and Moniz asked Cruz several questions about the improper October 2004 release of R.D. to which Cruz responded. Gillen then indicated that Case as the booking supervisor was responsible for R.D.'s improper release and that he should be disciplined. Moniz also stated that R.D.'s release showed that Case was not doing his job. Moniz also pointed out that the booking and records department was not complying with certain portions of Policy No. 493, which he had highlighted in different colors. Cruz responded by opining that the booking and records department was in compliance with the policy and that Sussan simply had made a mistake in releasing R.D. to his father.

Moniz then noted that Case had acted in an aggressive and inflammatory manner towards a released prisoner on or about September 2004 (September 2004 incident).<sup>37</sup> Although Cruz disagreed with Moniz's assertion about Case's behavior, he indicated that as Case's supervisor he would take responsibility for both incidents, especially the incident involving the prisoner because he had asked Case to escort the prisoner. Gillen and Moniz then told Cruz that they would contact him later about any action that they might take concerning the incidents.

29. Shortly thereafter, Gillen met with Cruz and two shift commanders who oversaw the day shift, Assistant Deputy Superintendent William Stone (Stone) and Captain Christine Krochko (Krochko). Krochko and Stone expressed concerns about shift commanders signing the release checklists on Saturdays and taking responsibility for releases for which they did not complete the paperwork or perform the sentence computations. Ultimately, Gillen decided that although the shift commanders would continue to execute the release checklist, they only would be responsible for verifying the identities of the released prisoners.

30. The parties refer to Article 23, Section 2 as the annual reappointment provision.

31. At that time, the Sheriff's Office and the IBCO were parties to a collective bargaining agreement that, by its terms, was in effect from July 1, 2001 through June 30, 2003 (2001-2003 Agreement). The 2001-2003 Agreement contained a duration clause extending the contract until the parties negotiated a successor collective bargaining agreement.

32. Article 23, Section 2 [Annual Reappointment Provision] of the 2001 -2003 Agreement stated in pertinent part:

Captains and Lieutenants will be designated by the Sheriff each year, following the bidding of the shifts in accordance with Article VIII, Section Five of this Agreement. . . . Employees will be notified prior to May 1st of each year if they are not being renewed in their position for the following year. . .

33. Previously, the positions of director and assistant deputy superintendent were not included in any bargaining unit.

34. Barrett and Hickey both received promotions to the rank of captain prior to the hearing in the present case.

35. The Board has corrected the record to reflect "McDonough" instead of "McDonald."

36. On or about that time, Cruz encountered Sheriff-elect McDonald at a party for Christopher Coppage, who had retired as a police officer from the Town of Duxbury. Cruz informed him about Sheriff McDonough's proposal, and the Sheriff-elect expressed his opposition to the proposal.

37. While the prisoner was waiting to be released on bail, the CJIS computer system went offline. Because the prisoner could not be released until the CJIS system went back online, he was placed in a cell in the booking and records department. The prisoner then became agitated, kicked the cell doors and screamed profanities. Cruz instructed Case not to release the prisoner until he calmed down, even if the CJIS system went back online. After the prisoner's wife, who had come to bail him out, was notified that his release would not be forthcoming, she complained to Moniz, who ordered the prisoner released. Because the prisoner was still highly agitated, Cruz ordered Case and Officer James Ross (Ross) to follow the prisoner and his wife as they went out the door of the bail lobby to ensure the woman's safety. Case asked Central Control to videotape the incident and to alert the K-9 officer to meet Ross and him outside. At the time of the release, Cruz, Case and Ross all completed reports.

In the two days that followed, Cruz became increasingly concerned when he did not get a response from either Gillen or Moniz about whether he and/or Case would be disciplined. On December 3, 2004, Cruz<sup>38</sup> requested to meet with Gillen and asked Case to accompany him to the meeting as a witness. While traveling to Gillen's office, Cruz and Case encountered Moniz, and Cruz also asked him to attend. At Gillen's office, Moniz asked about the nature of the meeting, and Cruz replied that Moniz and Gillen had not gotten back to him. Cruz reiterated that although he and Case had done nothing wrong, he wanted to know then whether they would be disciplined for the two incidents that were referred to in the December 1, 2004 meeting.<sup>39</sup> Cruz also opined that Sheriff McDonough was engaging in a witch hunt, because the Union would not accept all of the ADS's and directors into its bargaining unit. Gillen responded that it was his decision to pursue the matters.

Cruz then pointed out that the booking and records department always adhered to Policy 493 when releasing inmates. Case also reminded Moniz and Gillen that he personally would complete all the release paperwork and that he, Cruz, or the shift commanders would verify the identities of all inmates before they were released. Gillen and Moniz again voiced their approval of this plan. Gillen suggested that Case and/or Cruz contact other correctional organizations to learn about their release policies. However, Case declined Gillen's suggestion, because he claimed that he already had spoken with other organizations, including the state Department of Corrections, and that some of those organizations instead were moving to adopt the Sheriff's Office's procedures. Gillen also encouraged Case and Cruz to notify him if they had any other ideas to improve to the Employer's booking and release procedures. At some point, Gillen and Moniz both commented that the possible removal of Case from the booking and records department had been initiated at a higher level. At the end of the meeting, which lasted approximately thirty minutes, Gillen informed Case and Cruz that hopefully the controversy would go away when the new sheriff took office.

Case and Moniz then went to Moniz's office to view the CD recording that showed Case and Ross following the released prisoner in September 2004. Moniz asked Case whether Case trusted him and if so, how Case would describe his level of trust on a scale of one through ten. When Case answered with a minus two, Moniz

responded that Case evidently did not trust him. As Case and Moniz began to watch the CD, Moniz commented that Case had been aggressive and incited the prisoner by following the prisoner and his wife too closely as they exited the door to the parking lot. Case responded that he and Ross were concerned that the prisoner would slam the exit door<sup>40</sup> to the parking lot that would lock Case and Ross in the sally port that runs between the bail lobby door and the parking lot exit. Moniz noted that Case should have used the K-9 officer to escort inmates rather than doing it himself, and Case responded that the K-9 officer was contacted and took over observation of the prisoner and his wife in the parking lot.

#### *Sheriff McDonald Takes Office*

On January 5, 2005, Sheriff-elect McDonald became the Sheriff of Plymouth County.<sup>41</sup> On that same date, Sheriff McDonald discharged from employment certain directors and ADS's. Case, Peterson and three other correctional officers accepted assignments escorting the discharged employees from their work sites to their personal motor vehicles. Moniz had offered the assignment to Case, Peterson and the three other employees at the behest of the new Sheriff.

Shortly thereafter, Sheriff McDonald met with representatives from ACE. During that meeting, ACE's representatives reiterated its longstanding goal<sup>42</sup> to achieve department-wide seniority for its bargaining unit members. Further, ACE's representatives expressed concerns that Sheriff McDonald might make personnel changes that would result in large numbers of superior officers returning to the ACE bargaining unit. The next day, Sheriff McDonald and D. Larry Boucher (Boucher), president of ACE, executed a memorandum (January 7, 2005 memorandum) stating:<sup>43</sup>

On this 7th day of January 2005, Sheriff Joseph D. McDonald, Jr. and the Association of County Employees, hereby agree to modify Article VII-Seniority, Section Two<sup>44</sup> of the current Collective Bargaining Agreement between the parties (dated October 19, 2000-June 30, 2003)<sup>45</sup> as follows:

#### Article VII-Seniority

##### SECTION TWO:

All employees in the bargaining unit upon the execution of the Memorandum of Agreement signed 1-7-05 shall be entitled to retain all seniority rights as set forth in this Section. In the event any other bargaining unit contractually agrees to "overall seniority

38. In response to the Union's challenge, the Board changed "Case" to "Cruz."

39. Cruz, who was admittedly agitated, became offended when Moniz repeatedly urged him to sit down in a manner that Cruz considered condescending.

40. When the exit door to the parking lot shuts, it automatically locks.

41. Sheriff McDonald's official swearing-in ceremony took place on February 10, 2005, and he wore a pin with an ACE-insignia during the ceremony.

42. ACE had been attempting to obtain department-wide seniority for its bargaining unit members since at least 1994.

43. The Hearing Officer declined to make any findings about testimony that Boucher gave at an arbitration hearing in Case No. AAA 11 390 01126 05 at which he allegedly testified that the parties signed the January 7, 2005 memorandum on January 10, 2005 but backdated it to January 7, 2005. First, the arbitrator's award in that case makes no mention of that portion of Boucher's purported testimony. Fur-

thermore, Boucher did not testify in the present case. Although Case testified about Boucher's alleged statements at the arbitration, Case was not present at the arbitration to hear the statements. Thus, the Hearing Officer found that portion of Case's testimony to be inherently unreliable, because it consisted of two layers of hearsay.

44. Article VII, Section Two of the 2000-2003 Agreement between ACE and the Employer stated:

An employee of the Plymouth County House of Correction and Jail who is promoted or transferred to a position inside the Sheriff's office but outside the collective bargaining unit shall retain his seniority acquired in a position within the unit and in the event of his subsequent re-transfer to the unit, shall have added thereto his length of service with the Employer during such period of transfer.

45. The 2000-2003 collective bargaining agreement between ACE and the Employer contained a duration clause extending the contract until the parties negotiated a successor collective bargaining agreement.

within the Sheriff's Office", the following will apply to employees of that respective bargaining unit.

An employee of the Plymouth County House of Correction and Jail who is promoted to or transferred to a position inside the Sheriff's Office but outside the collective bargaining agreement shall retain his seniority acquired in a position within the unit and in the event of his subsequent re-transfer to the unit, shall have added thereto his length of service with the Employer during such period of transfer.

The aforementioned modification to "Article VII, Section Two" preserves all seniority rights for all employees in the bargaining unit upon the execution date of this MEMORANDUM OF AGREEMENT. Therefore, the undersigned agree to incorporate said terms as modified into the current Collective Bargaining Agreement, which shall remain in full force and effect until a successor agreement is signed.<sup>46</sup>

The Employer did not notify the Union before it executed the January 7, 2005 memorandum with ACE.

Thereafter, Case had a conversation with ACE executive board member Francis "Joe" Rogers (Rogers), in which Rogers informed Case that pursuant to the memorandum of understanding, supervisors who returned to ACE's bargaining unit would lose all of the seniority that they had accumulated. IBCO business agent Christopher Murphy (Murphy) then requested a meeting with the Sheriff.<sup>47</sup>

On January 13, 2005, a twenty-minute meeting took place between the Employer and the Union. Case, Peterson, Barrett, and Murphy<sup>48</sup> were present for the Union, while Sheriff McDonald, Special Sheriff Christopher Coppage (Coppage), Chief of Staff Gerald Pudolski (Pudolski), and Director of Human Resources Paul Lawton (Lawton) were present for the Employer. Sheriff McDonald stated that ACE had made a recent request for a memorandum of agreement containing department wide seniority to protect their bargaining unit members. Peterson replied that ACE had been seeking department-wide seniority for many years.

Case, who at this point had not seen the January 7, 2005 memorandum,<sup>49</sup> asked whether Rogers' statement was accurate. Lawton replied that assistant deputy superintendents who returned to ACE's bargaining unit would lose their accrued seniority. Case noted that the version of the memorandum that he had seen made no specific reference to assistant deputy superintendents. Further, he opined that the memorandum would not take effect unless all of the bargaining units agreed to department-wide seniority. Lawton indicated that he did not agree with Case's opinion but that he would

get back to him. The parties also discussed the annual reappointment provision, and the IBCO noted that it did not support a candidate in the recent sheriff's election because of the reappointment provision. Several days later, Case received a copy of the January 7, 2005 memorandum.

In February 2005, Lawton and Case had a conversation about the January 7, 2005 memorandum. Lawton informed Case that the January 7, 2005 memorandum meant that employees who returned to the ACE bargaining unit after January 7, 2005 would not retain all of the seniority that they previously had accrued with the Sheriff's Office. However, Lawton did not state exactly how much seniority the employees would keep when they became ACE unit members. Article VII, the Seniority Provision, of the 2001-2003 collective bargaining agreement between the IBCO and the Employer stated in pertinent part:

Section One: Seniority shall be defined as an employee's length of continuous employment by the Employer in a full-time capacity in a position covered by this Agreement. Seniority shall be acquired after completion of an employee's probationary period as a permanent full-time employee at which time seniority shall be retroactive to the first date of appointment as a full-time employee.

Section Two: An employee of the Plymouth County House of Correction and Jail who is promoted to or transferred to a position inside the Sheriff's Department but outside the collective bargaining unit shall retain his seniority acquired in a position within the unit and in the event of his subsequent retransfer to the unit, shall have added thereto his length of service with the Employer during such period of transfer.

#### *Transportation Lieutenant Grievance*

On or about March 2004, then Sheriff McDonough appointed two correction officers in the transportation department, Paul Greenwood (Greenwood) and Joseph DeTrani<sup>50</sup> (DeTrani),<sup>51</sup> as lieutenants (transportation lieutenants). The IBCO subsequently filed a grievance protesting the appointments, because Greenwood and DeTrani allegedly did not satisfy the contractual requirements for the position. The next day the Sheriff's Office informed the Union that Greenwood and DeTrani had only been appointed as acting lieutenants and suggested that the parties address the issue as part of ongoing successor contract negotiations. The Union agreed to place the grievance in abeyance, and Greenwood and DeTrani continued as acting transportation lieutenants.

In January 2005, Sheriff McDonald informed Greenwood and DeTrani that he was appointing them as permanent transportation

46. On or about January 10, 2005, both Case and Hickey saw another version of this memorandum of understanding behind locked, glass doors on ACE's bulletin board. The other version of the memorandum of understanding indicated that the language changes in Article Two, Section Two would only take effect upon agreement of all of the bargaining units. This version of the memorandum of understanding was removed from the bulletin board about a day or two later.

47. The Union had long opposed department-wide seniority, because correctional officers who took supervisory positions for the last three years of their careers in order to retire at higher rates of pay would immediately have greater seniority in the IBCO bargaining unit than longtime unit members. Prior to the January 7, 2005 memorandum, ACE unit members who were promoted to lieutenant or captain did not retain the seniority that they had accrued as line officers when they became members of the IBCO's bargaining unit.

48. Although Case testified that Hickey also attended the January 13, 2005 meeting, Hickey testified that he was not present. The Hearing Officer credited Hickey's testimony on this point because it is more likely that he would remember whether or not he attended the meeting.

49. Case only had seen the other version of the memorandum that is referenced in footnote 45.

50. In response to a challenge by the Union, the Board has corrected the spelling of DeTrani's name.

51. Greenwood and DeTrani previously had been appointed as deputy sheriffs pursuant to MGL c. 37, §3.

lieutenants.<sup>52</sup> Shortly thereafter, Case saw Greenwood with his new lieutenant's badge and asked him about it. When Greenwood told him about his permanent promotion, Case submitted a new grievance challenging the permanent promotions.

On the morning of January 28, 2005, Moniz told Case to report to Assistant Chief of Staff Parks' (Parks) office for a meeting and to bring Lieutenant John Ryan (Ryan) and Lieutenant Christopher Nye (Nye) with him. When Case asked whether he was required to bring Ryan and Nye, Moniz replied that Case did not have to bring them but that he knew that the two lieutenants were available. Case also noted that he could not make any agreements, because he was the only Union executive board member on duty, and Ryan and Nye were only unit members.

Case then asked Cruz whether he was willing and available to attend the meeting, and Cruz answered affirmatively. Case then contacted Assistant Deputy Superintendent William Stone (Stone), who was the shift commander that day, to notify him about the meeting and to get his consent for Cruz, Ryan and him to leave their posts to attend the meeting. Although Stone initially acquiesced, he called Case back two minutes later and asked why Case was not taking Nye with him. When Case said he was comfortable with and trusted Cruz, Stone said okay and hung up the telephone. Several minutes later, Stone told Case that Cruz was unavailable and that Case would have to take Nye and Ryan to the meeting.

The meeting took place at 10:00 AM on that same date with Case, Ryan and Nye present. Moniz, Parks and Lawton were present for the Sheriff's Office. Parks indicated that he had not called the meeting but asked Case to inform him about the grievance concerning the transportation lieutenants.<sup>53</sup> Case explained the IBCO's position, and Parks expressed his disagreement with that position. Case also provided the Sheriff's Office with the names of six to eight unit members who satisfied the contractual requirements for the transportation lieutenant. Ryan suggested that Major Robert Lawton,<sup>54</sup> who oversaw the transportation department, could select one of those candidates to fill the positions.

Moniz, Parks and Lawton then stepped outside the room for approximately five minutes. When they returned, Moniz proposed that in exchange for the Union giving the Employer complete discretion to select the transportation lieutenants, the Sheriff's Office would forgo the annual reappointment requirement for bargaining unit members. Case responded that although the proposal sounded great, he did not have any other executive board members to approve the proposal. Further, he noted the parties were not engaged in contract negotiations but were discussing a pending grievance.

At this point, Moniz pounded the table and indicated he was giving the Union a Hummer and was receiving an h-job in return.<sup>55</sup> Nye

then objected to Moniz's choice of words. Moniz apologized and said how about if I say instead, I am giving you a Hummer but receiving a Yugo.<sup>56</sup> Case commented again that he could not enter into any agreements, because he was the only executive board member present. Parks then commented that he hoped Case's response was not because of any personal issues that Case might have involving the transportation department.<sup>57</sup> Case reiterated that it was a Union issue, that the meeting was not the proper forum for this discussion, and that only Sheriff McDonald could offer to change the contract. Parks then referenced his close professional and personal relationship with the Sheriff. Finally, Parks informed Case that the IBCO had until twelve noon to accept the offer. Case protested that it was almost eleven o'clock and he did not believe that he could reach the other executive board members within an hour, but Parks repeated that the Union had until twelve o'clock.

When Case returned to his office in the booking department, he unsuccessfully attempted to reach the other three members of the Union's executive board. He then notified Parks that he could not reach the other executive board members and requested additional time for the IBCO to respond to the proposal, which Parks denied.<sup>58</sup> The designated time of twelve o'clock came and went without a response from the Union.

On February 2, 2005, the IBCO and the Employer met again concerning the transportation lieutenant grievance. Case, Barrett, Peterson and Hickey were present for the Union, while Parks, Lawton, and Isabel Eonas, Esq. (Eonas), the deputy general counsel, were present for the Sheriff's Office. Case presented the Union's position concerning the matter. Parks then indicated that it was fortunate that the Union had not accepted the proposal that he, Moniz, and Lawton had made on January 28, 2005, because Sheriff McDonald had castigated them for offering the proposal. Additionally, Parks gave the Union copies of the following letter that he intended to submit to Pudolski.

I have reviewed the IBCO contract as it relates to Sheriff McDonald's desire to appoint acting Lieutenant Paul Greenwood to the position of Lieutenant as the Assistant Transportation Supervisor, particularly Sections Two and Three of Article VIII: "Job Posting and Bidding."

Apparently, Booking Lieutenant (and IBCO Union president) Brian Case, feels that Sheriff McDonald would be exceeding his authority under the contract, in making that appointment of acting Lieutenant Greenwood. In particular, it appears that Lieutenant Case's argument relies on Section Two which enumerated eight (8) so-called "Specialty Positions," which appointments require the prerequisite of having served at least two (2) years as a Lieutenant or a Captain.

In the case of this appointment however, the Assistant Transportation Supervisor is not one of the 8 listed Specialty Positions, therefore the 2 year prior appointment exclusion does not apply. The As-

52. As permanent transportation lieutenants, Greenwood and DeTrani would be entitled to wear lieutenant's badges and bars on their uniforms.

53. In response to the Union's challenge, we have amended the record to reflect that the meeting was about the transportation lieutenants.

54. Major Robert Lawton was the brother of Director Lawton of Human Resources.

55. Hummer is the name of an expensive motor vehicle as well as a slang term for a sexual act.

56. Yugo was the name of a low cost motor vehicle that was sold in the United States from the mid-1980's to the early 1990's.

57. At the time, Case was divorced and was dating a deputy sheriff who worked in the transportation department.

58. Case also inquired as to what Parks meant when he referred to Case's personal issues, and Parks did not give him a response.

sistant Transportation Supervisor appointment therefore falls within Section One of Article VIII-Job Posting and Bidding clause, which states, *inter alia*, “With the exception of positions referred to in Section 2, all bargaining unit vacancies which the Sheriff intends to fill, including the creation of additional Lieutenant and Captain positions will be posted . . . The Sheriff or his designee will, in his sole discretion, select the person he feels is best qualified for the position. The foregoing does not, in any way, restrict the Sheriff’s ability to fill the position with someone from outside the bargaining unit. There will be no recourse to the grievance procedure.”

After review of the IBCO collective bargaining agreement, and consultation with staff and outside legal counsel, it is the opinion of the Human Resources Department of the Plymouth County Sheriff’s Office, that the appointment of a Lieutenant, Assistant Transportation Supervisor, is completely within the discretion of Sheriff McDonald, and is not subject to the limitations of Section Two of Article VIII governing Job Posting and Bidding.

Hickey then informed Lawton that the transportation lieutenant grievance was not Case’s issue but a Union issue and that Lawton should also add Hickey’s name to the grievance.

*A.D.M.’s Hiring as a Clerk/Typist*

In March of 2005, the Sheriff’s Office posted an opening for a clerk/typist in the booking and records department. Thereafter, Assistant Deputy Superintendent for Human Resources Mark Gabriel (Gabriel) asked Cruz to be part of the panel that would interview candidates for the position. Gabriel also informed Cruz that one of the candidates for the position was named A.D.M.<sup>59</sup> When Cruz asked whether A.D.M. was related to K.D.M., Gabriel replied that they were married. Cruz responded by describing the negative circumstances under which K.D.M. resigned from the booking and records department.<sup>60</sup> Gabriel then noted that A.D.M. had experienced problems in the communications department with her colleagues and her work performance. Cruz commented that he hoped that the Sheriff’s Office did not select A.D.M. for the position, and Gabriel responded that there were better candidates. Finally, Cruz referred Gabriel to Case, who directly supervised the position, and Gabriel notified Case on March 24, 2005 that interviews for the clerk/typist position were scheduled for the next day.

The Sheriff’s Office had scheduled interviews with nine candidates for the clerk/typist position. On March 25, 2005, Case met with Gabriel approximately one hour before the interviews began.<sup>61</sup> Gabriel gave Case a list of the candidates’ names and commented that the first candidate whom they were going to interview, A.D.M., was a problem employee who did not get along with her co-workers and had filed complaints against them.<sup>62</sup> Case then commented that A.D.M.’s surname looked familiar and asked whether A.D.M. was married to K.D.M., which Gabriel confirmed. Gabriel also told Case that the Employer was looking for a place to put A.D.M., because she needed to leave the communications department.

When Case and Gabriel interviewed A.D.M., they used the same set of questions that they subsequently used with the other candidates.<sup>63</sup> At the end of A.D.M.’s interview, Case and Gabriel briefly discussed her responses to their questions. Case opined and Gabriel agreed that A.D.M. was not forthcoming in a lot of her answers.

Case and Gabriel then interviewed a second candidate D.D. At the end of D.D.’s interview, Sheriff McDonald, Coppage, Pudolski and Lawton arrived and stated that they were going to observe some of the interviews. Lawton then inquired whether A.D.M.’s interview had gone well, and Gabriel and Case responded negatively. Case then described the difficulties that he and Cruz had with K.D.M. Further, Case noted that A.D.M. was not well suited to working in the booking and records department, which was a stressful environment<sup>65</sup> inside of the correctional facility, because she already had experienced problems working in the communications department, where she was in an office setting and not in direct contact with inmates.<sup>66</sup> No one responded to Case’s comments.

Case and Gabriel then continued the interviews. Sheriff McDonald, Coppage, Pudolski and Lawton were in and out of the room and each of them was present for some but not all of the remaining interviews.<sup>67</sup> After the interviews ended, Case and Gabriel went to Gabriel’s office in the Human Resources Department where Case saw Gabriel’s interview sheet for A.D.M.<sup>68</sup> Case and Gabriel then discussed the nine candidates and ranked them from one to nine,

59. A.D.M. is a pseudonym for an employee of the Sheriff’s Office who started as a part-time communications officer in the summer of 2004.

60. Several years before, Cruz and Case asked K.D.M., who was a booking officer, to leave the booking and records department because he allegedly damaged a new and expensive fingerprint machine.

61. The goal of the interviews was for Gabriel and Case to recommend three or four candidates from whom Sheriff McDonald would make his selection.

62. The Hearing Officer declined to credit Case’s rebuttal testimony that Gabriel told him that A.D.M. created a hostile work environment for her co-workers in the communications department. She found it unlikely that Case, during his two days of testimony as the Union’s witness, would not have referred to this alleged comment when he described at length comments that Gabriel allegedly made to him about A.D.M.

63. Case and Gabriel had sheets (interview sheets) for each candidate that contained the questions and spaces below each question, where they could write notes about the candidates’ responses.

64. Gabriel responded at hearing to a question about A.D.M.’s interview by stating that he thought she did okay. However, because he did not specifically deny Case’s statement about their conversation at the close of A.D.M.’s interview, the Hearing Officer credited Case’s testimony on this point.

65. Case characterized the booking and records department as a stressful environment, because employees who worked there were in direct contact with inmates. Some of the inmates were present because of an overflow in the segregation unit, while other inmates were changing clothes for court or undergoing body searches after returning from outside of the PCCF.

66. The Communications department was located in a separate building from the building where inmates were incarcerated.

68. Gabriel made notes on A.D.M.’s interview sheet, which described her responses. When the Employer introduced A.D.M.’s interview sheet into evidence at the hearing, the interview sheet contained a notation that Gabriel would recommend A.D.M. highly without reservation and gave her a grade of B+. Gabriel indicated that he made the notation and put the grade on the interview sheet during the interviews. However, the Hearing Officer credited Case’s testimony that the notation and the grade were not present when he saw the interview sheet, because it was inherently consistent with other portions of his testimony in which he claimed that

with one as the highest rank. Case gave A.D.M. a rank of eight out of nine, and Gabriel agreed.<sup>69</sup>

Lawton then arrived and commented that it would solve two problems for him, if A.D.M. transferred from communications to the booking and records department. Commenting that he understood that one of the problems that Lawton referred to was A.D.M.'s presence in the communications department, Case then asked what the second problem was. Lawton went into his office and did not respond. Case then asked Gabriel what Lawton meant, and Gabriel replied that he did not know.

Several weeks later, Case heard rumors that Sheriff McDonald had selected A.D.M. for the clerk/typist position in the booking and records department. Case then left two phone messages for Gabriel asking for confirmation of the rumor, but Gabriel did not respond. On or about April 11, 2005, Case met with Gabriel, who confirmed that A.D.M. was the successful candidate for the clerk/typist position. When Case again expressed concerns about A.D.M.'s suitability to work inside of the correctional facility, Gabriel told him to reduce his concerns to writing and that he would give the written document to the senior staff. Gabriel also assured Case that such a written document would not hurt him.

Case and Cruz then collaborated on a memorandum dated April 12, 2005 (the April 12, 2005 memorandum),<sup>70</sup> which they addressed to Lawton and Gabriel. The April 12, 2005 memorandum stated that:

It has come to our attention that Mrs. [A.D.M.] 71 is being considered for a position in the Records Department. We would like to notify you that we feel this is a poor choice for a couple of reasons. First when ADS Gabriel and I, Lt. Case, interviewed Mrs. [A.D.M.] neither of us thought she would be best suited for the job. In fact ADS Gabriel and I chose the same top four candidates and Mrs. [ADM] was not in the top six for that matter. Second it is our understanding that Mrs. [A.D.M.] is not proving to be an over achiever as far as work performance goes and if this is the case why is she being considered for this position. Third if she is still in her probationary period and not working out to be an over achiever why is she being considered for a position in the Records Department instead of being let go. Finally, we feel this could turn into a hostile work environment since her husband [K.D.M.] used to work in the Booking Department for us and given his poor job performance, interpersonal skills and anger problems we asked him to resign from the department. Given all these factors placing Mrs. [A.D.M.] in any position in the Records Department we feel would not be in the best interest of Mrs. [A.D.M.] or this department. On that same date, Cruz delivered the document in hand to Gabriel. Gabriel then forwarded the document to Lee as general counsel. Gabriel indicated that he brought the doc-

ument to Lee because he had told Case that he would disseminate any written statement that Case drafted to the senior staff and because he was concerned that the contents of the letter showed that a hostile work environment could ensue if A.D.M. was appointed to the clerk/typist position.

On April 14, 2005, Case went to Gillen's office to drop off certain documents.<sup>72</sup> Gillen, who previously read the April 12, 2005 memorandum, cautioned Case to be careful when writing memoranda. Further, Gillen, who was shocked and taken aback at the wording of the April 12, 2005 memorandum, told Case that using the phrase hostile work environment was not a good idea because something could happen. Case replied that he had chosen the words deliberately because Lawton was trying to create a hostile work environment for Cruz and him by placing A.D.M. in the clerk/typist position. Case then commented how Lawton considered him to be a problem because of actions that Case had taken as IBCO president. Gillen replied that he would look into Case's assertions and get back to him, but he never did. Sheriff's Office Policy No. 239,<sup>73</sup> entitled Sexual Harassment, Sexual Misconduct with Inmates, Harassment and Discrimination, states in pertinent part:

The purpose of this document is to make clear the Plymouth County Sheriffs Department policy concerning all forms of Sexual Harassment, Sexual Misconduct with Inmates, Harassment and/or Discrimination.

A. It is a policy of the Plymouth County Sheriff's Department that all employees of this Department be treated with dignity and respect. No employee should be subjected to any form of unlawful discrimination or harassment by management, supervisors, co-workers or those who have business dealings with the Plymouth County Sheriff's Department.

- 1) No employee, male or female, should suffer unsolicited, unwarranted physical or verbal abuse.
- 2) Nor should any person have to work in an intimidating, hostile or offensive working environment.
- 3) Sexual Harassment, Sexual Misconduct with Inmates, Harassment and/or Discrimination of any kind occurring in the work place or in any other work-related setting, will not be tolerated.

B. Further, any retaliation against an individual complaining about such conduct or cooperating with the investigation of claims of Sexual Harassment, Sexual Misconduct with Inmates, Harassment and/or Discrimination is also unlawful and will not be tolerated.

- 1) Any employee who engages in such conduct will be subject to immediate disciplinary action, including termination.

Gabriel agreed with him that A.D.M. did not have a successful interview. Further, Case's testimony about the absence of the notation and the grade when he saw the sheet was also consistent with the portion of Gabriel's testimony in which he acknowledged that he never told Case that he would highly recommend A.D.M. without reservation.

69. Gabriel claimed that he ranked A.D.M. as fourth out of nine and that Case agreed with him. However, the Hearing Officer credited Case's testimony that he ranked A.D.M. as eighth out of nine because it is not reasonable that Case ranked A.D.M. as fourth after he informed Sheriff McDonald, Coppage, Pudolski and Lawton that A.D.M. was not well suited to working in the booking and records department. Further, Case's assertion that Gabriel agreed with ranking A.D.M. as eighth is consistent with statements that Case made in a memorandum that he and

Cruz gave to Lawton and Gabriel on April 12, 2005, which is reprinted several paragraphs below.

70. Although Case actually typed the April 12, 2005 memorandum, the document indicated that it was from both Case and Cruz and it contained both of their initials.

71. Case and Cruz used A.D.M.'s surname.

72. Case dropped off exams, which he had corrected, for correctional officers who were seeking to work as booking officers.

73. Sheriff McDonald approved this version of Policy No. 239 on February 16, 2005.

C. Each supervisor and member of management is responsible for creating an atmosphere and environment free from harassment. Employees are responsible for respecting the rights of their co-workers.

D. Supervisors and managers will not tolerate or condone such behavior, witnessed or which is brought to their attention:

- 1) They will counsel and assist harassed employees in resolving problems in accordance with this policy.
- 2) When a supervisor or manager becomes aware of any disciplinary or harassing behavior, s/he will immediately notify the Director of Human Resources to request initiation of the procedures provided in this policy. . . .

On or about that same date, Case and Cruz went to Moniz's office to speak to him about a conversation that Moniz previously had with Lieutenant Mark Holmes<sup>74</sup> (Holmes) of the booking department.<sup>75</sup> Case and Cruz informed Moniz that if Moniz had questions about Case or Cruz, he should ask them directly rather than going to a third party. Moniz opined that Case and Cruz had misunderstood the nature of the conversation. Case and Cruz then expressed concerns about A.D.M.'s selection as the successful candidate for the clerk/typist position in the booking and records department, especially in light of Gabriel's comments that she was a problem, that she filed complaints about her co-workers, and that she needed to be removed from the communications department. They gave Moniz a copy of the April 12, 2005 memorandum.<sup>76</sup> They also reminded Moniz that A.D.M.'s husband K.D.M. previously had worked as a booking officer and had left under a cloud. Moniz informed them he would look into the matter and get back to them, but he never did.

74. Holmes also is Gillen's brother-in-law.

75. Moniz asked Holmes questions about the operation of the booking department. The Hearing Officer declined to make any findings about exactly what Moniz said to Holmes because Moniz could not recall any specifics about the conversation, and Holmes did not testify at the hearing. Although Case testified about what Holmes allegedly told him concerning the conversation, Case had no first-hand knowledge of the conversation.

76. Moniz denied that Case and Cruz had expressed concerns to him about A.D.M. at the April 14, 2005 meeting or that they had given him a copy of the April 12, 2005 memorandum. However, the Hearing Officer credited Case's and Cruz's testimony on those points, because it is plausible that Case and Cruz, who within a brief period of time had protested A.D.M.'s selection for the clerk/typist position to three senior staff members, Gabriel, Lawton, and Gillen, would also raise the issue with another senior staff member Moniz when they were meeting with him on another matter.

77. A.D.M. still worked in the booking and records department as of the dates of the hearing.

78. Sheriff McDonald was not present at the April 26, 2005 meeting, because he was in Colorado.

79. Gabriel testified that Gillen also was present at the April 26, 2005 meeting. However, Gillen testified that he only attended one meeting in April 2005 concerning the reappointment of IBCO unit members and that Sheriff McDonald was also present at the meeting. Because it is undisputed that Sheriff McDonald was not at the April 26, 2005 meeting but instead attended a subsequent meeting, the Hearing Officer found it highly unlikely that Gillen was present at the April 26, 1995 meeting. Further, when Lee described the participants at the April 26, 2005, he made no reference to Gillen. Thus, the Hearing Officer declined to credit Gabriel's testimony on this point.

On April 25, 2005, A.D.M. began to work as a clerk/typist in the booking and records department.<sup>77</sup> Case was A.D.M.'s immediate supervisor and trained her on the duties of her new position.

#### *Case's Non-Reappointment*

On or about April 26, 2005, Coppage, Pudolski, Parks, Lawton, Gabriel, and Lee attended a meeting during which they discussed their opinions as to whether Sheriff McDonald<sup>78</sup> should reappoint various IBCO unit members as lieutenants and captains pursuant to the annual reappointment provision.<sup>79</sup> At some point in the meeting, the focus of the discussion turned to Case.<sup>80</sup> Lee recommended that Case not be reappointed because Case had sent the April 12, 2005 memorandum. Lee contended that certain statements in the April 12, 2005 memorandum, including the references to a hostile working environment and A.D.M.'s placement in the records department as not being in her best interest, raised questions about Case's leadership and decision-making abilities. Prior to this date, Lee had not met Case and had not reviewed his personnel file, including his performance evaluations.

A second meeting concerning the annual reappointment of the IBCO unit members took place on or about April 29, 2005. Sheriff McDonald, Coppage, Pudolski, Lawton, Gillen,<sup>81</sup> Gabriel and Eonas were present at that meeting and discussed whether to reappoint the assorted IBCO unit members as supervisors. Sheriff McDonald decided not to reappoint Case as a lieutenant and cited the April 12, 2005 memorandum as playing a role<sup>82</sup> in his decision.<sup>83</sup> The Sheriff claimed that the phrase "hostile workplace" in the April 12, 2005 memorandum constituted notice of a possible hostile work environment that exposed the Sheriff's Office to potential liability in case of a lawsuit and that engendered concerns about Case's leadership skills.<sup>84</sup> During the meeting, Gillen con-

80. The record does not identify the individual who posed Case's reappointment as a topic of discussion. However, Gabriel indicated that Case's reappointment had come under scrutiny because of recent performance issues in the booking department, issues upon which he did not elaborate.

81. In previous years, Gillen had attended other meetings in which there were discussions about whether or not to reappoint various IBCO unit members pursuant to the annual reappointment provision.

82. Although Sheriff McDonald testified that he spoke with certain senior staff members about Case's leadership skills, he could not recall with whom he spoke or the nature of their responses. Further, he could not recall with specificity any other factors that he might have considered as part of his decision not to reappoint Case.

Although Gabriel identified Eonas as making a recommendation to Sheriff McDonald about Case's reappointment, the record does not reveal the nature of the recommendation. Further, Sheriff McDonald did not refer to such a recommendation in his testimony, and Eonas did not testify. Thus, the Hearing Officer declined to find that Eonas recommended to Sheriff McDonald that Case not be reappointed.

83. Because Sheriff McDonald did not become aware of the early releases that occurred from January 2003 to October 2004 until after he decided not to reappoint Case, those early releases did not influence his decision.

84. Sheriff McDonald testified that he had a discussion with Lee and that both of them agreed that Case's reappointment was not in the best interests of the Sheriff's Office. However, Lee testified that he never spoke directly with the Sheriff about Case's reappointment. Rather, he made his recommendation not to reappoint Case to other senior staff members at the April 26, 2005 meeting and believed that they would convey his recommendation to Sheriff McDonald. Further, Lee noted that he did not attend the April 29, 2005 meeting because he was out of the office attending to a personal matter. The hearing officer credited Lee's testimony on this point because Lee was more likely to remember whether he spoke to his superior, the Sher-

curred with the Sheriffs decision, because he felt that he could not defend the April 12, 2005 memorandum.<sup>85</sup>

In the afternoon of April 29, 2005, Case received a message to report to Gillen's office. Upon his arrival, Gillen gave him a letter (April 29, 2005 letter) from Sheriff McDonald that stated in pertinent part:

Pursuant to Article 23, Section 2, of the IBCO union labor contract, please be advised that I am not renewing your appointment as Lieutenant for the fiscal '06 year commencing on July 1, 2005.<sup>86</sup> Thus, any shift bidding rights available to you will be pursuant to the collective bargaining agreement between the ACE union and the Plymouth County Sheriff's Office.

When Case inquired why he was not being reappointed, Gillen responded that it was the Sheriff's decision. When Case was not satisfied with that answer and asked again, Gillen replied that he had not made the decision and that he did not necessarily agree with it. Gillen then reiterated that Sheriff McDonald had made the decision. Case also asked, in light of the January 7, 2005 memorandum between ACE and the Sheriff's Office, whether he would retain all his seniority when he started working again as a line officer, and Gillen responded affirmatively. Moniz and Gabriel, who were also present, did not say anything in response to Case's questions.<sup>87</sup> On that same date, Sheriff McDonald issued letters to four other IBCO unit members notifying them that pursuant to Article 23, Section 2, they were not reappointed as captains.<sup>88</sup> The four other IBCO unit members were: Norman Benoit (Benoit),<sup>89</sup> Richard Cardinal (Cardinal),<sup>90</sup> Jeffrey Merritt (Merritt)<sup>91</sup> and Peterson.<sup>92</sup>

As Case returned from Gillen's office on April 29, 2005, he encountered Stone. When Stone saw Case carrying the April 29, 2005 letter, he asked Case whether he had been demoted,<sup>93</sup> and Case answered affirmatively. Stone was surprised that Sheriff McDonald had not reappointed Case as a lieutenant, because he felt that Case had a good handle on his job duties. Further, no other members of management had spoken to him about Case's job performance. Stone then went to see Gillen and asked why Case had been demoted. Gillen informed him that it was Sheriff McDonald's decision but that Stone did not have all the facts.

At some point on April 29, 2005, Captain Christine Krochko (Krochko) 94 called Stone about a matter involving the day shift. During the telephone conversation, Stone informed her that Sheriff McDonald had not reappointed Case as a lieutenant. Krochko then asked to speak to Case, who confirmed the information. Prior to this date, no members of management had spoken to Krochko about Case's job performance.

On or about May 2, 2005, Krochko met with Moniz<sup>95</sup> to clear up what she believed to be a mistake<sup>96</sup> that resulted in Case not being reappointed. Krochko stated that she could not understand why Sheriff McDonald had not reappointed Case as a lieutenant because he was an outstanding employee with a great reputation and an excellent work record. Moniz responded that he knew that Case and Krochko were friends.<sup>97</sup> Krochko responded that her friendship with Case had nothing to do with her concerns about his demotion. Instead, his demotion ran contrary to the usual practice at the Sheriff's Office in which employees who performed satisfactorily moved up the career ladder. Moniz replied that Krochko was a good friend to Case and also noted that it was Sheriff McDonald's decision. Krochko<sup>98</sup> reiterated her opinion that Case deserved reappointment as a lieutenant and indicated that she was going to pursue the issue up the chain of command.

The next day Krochko met with Gillen,<sup>99</sup> who was Moniz's supervisor. Krochko informed Gillen that she thought Case's non-reappointment was a mistake because Case had received excellent evaluations, was willing to answer questions on his days off, and that no other employee knew how to calculate the sentencing records of every inmate. Gillen responded that it was the Sheriff McDonald's decision. He also intimated that Lawton played a role in the decision. Krochko then stated that she would be doing an injustice to the Sheriff's Office unless she followed through and met with the Sheriff about the matter.

Krochko made an appointment to meet with Sheriff McDonald on the following day. When she arrived at the meeting, she was informed that Sheriff McDonald was unavailable. Instead, she met with Coppage and Pudolski. She informed them that although she rarely asked to meet with a sitting sheriff, she did so here, because she believed that an oversight caused Sheriff McDonald not to re-

iff, on a particular issue than Sheriff McDonald was to remember whether he spoke to Lee or any of his other subordinates.

85. Gillen had not independently advocated that Sheriff McDonald demote Case.

86. The Sheriff's Office had used similar language when it did not reappoint lieutenants or captains in prior years.

87. The entire meeting lasted between five and ten minutes.

88. Sheriff McDonald reappointed the other thirty plus members of the IBCO's bargaining unit.

89. Benoit subsequently retired after Sheriff McDonald did not reappoint him.

90. Cardinal remained a member of the IBCO's bargaining unit and retained his accrued seniority, because Sheriff McDonald demoted him from the rank of captain to the rank of lieutenant.

91. Merritt was demoted to the position of BCI officer, which is a MCOFU bargaining unit position. Merritt retained his accrued seniority after his demotion, because MCOFU previously had agreed to department-wide seniority.

92. Sheriff McDonald demoted Peterson to the position of line officer. However, Gillen informed Peterson that he would retain all of his seniority when he returned to the ACE bargaining unit as a line officer.

93. Stone indicated that it was common knowledge that Sheriff McDonald was issuing reappointment letters to IBCO unit members on that day.

94. Krochko was not on duty.

95. The meeting lasted approximately ten to fifteen minutes.

96. Because Sheriff McDonald only had been in office for several months, Krochko believed that he might have confused Case with another employee.

97. Case and his former wife and Krochko and her husband attended social functions together. Case and Krochko also belonged to the same health club and sometimes exercised together.

98. In response to the Union's challenge, the Board has changed "Case" to "Krochko."

99. The meeting lasted approximately fifteen minutes.

appoint Case. Krochko recounted how Case was an excellent employee with a stellar reputation. Coppage and Pudolski thanked her for coming but emphasized that it was Sheriff McDonald's prerogative whether or not to reappoint Case. As the meeting ended, 10 Krochko asked them to convey her opinions to Sheriff McDonald.

On or about the time that Krochko attended the meetings referenced above, Cruz also attended a meeting regarding Case's demotion. Cruz was unaware that Sheriff McDonald had decided not to reappoint Case until Case told him on April 29, 2005.<sup>101</sup> That day,<sup>102</sup> Cruz called Sheriff McDonald's secretary and made an appointment to meet with the Sheriff the following week. When Cruz arrived for the meeting, the Sheriff's secretary informed him that Sheriff McDonald was unavailable and directed Cruz to Pudolski's office,<sup>103</sup> where Pudolski and Coppage were present. Cruz asked them why the Sheriff had not reappointed Case, and Pudolski and Coppage informed him that it was the Sheriffs decision. Cruz opined that Case's demotion was a big mistake because he was an accomplished supervisor, who was proud of his work and who did not call in sick. Pudolski rhetorically responded that if this "effing" place cannot run without Case, then what are we going to do. Coppage then commented that he understood Cruz's feelings about the situation, because Cruz and Case had worked together for many years.<sup>104</sup> Cruz then replied that "you have made your decision/" and he left the room.

On May 5, 2005, Case also was scheduled to meet with Sheriff McDonald.<sup>105</sup> When Case arrived at the meeting, the Sheriff was not there. However, Pudolski, Coppage, Parks and Lee were present. When Case asked why he had not been reappointed, Lee replied that it was Sheriff McDonald's decision. Case then asked what the Sheriff had used as criteria when he decided whether or

not to reappoint employees. Lee responded that the Sheriff had relied upon a review of the employees' personnel files and conversations with the employees' supervisors. When Case queried whether Lee had reviewed Case's personnel file,<sup>106</sup> Lee replied that he had reviewed all of them.<sup>107</sup> Case then asked Lee to identify any deficiencies in Case's personnel file, and Lee did not respond. Lee then indicated that he spoke with some of Case's supervisors. Case responded that Cruz, his immediate supervisor,<sup>108</sup> and Stone and Krochko, his shift commanders, had expressed disagreement with Case's demotion, which Pudolski confirmed. Lee then commented that the Sheriff McDonald did not need a reason when he decided not to reappoint Case. When Case pushed again for a reason, Lee reiterated that it was a professional decision that the Sheriff had made and that no reason was necessary. Case opined that Sheriff McDonald had not reappointed him because of his activities as Union president and cited, in particular, his resistance to Sheriff McDonough's request<sup>109</sup> that the IBCO accept ADS's and directors into its bargaining unit, his opposition to the Employer's January 7, 2005 Memorandum with ACE, and his pursuit of the grievance challenging the appointment of Greenwood and DiTrana as transportation lieutenants.

On May 10, 2005, the Union filed a grievance<sup>110</sup> in which it protested Sheriff McDonald's decisions not to reappoint 111 Benoit, Cardinal, Merritt and Peterson as captains and not to reappoint Case<sup>112</sup> as a lieutenant.

On June 3, 2005, Moniz met with Cruz to inform him that as of July 1, 2005, Case would no longer work in the booking and records department, even as a correctional officer. Moniz also instructed Cruz to have Case train Holmes as a records lieutenant and Case's replacement. Cruz expressed incredulity that the Employer would demote Case but expect him to train his replacement.

100. The meeting lasted about twenty minutes.

101. No member of management contacted Cruz to talk about Case's job performance prior to April 29, 2005.

102. In response to the Union's challenge, we have amended the record to correctly reflect when Cruz called Sheriff McDonald's secretary.

103. Cruz had not met Pudolski prior to this meeting.

104. Cruz and Case also were friends.

105. At the end of Case's work shift on April 29, 2005, he went to the administration building and asked to speak to Sheriff McDonald but was told that the Sheriff was unavailable. When Case then asked to speak with Pudolski or Coppage, he was told that they were also unavailable. Outside in the parking lot, Case encountered Parks and started to ask him why the Sheriff had not reappointed him. Parks told Case that he would not speak with him without an appointment. Thereafter, Case made an appointment to meet with Sheriff McDonald on May 5, 2005.

106. Case also sarcastically referred to certain facts contained in his personnel file, including that he only had taken one sick day during the course of his employment and that he only scored a 96 on his entrance exam to be a correction officer.

107. Case admitted that it was unclear whether Lee was referring to all documents contained in Case's personnel files or the personnel files of all employees who had not been reappointed.

108. Case also opined that Lee had not spoken with Cruz.

109. Lee became aware for the first time that Case had encouraged the IBCO to refuse Sheriff McDonough's request.

110. A day or two later Barrett met with Gillen to discuss the grievance. Ultimately, the Union did not submit the grievance to arbitration.

111. In the spring of 2003, pursuant to the annual reappointment provision, then Sheriff McDonough declined to reappoint Catherine Correia (Correia) as a lieutenant. The Union filed a grievance on Correia's behalf contending that Sheriff McDonough had demoted her without just cause and subsequently submitted that grievance to arbitration. On July 16, 2004, Arbitrator Tim Bornstein (Arbitrator Bornstein) in AAA Case No. 11 390 02020 03 issued a decision that the grievance was not substantively arbitrable. Arbitrator Bornstein stated in pertinent part on page 7 of in his decision that:

The contract grants him [Sheriff McDonough] discretion to choose lieutenants and captains once a year, and presumably he may exercise his discretion for any lawful reason. His reason may only be a general dissatisfaction with an officer's performance or his preference for someone else. While a lieutenant who is not reappointed may believe - with justification - that her non-reappointment is unfair, the parties have expressly agreed that the Sheriffs discretion is not reviewable in arbitration, fair or not.

112. Previously, Case had sent a memorandum on Union local letterhead dated May 15, 2003 to unit member Tim Baker, whom Sheriff McDonough had declined to reappoint as a lieutenant pursuant to the annual reappointment provision. The memorandum stated in relevant part:

As your union President I have spoken with our national union representative to see if there is any avenue that can be taken by the union to fight your not being reappointed as a Lieutenant. I also went to a meeting on Tuesday, May 6, 2003 in Framingham and met with the national Vice President, Paul Birks, to ask him if he knew of any avenue that could be taken to fight your not being reappointed and he informed me that due to the language in our current contract there is no avenue that we as a union can pursue....

Moniz responded that Case would be fired if he did not train Holmes. Shortly thereafter, Case went out on leave due to an injury.<sup>113</sup> Cruz then trained Holmes for several weeks, before the Sheriff's Office hired a consultant named Clair<sup>114</sup> to conduct weekly training for the booking and records department for a number of months. Cruz also continued to train Holmes on a daily basis. The Sheriff's Office did not initiate any changes in the practices and procedures of the booking and records department after July 1, 2005.<sup>115</sup>

*Seniority of Case and Peterson as ACE unit members*

On May 12, 2005, Captain Ronald Kumm (Kumm), the administrative officer<sup>116</sup> for the Sheriff's Office, informed Case via telephone that when he returned to the ACE bargaining unit as a line officer on July 1, 2005, he would not retain all of the seniority that he had accumulated as both a line officer and a lieutenant with the Sheriff's Office. Rather, Case would only be credited with the seniority that he had earned as a line officer prior to his promotion.<sup>117</sup> Case then asked why, despite prior assurances to the contrary, he was no longer receiving credit for his service as a lieutenant. Kumm replied that there had been a misunderstanding and that Lee had notified him that Case would not retain all of his seniority.

Later, that same day, Case met with Kumm, who gave Case copies of two email messages. Lee had sent the first email message on May 12, 2005 at 11:49 AM to Lawton and Gabriel with a copy to Kumm. Lee's email message stated:

Please provide Captain Kumm with the ACE seniority information for the following officers:

Norman Benoit  
Sean [Shaun] Peterson  
Brian Case

Under the MOA signed 117/05, seniority developed in other bargaining units may not count toward ACE seniority.

The second email message, which Gabriel sent several hours later to Kumm with copies to Lawton and the Legal Department, stated in pertinent part:

ACE seniority as requested by Director Lee is as follows:

Employee	ACE service	ACE seniority
Norman Benoit	7/1/83-5/10/95	11 yrs., 10 months
Sean Peterson	2/20/92-4/13/94	2 yrs, 2 months
Brian Case	4/12/93-12/10/98	5 yrs, 8 months

The copy of the second email message, which Kumm gave to Case, also contained handwritten notations of 1 year, 9 months and

4 years, 7 months next to the ACE seniority totals for Peterson and Case respectively. The differences between the two ACE seniority figures that Case and Peterson each had were the periods of time that the employees worked as temporary custodial officers. For instance, Case worked eleven months as a temporary custodial officer before he became a member of the line officers' bargaining unit. Kumm informed Case that the Sheriff's Office had not credited Case and Peterson for their services as temporary custodial officers when the Employer calculated their seniority as ACE bargaining unit members.

Prior to the demotions of Benoit, Case and Peterson, lieutenants and captains, who were not reappointed, retained all of their accrued seniority when they returned to the line officers' bargaining unit, including the periods of time, if any, that they worked as temporary custodial officers.<sup>118</sup> For example, the following IBCO unit members were not reappointed as lieutenants but retained all of their accrued seniority when they returned to the line officers' bargaining unit: a) 1995-John Buckley, b) 1996-Michael Santos, b) 1997-Barry Sullivan, c) 1999-Dennis Litchfield, d) 1999-Joseph Juliani, e) 2002-Michael Angellis, Jr., f) 2003-Timothy Baker, and g) 2003-Catherine Correia.<sup>119</sup>

On May 27, 2005, Murphy sent the following memorandum to Sheriff McDonald:

MGL c. 150E, s.6, requires you to give the Union advance notice and an opportunity to bargain prior to effectuating a change in an established condition of employment that affects a mandatory subject of bargaining. Your recent action of denying seniority to Brian Case, Shaun Peterson, Richard Cardinal, Norman Benoit, and Jeff Merritt with regard to their non-reappointment constitutes a change in an established condition of employment that affects a mandatory subject of bargaining.

The Union hereby demands that you rescind the change and offer to the Union notice and an opportunity to bargain prior to effectuating any such change.

In a June 9, 2005 letter, Lee, on behalf of Sheriff McDonald, responded in relevant part:

According to Article XXIII, Section Two of the Contract, Captains and Lieutenants are designated by the Sheriff on an annual basis. According to Article VIII, Section Three, promotions from correctional officers to senior officer will be made at the discretion of the Sheriff and are not subject to the grievance arbitration process. The Department followed this procedure with regard to senior officers Case, Peterson, Cardinal, Benoit, and Merritt.

Article VII of the contract governs seniority of members of the IBCO bargaining unit while they are members of the unit. That lan-

113. Case remained out of work until October 2005.

114. Clair was a retired records supervisor at the Norfolk County Sheriff's office.

115. In 2006, a booking supervisor, Lieutenant Douglas Rideout (Rideout), mistakenly released a prisoner, C.W., whom a local police department had turned over to the Sheriff's Department's custody, pending C.W.'s arraignment. Despite C.W.'s no bail status, Rideout misread a fine that C.W. owed as a bail amount and released him. Rideout received no discipline for the incident. In December 2007, Holmes released an inmate J.G., who had been sentenced to serve thirteen days in custody and pay a fine for civil contempt, without J.G. having paid the fine. Holmes received no discipline for the incident.

116. As administrative officer, Kumm was responsible for overseeing the bidding of shifts and the scheduling of vacations.

117. ACE unit members bid on work assignments, schedules, and vacation preferences based upon seniority.

118. Prior to approximately 1994, line officers, lieutenants and captains were members of the same bargaining unit.

119. The record is unclear whether Salvatore Armenia, who was not reappointed as a lieutenant in 1999, returned to the line officers' bargaining unit or resigned.

guage will continue to cover senior officers who leave and return to the bargaining unit. The contract does not and cannot govern members of other bargaining units. Notably, the ACE contract had seniority language identical to IBCO's prior to January 7, and IBCO never has taken the position that the language in that contract required retention of seniority upon promotion to IBCO positions.

On January 7, 2005, Sheriff McDonald signed a Memorandum of Agreement (MOA) with the corrections officers union governing seniority rights of members of that union. The contract between the Department and that union, as modified by the MOA, governs relations between the Department and the members of that union. It would be inappropriate to involve IBCO in the negotiations of the rights of ACE members, just as it would be inappropriate to involve ACE in the negotiation of the rights of IBCO members.

For the above reasons, your request for impact bargaining is denied.

On July 1, 2005, Case and Peterson were re-classified as line officers<sup>120</sup> and became members of ACE's bargaining unit. Thereafter, ACE filed a grievance challenging the Employer's decision to credit Peterson with one year and nine months of seniority and Case with four years and seven months of seniority when they returned to the ACE bargaining unit. ACE subsequently consolidated that grievance with an earlier grievance that ACE had filed challenging the Sheriff's decision to credit employee John Downey (Downey)<sup>121</sup> with some seniority when he returned to the ACE bargaining unit. ACE submitted both grievances to arbitration in Case No. AAA 11 390 01126 05. On September 29, 2005, Arbitrator Michael Ryan presided over a hearing in Case No. AAA 11 390 01126 at which ACE and the Sheriff's Office agreed to the following issues:

Did the Employer violate Article VII, as amended, when it credited John Downey with seniority April 1, 2005? If so, what is the remedy?

Did the Employer violate Article VII, as amended, when it credited Brian Case and Shaun Peterson with seniority upon their return to the bargaining unit on July 1, 2005? If so, what is the remedy?

On December 15, 2005, Arbitrator Ryan issued a decision that contained the following award:

The Employer violated Article VII, as amended when it credited John Downey with seniority upon his return to the bargaining unit on April 1, 2005. His seniority should start on April 1, 2005.

The Employer violated Article VII, as amended, when it credited Brian Case and Shaun Peterson with seniority upon their return to the bargaining unit on July 1, 2005. Their seniority should start on July 1, 2005.

Shortly thereafter, Derek Webb (Webb), the ACE president, informed Case<sup>122</sup> about Arbitrator Ryan's decision. Case requested that Webb provide him with a copy of the decision, which Webb<sup>123</sup> did several days later. In mid-January 2006,<sup>124</sup> the Sheriff's Office implemented the award, which caused Case and Peterson to be the least senior employees in the ACE bargaining unit for the purposes of bidding on work assignments, work shifts, and vacation preferences,<sup>125</sup> except for correctional officers, if any, hired after July 1, 2005. On January 23, 2005, Lee sent copies of Arbitrator Ryan's decision to Case, Peterson and Downey.<sup>126</sup> Peterson and Case still are members of ACE's bargaining unit.

On or about February 7, 2005, ACE was scheduled to take a ratification vote for two successor collective bargaining agreements.<sup>127</sup> Prior to that vote, ACE provided its members copies of a document that was entitled "Highlights of Contractual Changes" (Highlights Sheet) and that contrasted certain provisions in the prior collective bargaining agreement, the 2000-2003 Agreement, and the changes in those provisions in the proposed successor collective bargaining agreement. One of those provisions was the seniority clause in the 2000-2003 Agreement, which ACE summarized in pertinent part in the Highlights Sheet as:

a) Employees returning to our bargaining unit were allowed to come with their total seniority (i.e. a Lt. returning to ACE would 'bump' all C/O's with less total seniority when bidding shifts & days off)....

ACE then described in the Highlight Sheet the following relevant changes in the seniority provision of the proposed collective bargaining agreements:

a) Establish a fair means to apply seniority for employees transferring between bargaining units (example: C/O to Lt, and Lt. to C/O). This means that employees who re-transfer back into ACE will not retain their seniority. If any other bargaining units contractually agree to "overall seniority within the Sheriff's Dep't." members of that unit may return to ACE with their total seniority.

120. As line officers, Case and Peterson received lower salaries.

121. In April of 2005, John Downey (Downey), an assistant deputy superintendent (ADS) and an unrepresented employee, resigned his position and voluntarily returned to ACE's bargaining unit as a line officer. Thereafter, Boucher announced on behalf of ACE that Downey should not retain any of his accrued seniority when he returned as a line officer. On April 8, 2005, representatives from ACE and Sheriff's Office discussed the issue of Downey's seniority, and Lee stated that Downey was eligible to retain the seniority that he previously earned as a line officer although he would not receive credit for the time that he worked as an ADS. On April 21, 2005, ACE filed a grievance challenging the Employer's decision to credit Downey with any seniority.

122. Prior to Case's conversation with Webb, Case was unaware that ACE had filed a grievance challenging Peterson's and his seniority and that an arbitrator had conducted a hearing on the matter in September of 2005.

123. In response to the Union's challenge, we amended the record to reflect that Webb provided the decision.

124. Lee previously had recommended that the Sheriff's Office not appeal Arbitrator Ryan's decision by filing a motion to vacate the award in superior court. However, Lee indicated that Sheriff's Office did not implement the award immediately after December 15, 2005, because the Employer did not want the award to impact Case and Peterson right before Christmas.

125. The amount of vacation time that Case, Peterson and Downey earned each year was determined by their entire service with the Sheriff's Office.

126. Lee sent copies of Arbitrator Ryan's decision to Case, Peterson and Downey in response to a phone call that he received from Moniz. Moniz indicated that Peterson had come to Moniz's office seeking clarification about his seniority.

127. The first collective bargaining agreement, by its terms, covered the period from July 1, 2003 through June 30, 2005 (2003-2005 Agreement) and the second collective bargaining agreement, by its terms, covered the period from July 1, 2005 through June 30, 2008 (2005-2008 Agreement).

On February 7, 2006, Case also submitted a written motion to have the membership vote separately to accept or reject the January 7, 2005 memorandum that ACE had negotiated with Sheriff McDonald.<sup>128</sup> ACE denied Case's request indicating that it was sufficient to have the membership approve the terms of the January 7, 2005 memorandum as part of its vote on the proposed 2003-2005 Agreement. ACE unit members ultimately voted down the proposed 2003-2005 Agreement on February 7, 2006. However, approximately two weeks later the membership voted in favor of both proposed agreements and ACE and the Sheriff's Office subsequently executed the 2003-2005 agreement and the 2005-2008 agreement in May 2006.

*2005-2008 Collective Bargaining Agreement between the IBCO and the Sheriff's Office*

At some point after the summer of 2005,<sup>129</sup> the IBCO and the Sheriff's Office engaged the services of a mediator from the Board of Arbitration and Conciliation to facilitate their negotiations for a successor collective bargaining agreement.<sup>130</sup> On February 27, 2007, the parties executed two consecutive collective bargaining agreements. The first collective bargaining agreement, by its terms, covered the period from July 1, 2003 through June 30, 2005 (2003-2005 Agreement).<sup>131</sup> The second agreement, by its terms, covered the period from July 1, 2005 through June 30, 2008 (the 2003-2005 Agreement). In the 2005-2008 Agreement, the parties agreed to certain revisions to the annual reappointment provision, Article 23, Section 2. Article 23, Section 2 of the 2005-2008 Agreement stated in pertinent part:

Captains and Lieutenants will be designated by the Sheriff each year, following the bidding of the shifts in accordance with Article VII, Section Five of this Agreement. Employees will be notified prior to May 1st of each year if they are not being renewed in their position for the following year....

Subject to the limitation of the sunset clause in this paragraph, employees will not be subject to the annual renewal/nonrenewal process described in this section if they have: a) continuous service as a captain or lieutenant for the past two years; and b) maintained a record free of discipline at the level of suspension or higher for the past two years. The limitation on the Sheriff's discretion regarding reappointment described in this paragraph will automatically sunset and be of no further force or effect after June 30, 2008.

## Opinion

### Section 10(a)(3) Allegations

A public employer that retaliates or discriminates against an employee for engaging in activity protected by Section 2 of the Law violates Section 10(a)(3) of the Law. *Southern Worcester Regional Vocational School District v. Labor Relations Commission*, 386 Mass. 414 (1982); *School Committee of Boston v. Labor Relations Commission*, 40 Mass. App. Ct. 327 (1996). The Board

traditionally applies a three-step analysis to Section 10(a)(3) discrimination cases. *Town of Clinton*, 12 MLC 1361 (1985) (citing *Trustee of Forbes Library v. Labor Relations Commission*, 384 Mass. 559 (1981)). First, the Board determines whether the charging party has established a prima facie case of discrimination by producing evidence to support each of the following four elements: 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's conduct was motivated by a desire to penalize or discourage the protected activity. If the charging party establishes a prima facie case, the employer may offer evidence of one or more lawful reasons for taking the adverse action. If the employer is able to produce lawful reasons for its actions, the employee must prove that "but for" the protected activity, the employer would not have taken the adverse action. *Trustees of Forbes Library*, 384 Mass. at 565-66; *Bristol County*, 26 MLC 105, 109 (2000).

The complaint alleges that the Sheriff's Office retaliated against Case by: 1) failing to reappoint him as a lieutenant and 2) failing to credit him with the seniority he had accrued as a superior officer. We will address these allegations separately below.

### Case's Demotion

#### Protected, Concerted Activity

There is no dispute that Case engaged in protected, concerted activity. He was an active Union president who was a member of the executive board and negotiating committee for several successor contract negotiations. He wrote and filed most of the grievances that the Union submitted and was the point person for communications between the Union and Employer. When Sheriff McDonough established quarterly meetings between labor and management, Case participated on behalf of the Union, along with other members of the executive board. Further, Case was involved in concerted, protected activity in the months prior to the Employer's decision not to reappoint him. In November 2004, Case opposed Sheriff McDonough's request to add the positions of director and ADS into the bargaining unit prior to the end of Sheriff McDonough's term. In January 2005, Case expressed his opposition to the ACE January 2005 memorandum and attended a meeting with Sheriff McDonald, Coppage, Pudolski, and Lawton to discuss it. Also in January 2005, Case submitted a grievance regarding Sheriff McDonald's permanent appointment of two transportation lieutenants. At a meeting with Moniz, Parks, and Lawton to discuss the grievance, Case refused Moniz's proposal that the Union give the Sheriff's Office complete discretion to appoint

128. Case also believed that ACE had not complied with its own bylaws because its executive secretary had not signed the January 7, 2005 memorandum, a contention that ACE's leadership, including Webb and Rogers, disputed.

129. The IBCO and the Employer began successor contract negotiations on April 20, 2005, and the parties held a second bargaining session on June 21, 2005. The record does not contain the dates when the parties' subsequent bargaining sessions took place. However, the Union expressed concerns about the annual reappoint-

ment provision and the Sheriff's Office's January 7, 2005 memorandum with ACE at each of those negotiations.

130. Cruz succeeded Case as IBCO local president on or about July 2005.

131. The annual reappointment provision of the 2003-2005 Agreement remained unchanged and contained the same language as Article 23, Section 2 of the 2001-2003 Agreement, which was referred to in footnote 33.

transportation lieutenants in exchange for the Sheriff's Office foregoing the annual reappointment of bargaining unit members.

#### Knowledge

The Union has established that the Employer, and specifically Sheriff McDonald, was aware of Case's protected activity. First, the Employer does not dispute that Sheriff McDonald knew that Case was an active Union president and involved with negotiations and filing grievances. Second, Case opposed the ACE January 7, 2005 memorandum at a meeting that several Employer representatives attended, including Sheriff McDonald.

The Employer argues, however, that the Union did not prove Sheriff McDonald was aware Case had refused to settle the grievances regarding the transportation lieutenants. It notes that, although the Union presented evidence that Case announced his refusal to settle the grievance to Moniz, there is no evidence that Moniz passed that information on to Sheriff McDonald. However, at a subsequent meeting regarding the grievances, Parks, the Sheriff's Assistant Chief of Staff, indicated that it was fortunate that the Union had not accepted the Employer's earlier proposal because Sheriff McDonald had castigated them for offering it. We thus infer that since Sheriff McDonald was aware of the Employer's offer to settle the transportation grievances, he was also aware of the grievances themselves and Case's refusal to settle them.<sup>132</sup>

#### Adverse Action

Sheriff McDonald's decision not to reappoint Case as lieutenant was an adverse action, which the Employer does not dispute.

#### Unlawful Motivation

To support a claim of unlawful motivation, a charging party may proffer direct or indirect evidence of discrimination. *Lawrence School Committee*, 33 MLC 90, 97 (2006) (citing *Town of Brookfield*, 28 MLC 320, 327-28 (2002), *aff'd sub nom.*, *Town of Brookfield v. Labor Relations Commission*, 443 Mass. 315 (2005)). Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable inference that a forbidden bias was present in the workplace." *City of Holyoke*, 38 MLC 153, 156 (2009) (citing *Wynn & Wynn, P.C. v. MCAD*, 431 Mass. 655, 667 (2000)). Unlawful motivation also may be established through circumstantial evidence and reasonable inferences drawn from that evidence. 38 MLC at 156. Several factors may suggest unlawful motivation, including the timing of the alleged discriminatory act in relation to the protected activity, triviality of reasons given by the employer, disparate treatment, an employer's deviation from past practices, or expressions of animus or hostility towards a union or the protected activity. 38 MLC at 157.

132. The Employer also argues that the Union has not established that Sheriff McDonald was aware of the Union's opposition to Sheriff McDonough's proposal to add directors and ADS's to the bargaining unit. However, because both Sheriff McDonald and the Union opposed the proposal, it is unlikely that this would have motivated Sheriff McDonald to take an adverse action against Case. Therefore, this point does not affect our analysis below.

133. The Employer argues that Sheriff McDonald understood the Union's concern over the reappointment language in the ACE January 2005 memorandum and hoped that the parties could reach a solution. However, there are no facts in the re-

#### Timing

Case's non-reappointment occurred approximately three months after Case: 1) opposed the ACE January 2005 memorandum,<sup>133</sup> 2) grieved the transportation lieutenant appointments, and 3) refused to settle the transportation lieutenant grievances. The Employer argues that this timing does not support a finding of illegal motivation, citing *Melrose School Committee*, 33 MLC 61 (2006), as support. In *Melrose School Committee*, the Board held that the three months between the protected activity and adverse action in that case was too lengthy to be persuasive evidence of a Section 10(a)(3) violation. We distinguish *Melrose School Committee*, however, because here, Sheriff McDonald made his decision not to reappoint Case at the first opportunity he had following Case's protected activity, i.e., the annual reappointment process on or about May 1st of each year. Moreover, although timing alone is insufficient to support a finding of illegal employer motivation, it is one factor to consider. *City of Holyoke*, 35 MLC at 157. Therefore, along with the other factors discussed below, we find that the timing of the non-reappointment supports the Union's position.

#### Failure to Explain Reasons

Also significant is the Employer's failure to explain its reason for the demotion despite Case's efforts, as well as several of his supervisors/colleagues' efforts, to learn the reason. See, *Town of Mashpee*, 36 MLC 163, 172 (2010) (failure reasons for decision can support an inference of unlawful employer motivation); *Town of Plainville*, 22 MLC 1337 (1996) (employer's failure to tell employee of perceived performance problems belies its contention that his performance was the central motivating factor in its decision).<sup>134</sup> Case asked Gillen why he was not reappointed, but Gillen refused to give him a reason. Case also met with Pudolski, Coppage, Parks, and Lee (after attempting to meet with Sheriff McDonald) and asked for a reason for his non-reappointment. Although Lee advised Case that Sheriff McDonald had relied upon a review of the employees' personnel files and had conversations with the employees' supervisors, Lee did not respond to Case's questions regarding any deficiencies in his (Case's) personnel file. When Case advised Lee that his supervisors and shift commanders disagreed with the demotion, Lee commented that Sheriff McDonald did not need a reason for his decision. In addition to Case's attempt to find out the reasons for his non-reappointment, Stone, Cruz, and Krochko also attempted to determine the reason by speaking with various senior staff members, but were also denied an explanation.

In addition to its failure to provide Case and his colleagues the reason for the reappointment decision, at hearing, the Sheriff's Office was also inconsistent about exactly who took part in the deci-

cord to support this contention. Moreover, even if Sheriff McDonald understood the Union's concern, this does not necessarily mean that he was not improperly motivated by Case's conduct cited above.

134. The Sheriff's Office attempts to distinguish *Town of Plainville* by arguing that, in that case, there was strong evidence of anti-union animus, which does not exist here, and that the employer's failure to offer a contemporaneous explanation for an adverse action is only one factor for the Board to consider. However, as we note above, the timing of the Sheriff's Office decision also supports the Union's *prima facie* case.

sion-making and what factors were considered. Although Sheriff McDonald testified that he spoke with certain senior staff members about Case's leadership skills, he could not recall with whom he spoke or the nature of their responses. He also could not recall with specificity any other factors that he considered as part of his decision. Further, Sheriff McDonald testified that he discussed the decision with Lee, but Lee testified that he never spoke with Sheriff McDonald directly about Case's reappointment, and Lee was not at the April 29, 2005 meeting at which Sheriff McDonald and senior staff discussed the reappointment. Gabriel testified that Eonas made a recommendation to Sheriff McDonald about Case's reappointment, but Sheriff McDonald did not testify about this, and Eonas did not testify. These inconsistencies also lend support to the Union's contention that the Sheriff's Office was unlawfully motivated in its decision to demote Case.

#### *Sheriff's Office's Reasons for Decision*

As we have determined that the Union initially established a prima facie case that the Sheriff's Office violated Section 10(a)(3) of the Law, the burden shifts to the Sheriff's Office to show that its legitimate reason(s), standing alone, would have induced it to make the same decision. *Town of Dennis*, 29 MLC 79 (2002). The employer's burden to produce a legitimate, non-discriminatory motive for taking the adverse action is more than simply stating an unsubstantiated allegation. *Commonwealth of Massachusetts*, 25 MLC 44, 46 (1998). The employer must state a lawful reason for its decision and produce supporting facts indicating that the proffered reason was actually a motive in the decision. *Trustees of Forbes Library*, 384 Mass. at 566. We now turn to the Sheriff's Office's justification for not reappointing Case.

The Sheriff's Office contends that Sheriff McDonald decided not to reappoint Case because of his April 12, 2005 memorandum about A.D.M. after discussing the matter at a meeting with senior staff members on or about April 29, 2005. According to Sheriff McDonald's testimony, the phrase "hostile workplace" in the memorandum constituted notice of a possible hostile work environment that exposed the office to potential liability in case of a lawsuit and engendered concerns about Case's leadership skills.

The Sheriff's Office contention is supported by the fact that prior to the April 29, 2005 meeting, senior staff met on or about April 26, 2005 (without Sheriff McDonald), at which time they also discussed the April 12, 2005 memorandum. Lee recommended against appointing Case because the memorandum raised questions about Case's leadership and decision-making abilities. Moreover, after Gillen read the memorandum earlier in April, he advised Case to be careful when writing memoranda and that using the phrase "hostile work environment" was not a good idea.

We are persuaded that the Employer had a legitimate concern regarding the April 12, 2005 memorandum, and that the memorandum was a motive in its decision not to reappoint Case.

#### "But For" Analysis

Once an employer produces evidence of a legitimate, non-discriminatory reason for taking the adverse action, we consider whether the employer would have taken the adverse action "but for" the employee's protected activity. *Town of Brookfield*, 28 MLC at 328 (2002). For the reasons explained below, we find that the Sheriff's Office would not have demoted Case but for his protected activity.

To begin with, the findings show that Case had been a lieutenant since 1998 and had been reappointed to the position for six consecutive years. He had not been disciplined during that time, and he earned favorable performance evaluations each year. Although the Employer highlights Case's involvement in the above-described early releases of prisoners, Sheriff McDonald was not aware of the early releases until after he decided not to reappoint Case and, thus, the early releases did not factor into his decision.

Further, the Sheriff's Office treated Case differently than it treated Cruz, who also authored the memo regarding A.D.M. that the Sheriff's Office claims necessitated Case's non-reappointment. In its brief, the Sheriff's Office argues that,

[a]s a... supervisor, [Case] was responsible under Department policy and under Massachusetts law to prevent the workplace from becoming hostile. His willful disregard for this obligation and his express willingness to turn a blind eye to workplace harassment threatened to subject the Department and the Sheriff to liability. In Massachusetts, an employer is vicariously liable for the conduct of supervisors who create a hostile environment in the workplace.

As a captain in the records department, this same reasoning would also apply to Cruz. However, Cruz, who was also subject to the annual reappointment process, was reappointed. Moreover, there are no findings indicating that he was disciplined in any way or even counseled regarding the April 12, 2005 memorandum and the Employer's concerns about it. Notably, Cruz did not have as active a role in the Union as Case during the relevant time period, and Cruz was not present at the meeting regarding the ACE January 2005 memorandum or the transportation grievances.

The Sheriff's Office argues that Cruz engaged in much of the same protected activity as Case, citing his involvement in opposing discipline of Case for the third early release, and figuratively standing by Case with regard to the October 2004 release. However, Cruz's activity predates Sheriff McDonald, who made the reappointment decision, and Sheriff McDonald was not even aware of the early releases until after Case's demotion. The Employer further argues that Cruz assumed the presidency of the Union after Case's demotion and engaged in the same protected activity formerly performed by Case, and has retained his position as captain. However, Cruz's protected activity that occurred after Case's non-reappointment is not relevant to our comparison of the Employer's treatment of Case and Cruz in response to the April 12, 2005 memorandum.<sup>135</sup>

135. The Sheriff's Office also argues that Case, and not Cruz, wrote the memorandum, noting that one portion of the memo states "I, Lt. Case...". According to the Employer, "Case was in the driver's seat, and Cruz foolishly went along as the pas-

senger." We reject this argument as the findings of fact reflect that Case and Cruz collaborated on the memo and much of the memo refers to both authors, e.g., "[w]e would like to notify you that this is a poor choice for several reasons..." and "...we

For the reasons explained above, we are persuaded that but for Case's protected activity the Sheriff's Office would not have demoted Case. Accordingly, we find that the Sheriff's Office violated Section 10(a)(3) of the Law as alleged.

*Failing to Credit Case with Accrued Seniority*

The complaint alleges that the Sheriff's Office also failed to credit Case with his accrued seniority when he returned to the ACE bargaining unit in retaliation for his protected, concerted activity. With regard to its *prima facie* case, the Union has established that Case engaged in concerted, protected activity, as explained above. In addition, the Union filed a grievance challenging the Employer's seniority decision on Case's behalf, which the Employer acknowledges is also concerted, protected activity. The Employer also acknowledges that its decision not to credit Case with all of his accrued seniority when he returned to the ACE unit was an adverse action.

The Sheriff's Office contends that Lee made the decision regarding Case's seniority, and that the Union has not shown that Lee knew of Case's protected activity. Without deciding which, if any, of Case's protected activity Lee was aware of, we are not persuaded that the decision not to credit Case his accrued seniority was motivated by a desire to penalize or discourage Case's protected activity. We reach this conclusion because most of Case's protected activity involving Sheriff McDonald occurred after the Sheriff's Office entered into the 2005 ACE memorandum. Specifically, Sheriff McDonald entered into the 2005 ACE memorandum in January, very shortly after his appointment as sheriff. At that time, Case had not yet opposed the memorandum, nor had he opposed the transportation lieutenant appointments or rejected the Employer's settlement offer regarding the grievances. For these reasons, we find that the Employer did not fail to credit Case with his accrued seniority in violation of Section 10(a)(3) of the Law and dismiss this allegation.

*Section 10(a)(5) Allegation*

The complaint alleges that the Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing the method that it used to calculate Case's and Peterson's accrued seniority. A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124 (1989). To establish a vio-

lation of the Law, an actual change in the existing condition of employment must have occurred. *City of Peabody*, 9 MLC 1447 (1982). The Employer advances several arguments for why it did not violate Section 10(a)(5) of the Law by not crediting Case and Peterson with their accrued seniority, which we address below.

*Change in Practice*

The Sheriff's Office first contends that it did not change an existing practice or institute a new one. Rather, it bargained with the Union over the definition of seniority that affects members while they are in the bargaining unit, and the governing language in the Union contract has remained unchanged. The Employer further argues that the January 2005 MOA does not change the operation of this language. However, an employer's bargaining obligation extends to working conditions established through custom and past practice, as well as those specified in a collective bargaining agreement. *City of Boston*, 16 MLC 1429, 1434 (1989). Prior to May 2005, Union members who returned to the ACE bargaining unit were credited with all of their accrued seniority, but when Case and Peterson returned to the ACE bargaining unit, they were denied all accrued seniority. This was clearly a change to an established past practice.<sup>136</sup>

*Mandatory Subject of Bargaining*

The method of calculating seniority is a mandatory subject of bargaining. *Brockton School Committee*, 23 MLC 43 (1996). While the Employer does not dispute this, it argues that seniority is not a right incident to employment or a term or condition of individual employment. It asserts that, for this reason, the seniority of ACE unit members is not a mandatory subject of bargaining for the Union. Rather, the Employer is only required to bargain with ACE over seniority of ACE members, and with the Union over seniority of Union members. It cites for support *Chelmsford School Committee*, 8 MLC 1515, 1516 (1981), and several federal court decisions interpreting the Railway Labor Act (RLA).<sup>137</sup>

In *Chelmsford School Committee*, the school administrators union requested an advisory opinion as to what rights it had to make proposals regarding the seniority of unit members who leave the unit and become members of the teachers unit. The Board held that the school administrators union could not insist on bargaining over terms and conditions of employment of administrators after they leave the unit and become teachers, citing the following language of *Saugus School Committee*, 7 MLC 1849 (1981), an analogous case:

It is . . . clear that if a bargaining unit is under contract, and an employee is hired into that bargaining unit then from that moment the new employees' terms and conditions of employment are governed

feel this could turn into a hostile work environment...". Further, Cruz was the one who provided the memorandum to the Employer by hand-delivering it to Gabriel. And even if Cruz did not co-write the memorandum, it would seem that the Employer would have been concerned with Cruz, as Case's supervisor, going along with Case's "express willingness to turn a blind eye to workplace harassment."

136. The Sheriff's Office disputes that the ACE Memorandum infringes on Article VII, Section 2 of the CBA, specifically:

An employee of the Plymouth County House of Correction and Jail who is promoted to or transferred to a position inside the Sheriff's Department but

outside the collective bargaining unit shall retain his seniority acquired in a position within the unit and in the event of his subsequent retransfer to the unit, shall have added thereto his length of service with the Employer during such period of transfer.

However, as discussed above, we find that the Employer unilaterally changed the parties' practice with regard to seniority, and not that it repudiated this contract language.

137. While such federal decisions can be instructive, we rely here on earlier Board decisions.

by the existing contract in that unit- not by any arrangements made with the employer outside the scope of that contract. It makes no difference whether the new employee comes from within or outside the system, nor does it matter whether the ulterior arrangement is a private deal or the product of a bargaining relationship with a different union.

In *Saugus School Committee*, the school committee also requested an advisory opinion regarding whether it had to negotiate with either the administrators' unit or teachers' unit over a proposal that administrators be granted or denied seniority for time spent outside the administrators bargaining unit. While the Board recognized the issues cited above, it also advised:

...the School Committee that it must, upon demand, bargain in good faith over the method of calculation of seniority and the eligibility of administrators' to fill teaching positions. However, it is apparent that the efficacy of any agreement reached with the [administrators unit] will depend upon the provisions of the [teachers unit's] bargaining agreement. It is entirely conceivable that if one contract is negotiated without cognizance of the other, the School Committee could face conflicting obligations, exposing itself to liability to one bargaining unit or the other. However, this result cannot be avoided by narrowing the scope of the bargaining without substantially restricting the ability of the employee organizations and the employer to protect their interests or subjugating the rights of some employees to the rights of others. Rather, the potential conflicts must be resolved through negotiations.

This is the situation that has occurred here. While coming to an agreement with ACE that provides that Union members who return to ACE will lose their accrued seniority, the Sheriff's Office has exposed itself to conflicting obligations between the Union and ACE.<sup>138</sup> As we advised, such conflicts cannot be resolved by restricting the ability of the Union or ACE to protect its interests, or by subjugating the rights of the Union members to the rights of ACE members, but through negotiations. See also, *Town of Falmouth*, 20 MLC 1555, 1560 (1994) (town must bargain over conflicting obligations to the superiors' and patrol officers' units with respect to detail assignments); *Town of Burlington*, 35 MLC 18, 27 (2008) (appeal pending) (town's main failing was its failure to take any action to reconcile conflicting obligations between unions).<sup>139</sup>

Moreover, the Employer did more than merely bargain over the seniority of ACE members, as the January 7, 2005 memorandum affected *accrued* seniority rights of Union members. The Employer cannot reasonably argue that it is under no obligation to bargain with Union members over their rights upon transfer when it has done just that with ACE members over their rights when they leave the unit and become members of another unit.

138. Citing *Aeronautical Dist. Lodge*, 337 U.S. 521, 525 (1949), the Employer also argues that "it is the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured remain static." While this may be true, this does not mean that an employer may make a unilateral change to established practice without providing an employee organization, whose members may be affected by such a change, an opportunity to bargain.

139. The Sheriff's Office maintains that this ruling will have the effect of crippling collective bargaining by public agencies that employ multiple bargaining units as it will be unable to sign any agreement with a unit until it bargains the theoretical impacts of any change with each of the remaining units. According to the Sheriff's Office, such a result would run counter to the promotion of collective bargaining and

#### *Waiver by Inaction*

The Sheriff's Office further argues that it did provide the Union with notice and an opportunity to bargain because the Union received actual notice of the change by January 13, 2005, but did not request to bargain until May 27, 2005. A union waives its right to bargain by inaction if the union 1) had actual knowledge or notice of the proposed action; 2) had a reasonable opportunity to negotiate about the subject; and 3) unreasonably or inexplicably failed to bargain or request bargaining. *Town of Hudson*, 25 MLC 143 (1999); *Town of Milford*, 15 MLC 1247, 1252-54 (1988); *Scituate School Committee*, 9 MLC 1010 (1982). An employee organization is not required to respond to rumors of proposed changes, speculation or proposals that are so indefinite that no response could be formulated. *City of Gardner*, 10 MLC 1218, 1222 (1983).

Of importance in this case are the Board's decisions holding that it will not apply the doctrine of waiver by inaction where the union is presented with a *fait accompli*, where, "under all the attendant circumstances, it can be said that the employer's conduct has progressed to a point that a demand to bargain would be fruitless." *Town of Hudson*, 25 MLC at 143 (1999); *Holliston School Committee*, 23 MLC 211, 212-13 (1997). Here, by the time the Union learned of the ACE January 2005 Memorandum, the memorandum had already been executed by both the Sheriff's Office and ACE.<sup>140</sup> Therefore, a demand to bargain by that point would have been fruitless. Accordingly, we do not find that the Union waived its right to bargain by inaction.

#### *Waiver by Contract*

The Sheriff's Office also claims that it bargained with the Union over the impact of any change at labor-management meetings and contract bargaining for a successor contract that took place from January 13, 2005 through 2006, which resulted in contract language that it contends the parties agreed to in 2006 as part of a successor CBA. Where an employer raises the affirmative defense of waiver by contract, it bears the burden of demonstrating that the parties consciously considered the situation that has arisen and the union knowingly waived its bargaining rights. *Massachusetts Board of Regents*, 15 MLC 1265, 1269 (1988); *Town of Marblehead*, 12 MLC 1667, 1670 (1986). The initial inquiry focuses upon the language of the contract. *Town of Mansfield*, 25 MLC 14, 15 (1998). If the language clearly, unequivocally, and specifically permits the public employer to make the change, no further inquiry is necessary. *City of Worcester*, 16 MLC 1327, 1333 (1989). If the language is ambiguous, we will review the parties' bargaining history to determine their intent. *Peabody School*

the advancement of a harmonious environment. The Board find this argument unconvincing, as the Union was not "theoretically" impacted by the Employer's agreement with ACE, rather, two unit members lost multiple years of accrued seniority.

140. The Union first learned that ACE had entered into the memorandum with ACE through Case's conversation with an ACE Executive Board member. The Union then requested a meeting with the Employer to discuss the ACE memorandum, which took place on January 13, 2005. At this meeting, there was some ambiguity as to the effect of the memorandum on Union members. Because we find that the Employer presented the Union with a *fait accompli* in January 2005, we do not reach the question of whether the notice the Employer provided was definite enough for the Union to formulate a response.

*Committee*, 28 MLC 19, 21 (2001); *Town of Marblehead*, 12 MLC at 1670.

Without deciding whether the cited language would have acted as a waiver of the Union's right to bargain, we note that the findings indicate that the July 1, 2003 - June 30, 2005 and July 1, 2005 - June 30, 2008 successor agreements were not executed until February 2007, well after the conduct at issue here. Therefore, language that was not in existence at the time of the unilateral change cannot satisfy the requirements of the waiver by contract affirmative defense.<sup>141</sup>

#### Conclusion

For the reasons explained above, we find that the Employer violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by not reappointing Case as lieutenant. We also find that the Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing the method that it used to calculate Case and Peterson's seniority. However, we dismiss the allegation that the Employer retaliated against Case by refusing to credit him with the seniority that he previously accrued.

#### ORDER

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Sheriff's Office shall:

#### 1. Cease and desist from:

- a. Retaliating against Case for engaging in concerted protected activities.
- b. Failing to bargain collectively in good faith with the Union by not providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the change in calculating unit members' seniority when they return to the ACE bargaining unit.
- c. In any like or similar manner, interfering with, restraining, or coercing any employees in the exercise of their rights guaranteed under the Law.

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

- a. Immediately offer to reinstate Case to the position of lieutenant of records and restore his seniority to its status immediately prior to the demotion.
- b. Make whole Case for all losses of earnings he suffered, if any, as a result of the Sheriff's Office's unlawful action, plus interest on all sums owed at the rate specified in MGL c. 231, Section 61, compounded quarterly.
- c. Restore the status quo ante by reinstating the method of calculating seniority that existed prior to the execution of the ACE January 2005 memorandum for those Union members who returned to the ACE bargaining unit on or after January 7, 2005.
- d. Restore the seniority of those Union members who returned to the ACE bargaining unit on or after January 7, 2005 to their status immediately prior to their return to the ACE bargaining unit.

e. Make whole employees represented by the Union for all losses suffered, if any, as a result of the Sheriff's Office's change to the method in which it calculated seniority of Union members who return to the ACE unit, plus interest at the rate specified in MGL c. 231, Section 61, compounded quarterly.

f. Provide the Union with notice before changing the method in which the Sheriff's Office calculates seniority of Union members who return to the ACE unit, and upon request of the Union, bargain in good faith to resolution or impasse concerning any proposed changes.

g. Post in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the Sheriff's Office 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.

SO ORDERED.

#### APPEAL RIGHTS

Pursuant to MGL c.150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. 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.

#### DEPARTMENT OF LABOR RELATIONS COMMONWEALTH EMPLOYMENT RELATIONS BOARD

#### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

#### AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (Board) has held that the Plymouth County Sheriff's Office (Sheriff's Office) violated Sections 10(a)(1), 10(a)(3), and 10(a)(5) of General Laws, Chapter 150E (the Law) by demoting Brian Case in retaliation for his protected concerted activity and unilaterally changing the method it uses to calculate seniority of National Correctional Employees Union (Union) members who return to the Association of County Employees (ACE) bargaining unit. The Sheriff's Office posts this notice in compliance with the Board's order.

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

- To engage in self-organization; to form, join or assist any union;
- To bargain collectively through representatives of their own choosing;
- To act together for the purpose of collective bargaining or other mutual aid or protection; and
- To refrain from all of the above.

141. To the extent that the Employer argues that by these bargaining sessions, it fulfilled its duty to bargain over the change in the method of calculating seniority, we

reject the argument as the bargaining occurred after the Sheriff's Office entered into the ACE January 2005 memorandum.

WE WILL NOT retaliate against Brian Case for engaging in concerted protected activities.

WE WILL NOT fail and refuse to bargain collectively in good faith with the Union over changes to the method for calculating seniority of members who return to the ACE unit.

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

WE WILL take the following affirmative action to effectuate the purposes of the Law.

Immediately offer to reinstate Case to the position of lieutenant of records and restore his seniority to its status immediately prior to the demotion.

Make whole Case for all losses he suffered, if any, as a result of our unlawful action, plus interest on all sums owed at the rate specified in MGL c. 231, Section 61, compounded quarterly.

Restore the status quo ante by reinstating the method of calculating seniority that existed prior to the execution of the ACE January 2005 memorandum for those Union members who returned to the ACE bargaining unit on or after January 7, 2005.

Restore the seniority of those Union members who returned to the ACE bargaining unit on or after January 7, 2005 to their status immediately prior to their return to the ACE bargaining unit.

Make whole any employees represented by the Union for any losses suffered, if any, as a result of the change to the method in which we calculate seniority of Union members who return to the ACE unit, plus interest at the rate specified in MGL c. 231, Section 61, compounded quarterly.

Provide the Union with notice before changing the method in which we calculate seniority of Union members who return to the ACE unit, and upon request of the Union, bargain in good faith to resolution or impasse concerning any proposed changes.

[signed]  
Plymouth County Sheriff's Office

Date

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE  
DEFACED OR REMOVED**

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).

\* \* \* \* \*

1. In 2007, the Division of Labor Relations (Division) succeeded the Labor Relations Commission (LRC). Pursuant to Chapter 145 of the Acts of 2007, the Division had "all the legal powers, authorities, responsibilities, duties, rights and obligations

In the Matter of TOWN OF WEST SPRINGFIELD

and

WEST SPRINGFIELD FIRE FIGHTERS ASSOCIATION,  
LOCAL 2212, IAFF

Case No. MUP-07-4951

67.15 union waiver of bargaining rights  
67.8 unilateral change by employer

September 10, 2012

Kendrah Davis, Hearing Officer

James Donahue, Esq.

Representing the Town of West  
Springfield

Marshall T. Moriarty, Esq.

Representing West Springfield  
Fire Fighters Local 2212, IAFF

**HEARING OFFICER'S DECISION**

**SUMMARY**

The issue in this case is whether the Town of West Springfield (Town) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws of Chapter 150E (the Law) when the Town failed to bargain in good faith by requiring bargaining unit members to inspect and maintain the Town's fire hydrants without giving the West Springfield Fire Fighters Association, Local 2212, IAFF (Union) prior notice an opportunity to bargain to resolution or impasse. For the reasons explained below, I find that the Town did not fail to bargain in good faith when it required bargaining unit members to inspect and maintain the Town's fire hydrants.

**STATEMENT OF THE CASE**

On October 26, 2007, the Union filed a Charge of Prohibited Practice (Charge) the Department of Labor Relations (DLR)<sup>1</sup> alleging that the Town had engaged in a prohibited practice within the meaning of Sections 10(a)(1) and 10(a)(5) of the Law. A duly-designated DLR investigator investigated the Charge and issued a Complaint of Prohibited Practice (Complaint) on May 29, 2009. On June 16, 2009, the Town filed its Answer. I conducted a hearing on April 13, 2010, at which both parties had the opportunity to be heard, examine witnesses and introduce evidence. On May 14 and 18, 2010, the Town and the Union filed their post-hearing briefs, respectively. Based on the record, I make the following findings of fact and render the following decision.

**STIPULATIONS OF FACT**

The parties agreed to the following stipulations of fact:

previously conferred on the [LRC]." Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations' name is now the DLR. References to the DLR include the LRC.