

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of:

CITY OF HOLYOKE

and

INTERNATIONAL BROTHERHOOD OF POLICE
OFFICERS, LOCAL 388

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Case No. MUP-05-4503

Date Issued:

January 9, 2009

Board Members Participating:

Marjorie F. Wittner, Chair

Elizabeth Neumeier, Board Member

Appearances:

Melissa M. Shea, Esq.	-	Representing the City of Holyoke
Michael P. Clancy, Esq.	-	Representing the International Brotherhood of Police Officers, Local 388

DECISION¹

Statement of the Case

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

1 The International Brotherhood of Police Officers, Local 388 (Union) filed a charge
2 with the former Labor Relations Commission (Commission) on August 12, 2005,
3 alleging that the City of Holyoke (City) had violated Sections 10(a)(1), (a)(2), (a)(3), and
4 (a)(4) of Massachusetts General Laws, Chapter 150E (the Law).

5 Following an investigation, the Commission issued a complaint of prohibited
6 practice on February 2, 2007. The complaint alleged that the City had violated Sections
7 10(a)(3) and, derivatively, 10(a)(1) of the Law by transferring Gary Gresh (Gresh) from
8 the Detective Bureau to the Field Operations Bureau (FOB) in the Holyoke Police
9 Department. The Commission dismissed the allegations that the City violated Sections
10 10(a)(2) and 10(a)(4) of the Law.² The City filed an answer to the complaint on
11 February 15, 2007.

12 On May 31, 2007 and July 19, 2007, Susan Atwater, Esq., a duly-designated
13 hearing officer of the Board, conducted a hearing at which all parties had an opportunity
14 to be heard, to examine witnesses and to introduce evidence. The Union and the City
15 filed post-hearing briefs on or about September 21, 2007.

16 On April 29, 2008, the Hearing Officer issued Recommended Findings of Fact.
17 The parties filed no challenges. After reviewing the record, we adopt the Hearing
18 Officer's Recommended Findings of Fact and summarize the relevant portions below.

19 Stipulations of Fact

- 20 1. Police Chief Scott (Chief Scott) is an agent of the City.
21
22 2. Prior to May 1, 2001, Officer Gresh was assigned to the Narcotics Division of the
23 Criminal Investigation Bureau (CIB).
24

² The Union did not request reconsideration of the allegations that the Commission dismissed.

- 1 3. Effective May 5, 2002, Officer Gresh was transferred from the Narcotics Division to
2 the FOB.
3
- 4 4. On or about October 5, 2003, Officer Gresh was transferred to the Detective Unit of
5 the CIB.
6
- 7 5. Chief Scott met with a representative of the City and the Union on January 19, 2005
8 to discuss the grievance filed by Officer Gresh. After said meeting, on or about
9 February 4, 2005, Chief Scott rescinded the verbal reprimand and sick abuser
10 notice.
11
- 12 6. Officer Gresh did not request the March 24, 2005 assignment to the FOB.
13
- 14 7. Officer Gresh's rate of pay was not affected by the March 24, 2005
15 transfer/assignment to the FOB.
16

17 Findings of Fact³
18

19 Relevant Contractual Provisions

20 The collective bargaining agreement between the Union and the City that was in
21 effect between July 1, 2003 and June 30, 2006 (Agreement) provides in pertinent part:

22 Article Two: Union Recognition

23 Paragraph 2.5

24 Except as expressly abridged by the terms and provisions of this
25 Agreement, the Union and the employees agree that the responsibility and
26 the right to operate and manage the business and the affairs of the
27 Department....are vested exclusively in the City. These rights include
28 without being limited to, the right to...control, determine and
29 change...working assignments and schedules [and]...to transfer the
30 employees....
31

32 Article Seventeen: Sick Leave

33 Paragraph 17.4A

34 A Sick Leave abuser list shall be established by the Chief... Members will
35 automatically be placed on the sick leave abusers list the seventh (7th) day
36 sick leave is used in any calendar year. Days of sick leave used will not be
37 counted toward said seven (7) days if the member had an illness verified
38 by a physician's certificate.
39

40 Paragraph 17.4B

41 Removal of a member's name from the Sick Leave Abusers List shall be
42 done by the Chief after three (3) consecutive months of non-use.

³ The Board's jurisdiction is not contested.

1
2 Paragraph 17.4C

3 Physician's certificates may be made a condition precedent at any time by
4 the Chief to the receipt of any sick leave benefits by an abuser...

5
6 Article Nineteen: Adjustment of Grievances

7 Paragraph 19.1

8 ...A grievance is defined as a claim or a dispute between the City and
9 either an employee [or] the Union pertaining to the application of or
10 compliance with the express provisions of this Agreement...

11
12 Article Twenty-One: Employee Files

13 Paragraph 21.8

14 Except for probationary employees...no employee shall be removed,
15 dismissed, discharged, suspended or disciplined without just cause as
16 provided by law. All matters relating to disciplinary matters shall be dealt
17 with according to the provisions as presently contained in Chapter 31,
18 Section 41-46 of the Civil Service Law and the terms of the Agreement as
19 herein contained.

20
21 The Holyoke Police Department

22 The Holyoke Police Department contains three separate bureaus: the CIB, the
23 FOB, and the Technical Services Bureau (TSB). The CIB is organized into six divisions,
24 including the General Assignment Division (commonly known as the Detective Division)
25 and the Narcotics/Vice Division.⁴

26 The General Assignment Division of the CIB is responsible for conducting initial
27 and/or follow-up investigations into felony and misdemeanor violations of city, state and
28 federal statutes, particularly "Part I" offenses: murder, rape, robbery, burglary, auto theft
29 and larceny.⁵ The Narcotics/Vice Division of the CIB investigates narcotics and vice
30 crimes. The officers assigned to this division perform undercover police work involving

⁴ Prior to January of 2003, the Narcotics Division was in the Crime Prevention Bureau (CPB).

⁵ Part I offenses are defined as such in the "Uniform Crime Report of the FBI."

1 narcotics and drug trafficking, such as conducting street surveillance and making drug
2 buys. The detectives in the CIB work in plainclothes.

3 The FOB contains the uniformed officers who perform patrol duties and respond
4 to radio calls from City dispatchers. The majority of the Police Department's uniformed
5 staff work in the FOB. Supervisory personnel work on the streets and in the police
6 station between 75% and 85% of the time.

7 Chief Scott assigns officers to specific bureaus, divisions and watches.⁶ When
8 probationary officers graduate from the Police Academy, Chief Scott assigns them to
9 specific watches within the FOB. Chief Scott often transfers experienced officers to new
10 assignments at the same time that he issues academy graduate assignments. Officers
11 occasionally request a reassignment when they anticipate that the Chief will issue a
12 personnel order placing new academy graduates.

13 Captain Arthur Monfette (Captain Monfette) commands the CIB and assigns
14 individual cases to the detectives working there. Captain Monfette generally gives new
15 detectives less important cases, like misdemeanors, rather than higher level cases, like
16 homicides. Captain Monfette assigns experienced detectives to particular cases
17 depending on their interest and skills. As a result, certain detectives routinely receive
18 more difficult and complex cases.⁷

19 The Detective Division tracks the cases that are assigned to each detective on a
20 board in the police station and on monthly statistical reports. Chief Scott monitors the

⁶ Union President Edward Moskal (Moskal) monitors the transfers to ensure that they comply with applicable contractual rights.

⁷ The record suggests that, at some point after the March 24, 2005 transfers at issue here, all of the detectives began to receive both major and minor cases.

1 activity of the detectives in the CIB by observing the detectives, reviewing the
2 information displayed on the board and in the monthly reports, and reviewing particular
3 cases on his computer.

4 Officer Gary Gresh

5 Gresh began working for the Holyoke Police Department in 1985 and was initially
6 assigned to the FOB. Between 1995 and 2002, Gresh worked in the Narcotics/Vice
7 Division. Chief Scott transferred Gresh⁸ from Narcotics Division to the FOB in May of
8 2002, because he did not believe that Gresh displayed the motivation that Chief Scott
9 sought in the detectives in the Narcotics Division.⁹ However, Gresh had enjoyed
10 working in the Narcotics Division and actively sought a transfer back to that division.
11 Gresh relayed his interest in returning to the Narcotics Division to his friend and
12 neighbor, Attorney Jorge Neves (Neves), asking Neves to intercede on his behalf with
13 Chief Scott.¹⁰ Neves sympathized with Gresh and spoke to the Chief frequently about
14 transferring Gresh back to the Narcotics Division.

15 In response to Neves's continual pursuit of a transfer for Gresh, Chief Scott
16 assigned Gresh from the FOB to the Detective Division of the CIB in October of 2003.
17 Chief Scott sought to give Gresh the opportunity to demonstrate the individual initiative
18 that Chief Scott sought in a detective. Gresh had not requested a transfer to the
19 Detective Division and had previously advised Chief Scott that he had no interest in that

⁸ Chief Scott transferred twenty-seven other officers to new assignments at the same time that he transferred Gresh.

⁹ Chief Scott believed that Gresh was better suited to the FOB where he would respond to dispatcher calls and where supervisors were present on a majority of shifts.

¹⁰ As an attorney in Holyoke, Neves had a professional relationship with Chief Scott and had represented many police officers.

1 Division. Consequently, Gresh continued to seek a transfer back to the Narcotics
2 Division, and Neves continued his efforts on Gresh's behalf.

3 During Gresh's tenure in the Detective Division, Captain Monfette understood
4 that Gresh was not interested in investigating higher level cases such as homicides.¹¹
5 Consequently, Captain Monfette assigned less complex cases to Gresh, like auto thefts
6 or minor burglaries. Captain Monfette did not object to Gresh's preference for less
7 complex cases, but he viewed Gresh's work performance as mediocre or marginal.
8 Gresh completed all of the work assigned to him as a detective. No citizen complaints
9 were filed against Gresh, and he was never disciplined or told that his work did not meet
10 expectations.¹²

11 Chief Scott observed Gresh's work performance while Gresh worked in the
12 Detective Division. Chief Scott thought that Gresh dressed well and kept his work space
13 neat. However, Chief Scott viewed Gresh as a marginal employee who had less
14 investigative ability than other detectives and did not demonstrate individual initiative.

15 On December 21, 2004, Chief Scott issued a "sick abuser notification" to Gresh,
16 advising Gresh that he had been placed on an "Abuser's List." On December 24, 2004,
17 Chief Scott issued a verbal reprimand to Gresh regarding his sick leave use. The City
18 reduced the verbal reprimand to written form and placed it in Gresh's personnel file.

19 On January 2, 2005, Moskal filed a grievance on Gresh's behalf challenging the
20 reprimand.¹³ On January 19, 2005, Gresh, Moskal, Union Representative Robert

¹¹ Gresh had never received homicide investigation training.

¹² The Holyoke Police Department does not formally evaluate its police officers.

¹³ The grievance alleged that the City had violated Sections 2.5, 17.4A, 17.4B, and 17.4C of the Agreement by issuing the reprimand and the sick abuser notification.

1 Dickson (Dickson), and Union Attorney Michael Clancy (Clancy) met with Chief Scott,
2 City Solicitor Karen Betournay (Betournay), and City Labor Attorney Daniel Sheridan
3 (Sheridan) to discuss Gresh's grievance. The Union presented information regarding
4 Gresh's sick leave use to the City at the meeting. The Union's information demonstrated
5 that Gresh did not merit the discipline and the sick abuser letter that the Chief had
6 issued. Consequently, on February 4, 2005, Chief Scott rescinded the letter of
7 reprimand and sick abuser notice that he had previously issued to Gresh.

8 The March 24, 2005 Assignments

9 At some point prior to March 24, 2005, Captain Monfette had asked Chief Scott
10 to assign two additional officers to the Detective Division: Officer David Usher (Usher)
11 and Officer Loumag Alicia (Alicia). Chief Scott subsequently decided to assign three
12 additional officers to the Detective Division. Having favorably observed the performance
13 and initiative of FOB officers Cournoyer, Cadigan, and Stuart, Chief Scott contacted
14 those individuals and asked if they would be willing to transfer into the Detective
15 Division. All three agreed to the transfer.

16 On March 24, 2005, Chief Scott issued Personnel Order 014-15 containing the
17 following reassignments:

- 18 • 8 Police Academy graduates transferred to the FOB;
- 19
- 20 • 2 probationary officers transferred to the FOB pending completion of the Police
- 21 Academy;
- 22
- 23 • 5 officers (Cournoyer, Usher, Cadigan, Alicea, Stuart) transferred from the FOB
- 24 to the CIB;
- 25
- 26 • 7 officers (Garcia, Monaghan, Shattuck, Colon, Czupkiewicz, Monsalve, and
- 27 Donze) transferred to different watches within the FOB;
- 28
- 29 • 1 officer (Chirgwin) transferred from the FOB to the TSB;

- 1 officer (Taylor) transferred from the TSB to the FOB;
- 1 officer (Gresh) transferred from the 1st watch of the CIB to the 1st watch of the FOB.

Many of the non-probationary officers had previously requested their specific assignments, however, Gresh and Shattuck had not. Captain Monfette had not discussed his assessment of Gresh's work performance with the Chief and had not asked Chief Scott to transfer Gresh out of the CIB.

The Chief did not tell Gresh why he had transferred him from the Detective Division to the FOB. The Chief testified at the hearing that he transferred Gresh, because Gresh was a marginal employee who did not fit into the mold that the Chief was trying to develop for the Detective Division.

On March 25, 2005, Captain Monfette telephoned Gresh and stated: "you are not going to be surprised by this, but you are transferred out of here." On that same day, Chief Scott telephoned Neves and told Neves that he had transferred Gresh from the CIB to the FOB. Chief Scott alerted Neves to the transfer, because Chief Scott anticipated that Gresh would contact Neves regarding the new assignment.

A few officers joked with Gresh upon his return to the FOB. A computer screen saver in the police station displayed alternating messages, like: "Welcome Back to Uniform", "The Chief Got You Again", and "Guess Who Got Kicked Out of the DB." In March of 2006, Gresh was injured on duty and remained out of work for eight months. Gresh did not suffer any work-related injuries during his tenure as a detective.

Opinion

Section 2 of the Law guarantees employees the right to form, join or assist any employee organization and to engage in lawful, concerted activities for the purpose of bargaining collectively or other mutual aid or protection. 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 Reg. Voc. School District v. Labor Relations Commission, 386 Mass. 414 (1982); School Committee of Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327 (1996). To establish a prima facie case of a Section 10(a)(3) violation, a charging party must show that: (1) the employee engaged in concerted activity protected by Section 2 of the Law; (2) the employer knew of the concerted, 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. Town of Carver, 35 MLC 29, 47 (2008), citing, Quincy School Committee, 27 MLC 83, 92 (2000); Town of Clinton, 12 MLC 1361, 1365 (1985).

Here, the Union has established the first and second elements of its prima facie case. First, Gresh engaged in concerted, protected activity when Moskal filed a grievance on Gresh's behalf on January 2, 2005. Boston City Hospital, 11 MLC 1065, 1072 (1984) (the filing and processing of a grievance by an employee constitutes concerted, protected activity, because the employee is seeking to enforce the provisions of a collectively-bargained agreement, even if the employee is acting in his or her own self-interest), citing, Interboro Contractors, Inc., 157 NLRB 1295, 61 LRRM 1573 (1966), enf'd 399 F.2d 495, 67 LRRM 2083 (2d Cir. 1967). Second, the City does not dispute

1 that it knew of Gresh's January 2, 2005 grievance. Nevertheless, for the reasons
2 discussed below, the Union has not met its burden of establishing the other two
3 elements of its prima facie case.

4 With respect to the third element, the Board has determined that an involuntary
5 transfer to a less preferable position constitutes adverse action. Boston City Hospital,
6 11 MLC at 1072. See also, Melrose School Committee, 33 MLC 61, 69, (2006) (finding
7 adverse action where an employer changed an employee's status from part-time to full-
8 time, after the employee informed the employer that she did not want to work full-time
9 due to the potential adverse impact on her retirement benefits); Board of Higher
10 Education, 32 MLC 181, 184 (2006) (finding engineering professor's assignment to
11 teach all math courses and no engineering courses constituted adverse action).

12 The Union maintains that the City's transfer of Gresh from the Detective Division
13 to the FOB constituted adverse action because Gresh did not request a transfer to the
14 FOB. Nevertheless, since 2003, Gresh actively had sought a transfer out of the
15 Detective Division and Gresh had advised Chief Scott before the transfer that he had no
16 interest in the Detective Division. Moreover, Gresh's wages were unaffected by his
17 transfer to the FOB. Therefore, the fact that the Chief transferred Gresh to the FOB,
18 instead of to the Narcotics Division, is not dispositive.

19 The Union also argues that Gresh has been "made sport of" by other officers as
20 a result of the transfer. However, the subjective opinions of co-workers expressed in
21 casual office banter do not demonstrate that the transfer at issue was adverse within the
22 meaning of the Law. See, Town of Dracut, 25 MLC 131, 133 (1999) (finding that
23 adverse action is adverse personnel action taken by the employer, such as a

1 suspension, discharge, involuntary transfer, or reduction in supervisory authority).
2 Additionally, the Union contends that "the chance of being injured on duty or in physical
3 contact with unsavory characters is greater" as a uniformed patrol officer. Yet, the
4 evidence is insufficient to establish that a FOB position is significantly more dangerous
5 than a detective position. Therefore, there is no evidence that the Chief transferred
6 Gresh to a less preferable position. Consequently, we decline to find that the City took
7 adverse action against Gresh.

8 Even if the City's transfer of Gresh did constitute adverse action, the Union failed
9 to prove the final element of its prima facie case. Specifically, the Union did not
10 demonstrate that the City's transfer of Gresh was unlawfully motivated. To support a
11 claim of unlawful motivation, a charging party may proffer direct or indirect evidence of
12 discrimination. Lawrence School Committee, 33 MLC 90, 97 (2006), citing, Town of
13 Brookfield, 28 MLC 320, 327-328 (2002), aff'd sub nom., Town of Brookfield v. Labor
14 Relations Commission, 443 Mass. 315 (2005). Direct evidence is evidence that, "if
15 believed, results in an inescapable, or at least a highly probable inference that a
16 forbidden bias was present in the workplace." Wynn & Wynn, P.C. v. Massachusetts
17 Commission Against Discrimination, 431 Mass. 655, 667 (2000), quoting, Johansen v.
18 NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991). "Unlawful motivation also may
19 be established through circumstantial evidence and reasonable inferences drawn from
20 that evidence." Town of Carver, 35 MLC at 48, citing, Town of Brookfield, 28 MLC 320,
21 327-328 (2002), aff'd sub nom., Town of Brookfield v. Labor Relations Commission, 443
22 Mass. 315 (2005). Several factors may suggest unlawful motivation, including the
23 timing of the alleged discriminatory act in relation to the protected activity, triviality of

1 reasons given by the employer, disparate treatment, an employer's deviation from past
2 practices, or expressions of animus or hostility towards a union or the protected
3 activity. Town of Carver, 35 MLC at 48, citing, Melrose School Committee, 33 MLC at
4 69; Cape Cod Regional Technical High School District Committee, 28 MLC 332 335
5 (2005); Bristol County, 26 MLC 105, 109 (2000). Timing alone is insufficient to establish
6 unlawful employer motivation. City of Malden, 5 MLC 1752, 1764 (1979).

7 Here, the Union contends that discriminatory animus can be inferred from the
8 timing of Gresh's March 24, 2005 transfer in relation to his January 2, 2005 grievance.¹⁴
9 The Union argues that, "Gresh stood out by no means other than the fact he had
10 recently filed a grievance." However, the Union offers no other arguments to show
11 unlawful motivation and we find none. We note first that there is no evidence
12 contradicting Monfette's and Chief Scott's view of Gresh's work performance as
13 marginal or mediocre. In particular, we note that, in 2002, well before Gresh's protected
14 activity in 2005, the Chief transferred Gresh to the FOB from the Narcotics Division
15 because he believed Gresh lacked the motivation that Chief Scott sought in the
16 detectives in the Narcotics Division. Second, there is no evidence that the City singled
17 out Gresh. The City transferred other officers to new assignments on the same day that
18 it transferred Gresh. Gresh was not the only officer that the City assigned to the FOB
19 and he was not the only officer who did not request his new assignment. Accordingly,
20 we find no evidence of unlawful motivation, the fourth element in the Union's prima facie
21 case.

22

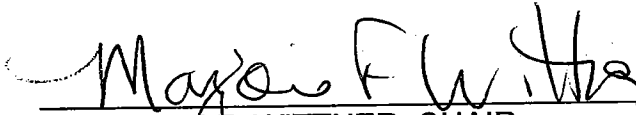
¹⁴ The Union does not argue that there is direct evidence of unlawful motivation, and we find none in the record.

Conclusion

For the reasons discussed above, the Union failed to establish a prima facie showing of discrimination. Accordingly, we conclude that the City has not violated Sections 10(a)(3) and, derivatively, 10(a)(1) of the Law, and we dismiss the complaint of prohibited practice.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD


MARJORIE F. WITTNER, CHAIR


ELIZABETH NEUMEIER, BOARD MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. 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.