

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
	*	
TOWN OF CHELMSFORD	*	Case No. MUP-12-2093
	*	
and	*	Date Issued:
	*	
CHELMSFORD FIREFIGHTERS,	*	September 23, 2014
LOCAL 1839	*	
	*	

Hearing Officer:

Helen M. Bowler, Esq.

Appearances:

Paul T. Hynes, Esq.	-	Representing the Chelmsford Firefighters, Local 1839
Brian M. Maser, Esq.	-	Representing the Town of Chelmsford

HEARING OFFICER'S DECISION

Summary

1 The issues are whether the Town of Chelmsford (Town or Employer) violated
2 Sections 10(a)(3) and, derivatively, 10(a)(1) of Massachusetts General Laws Chapter
3 150E (the Law) by retaliating against Firefighter John Kivlan (Kivlan) for his protected
4 union activity when Chief Michael Curran (Curran) issued him a verbal reprimand in
5 January, 2012 and subsequently failed to promote him to permanent fire captain. In
6 addition, the Town is alleged to have independently violated Section 10(a)(1) by
7 interfering with, restraining, or coercing Kivlan in the exercise of his rights under the Law

1 by threatening further discipline when he sought written clarification of the basis of
2 Curran's reprimand. Based on the record and for the reasons explained below, I
3 conclude that the Town violated Section 10(a)(3) of the Law in the manner alleged when
4 it verbally reprimanded and failed to promote Kivlan, but did not independently violate
5 Section 10(a)(1) of the Law.

Statement of the Case

6 On July 26, 2012, the Chelmsford Firefighters, Local 1839 (Union) filed a charge
7 with the Department of Labor Relations (DLR), alleging that the Town had engaged in
8 prohibited practices within the meaning of Sections 10(a)(3) and 10(a)(1) of the Law.
9 The DLR docketed the charge as MUP-12-2093. On September 18, 2012, a DLR
10 investigator held an in-person investigation. On November 5, 2012, the investigator
11 issued a three count complaint, alleging that the Town had violated Sections 10(a)(3)
12 and derivatively, 10(a)(1) of the Law when Curran issued a verbal reprimand (Count I)
13 and chose to fill a promotional vacancy for captain by provisional appointment rather
14 than utilize a permanent appointment list (List) on which Kivlan was the only person
15 eligible for appointment. (Count II). In addition, the investigator alleged in Count III that
16 Curran independently violated Section 10(a) (1) by threatening to change the verbal
17 reprimand to a written reprimand when Kivlan requested the basis for the reprimand in
18 writing. The Town filed its answer to the complaint on November 7, 2012.

19 Pursuant to the Notice of Hearing, I conducted a hearing on October 24, 2013
20 and November 25, 2013. The parties were afforded a full opportunity to be heard, to
21 examine and cross-examine witnesses, and to introduce evidence. On January 27,
22 2014, the parties filed timely post-hearing briefs. On the entire record, including my

observation of the demeanor of the witnesses, I make the following findings of fact and render the following opinion.

Stipulations of Fact

1. The Town of Chelmsford (Town) is a public employer within the meaning of Section 1 of the Law.
2. The Union is an employee organization within the meaning of Section 1 of the Law.
3. The Union is the exclusive bargaining representative for all uniformed permanent firefighters in the Chelmsford Fire Department (Department) excluding the fire chief, two deputy chiefs and civilian personnel.
4. Fire Chief Michael Curran (Curran) heads the Department.
5. John Kivlan (Kivlan) is a Firefighter and former President of the Union referenced in Paragraph 3.
6. On January 26, 2012 Curran reprimanded Kivlan.

Findings of Fact

The Chelmsford Fire Department

The Department is a Civil Service department, having accepted the provisions of G.L. c. 31¹, and makes hiring and promotion decisions in accordance with its provisions. This obligation is codified in the parties' collective bargaining agreement which provides in Article 23, that "All matters pertaining to seniority, promotions, vacancies and reductions in force shall be regulated by the rules and regulations of the Civil Service

¹ M.G.L. c. 31, section 1 et seq. are the Civil Service Laws of the Commonwealth which set out the procedures for hiring municipal personnel in cities and towns that have accepted its provisions.

Commission.” Chief Curran is a “strong chief”² vested with the authority to appoint, promote and discipline firefighters in the Department. Curran was appointed Chief in October, 2010. Prior to that time he served as Deputy Chief of Operations, Captain and Firefighter. In addition to the Chief, the department is composed of two deputy chiefs, six captains and approximately fifty-two firefighters organized into four groups of twelve to fourteen individuals.

The Deputy Chief of Operations, Michael Donoghue (Donoghue) and a second Deputy Chief of Fire Prevention report directly to Curran. Donoghue oversees the day to day operations of the Department. Below the deputy chiefs are four line captains who act as shift commanders and two additional captains who have no supervisory responsibilities, one overseeing fire prevention activities and the second, training. Each of the four groups work a twenty-four hour shift schedule organized by one day on, one day off, one day on and four days off. The Fire Chief, Deputies, and Training and Fire Suppression Captains work an administrative or “day” schedule. The Town has five fire stations.

Kivlan’s Background and Qualifications

Kivlan was appointed a firefighter in Chelmsford in July, 1998. He holds the rank of private/firefighter and is a certified emergency medical technician (EMT). He also holds several academic degrees related to the fire sciences: an Associate’s Degree in Science, Fire Protection and Safety Technology, a Bachelor’s Degree in Fire Science

² The Town has accepted the provisions of M.G.L. c. 48 Section 2 known as the “Strong Chief Law” which provides that a fire chief in a town which accepts its provisions has “full and absolute authority” to appoint and remove personnel.

1 Engineering and Fire Administration and Leadership, and a Master's Degree in Fire
2 Science Management.

3 Kivlan also holds numerous professional certifications. He is an EMT-Basic and
4 Paramedic level. He also is certified as Firefighter I and II, HazMat Technician, Fire
5 Instructor I, Fire Officer I and II, Incident Safety Officer (Fire Suppression) and Incident
6 Safety Officer (Hazardous Materials Operations). He is also a member of the regional
7 HazMat Team. In 2005, he received a Firefighter of the Year Award from the
8 Commonwealth Department of Fire Services for his rescue of an elderly woman from a
9 two-alarm fire.

10 Prior to January, 2012 Kivlan had no disciplinary record regarding his
11 performance as a firefighter.

12 Kivlan's Union Activities

13 While employed in Chelmsford, Kivlan has held various offices with Union Local
14 1839. He served as a member of the Union Executive Board from 2002 through 2004.
15 In addition, he was the Local President from 2004 until his resignation in September,
16 2011. During his time as President, he served on the negotiating team during contract
17 negotiations and filed at least one grievance.

18 Three specific events led to friction between the Union and the Department
19 administration during Kivlan's tenure as Union President. The first involved the
20 purchase of a piece of fire equipment. The second involved the location of a new fire
21 station. In both instances, the Union spoke out against the administration's decisions.

22 The most controversial event that occurred while Kivlan was Union president
23 was the Union's decision not to participate in the Town's Fourth of July Parade in 2008.

1 Kivlan communicated the Union's decision to the Town's administration, and the Town
2 was displeased with the decision. Curran made negative comments about this incident.
3 Curran attributed the parade decision to Kivlan in separate conversations with three
4 department employees, Daniel Funaro (Funaro), Keith Lindsay (Lindsay) and William
5 Shellbach (Shellbach). In late 2012, Curran told Shellbach, then Union president, that
6 he was still "dealing with the backlash from the past president (Kivlan) regarding the
7 parade." When Funaro, Kivlan's commanding captain, went to see Curran to advocate
8 for Kivlan's promotion in 2012, Curran said that Kivlan was to blame for the parade
9 issue. Finally, Curran told Lindsay, who succeeded Kivlan as Union president, that "prior
10 president (Kivlan) may not have had the best interests of the Department in mind."³

11 The Verbal Reprimand and January Meeting

12 In mid-January, 2012, Kivlan brought to Donoghue's attention a conversation that
13 Kivlan had previously with Captain Henry Houle (Captain Houle), his shift commander,
14 regarding the staffing of a fire engine. Although Captain Houle staffed the engine as he
15 saw appropriate, Kivlan had manpower and safety concerns with how Captain Houle
16 had decided to staff the engine, and Kivlan raised them with Donoghue. Captain Houle
17 and Donoghue had words over a resulting email Donoghue sent to Captain Houle and
18 the fact that Kivlan spoke directly to Donoghue. ⁴

³ I credit Shellbach, Funaro and Lindsay's testimony. Curran initially did not recall the conversation with Shellbach although he later recalled the conversation but not the remark, denied the comment to Funaro, although he recalled having the conversation with him but no specifics of the conversation, and did not address Lindsay's comment in his testimony.

⁴ There was some confusion in the testimony regarding which captain, Houle or Kevin O'Brien (O'Brien) had the staffing incident with Kivlan. It is not relevant to the disposition

1 On the morning of January 26, 2012, Curran telephoned Kivlan and told him to
2 report upstairs and bring Ryan Houle (Houle), the Union Vice President, with him. Kivlan
3 and Houle went upstairs and met with Curran. Curran began the conversation and told
4 Kivlan that he was disciplining him for a chain of command violation. Curran told him
5 that he was not a captain and "not the Union president anymore" and needed to have
6 his captain present with him when discussing a concern with Donoghue. Kivlan asked
7 Curran, "Since when do you need to bring a captain with you?" Curran replied, "Since
8 today."⁵

9 During the January 26th meeting with Kivlan, Curran raised two prior incidents
10 where he considered Kivlan to have broken the chain of command. The first involved a
11 microwave fire that Kivlan had responded to in early January, 2012. Kivlan believed
12 that a Department investigator needed to interview the tenant. But instead of asking
13 O'Brien about it, he raised the issue with Donoghue. The second prior incident occurred
14 in 2007 and involved a direct conversation between Kivlan and then Deputy Chief
15 Curran regarding a propane tank. Curran had directed firefighters to chain the tank to a
16 tree during river flooding. Curran and Kivlan had a heated exchange about this directive
17 in front of other firefighters. Curran alleged at hearing that Kivlan made derogatory and
18 disrespectful comments to him. Kivlan was not disciplined regarding the propane tank

of the matter, because Curran indicated both officers complained to him on two separate occasions and both were considered when he disciplined Kivlan.

⁵ There is no evidence that any firefighter has previously been disciplined for failing to observe the chain of command. Neither Curran nor Kivlan were aware of any such discipline.

1 incident.⁶

2 Kivlan then asked Curran if he had information about the incident in writing.
3 Curran responded that he had nothing. The meeting concluded, and Curran and Kivlan
4 shook hands.⁷

5 The Failure to Appoint Kivlan as Permanent Captain

6 Under the provisions of the Civil Service law, Curran has the authority to make
7 permanent promotions to vacant captain position(s) following an examination process
8 and certification of an appointment list by the Commonwealth's Human Resources
9 Division (HRD). Once HRD establishes an eligibility list for promotion, it is in effect for a
10 two year period. Generally, a certification must satisfy the "2n+1 rule" (the Rule)⁸
11 meaning it must contain sufficient names to reflect twice the number of vacancies to be
12 filled plus one. Once a list no longer meets the Rule, the appointing authority has the
13 discretion to determine whether to promote from the existing list or provisionally
14 promote an employee in the next lower title. In accordance with HRD local delegation
15 procedures, the appointing authority, in this case, Curran, has the responsibility to notify
16 candidates of the existence of the list and his or her obligation to sign the list to indicate
17 a willingness to accept a promotion and to notify candidates of interviews for vacant
18 positions.

⁶ Curran brought up the two prior incidents because he believed they constituted a pattern of insubordination. Further, he testified that he had no obligation to investigate the chain of command issue regarding Henry Houle because he felt a pattern was evident.

⁷ There is no evidence that Curran stated to Kivlan that, "If I give you something in writing, consider it a written warning," as alleged in Count III of the Complaint. Houle testified to these facts, and I credit his testimony.

⁸ M.G.L. c. 31, Section 15.

1 In the fall of 2010, Curran had an active certification list for filling captain
2 vacancies in the Department. Certification No. 205885 was established on May 22,
3 2009 and expired on May 22, 2011. Two names appeared on the list, Henry Houle and
4 Daniel Koutsoufis (Koutsoufis). Henry Houle had already been promoted by the prior
5 Chief and Koutsoufis was the only name on the list once Curran became Chief in 2010.
6 Kivlan, as Union President, approached Curran in 2010 to inquire if Koutsoufis would be
7 appointed. Curran told Kivlan that Koutsoufis was not eligible because he did not have
8 an Associate's Degree and ten years' experience, a new requirement that the Town had
9 imposed through special legislation.⁹ Curran used his discretion to return the list to HRD
10 and appointed Francis Conlin, the senior firefighter, as provisional captain.

11 Subsequently, another examination was held resulting in Certification No.
12 208821, a captain promotional list containing four names in descending order, O'Brien,
13 Marc Pare (Pare), Daniel Manley (Manley) and Kivlan. The list was issued on May 23,
14 2011 and expired on May 23, 2013. Soon after the list was established, a vacancy
15 arose for captain. Curran notified O'Brien, Pare and Manley of the vacancy and
16 interviewed the three candidates. He did not notify Kivlan of the list or interview him.
17 Curran appointed O'Brien to the vacancy on August 8, 2011.

18 A second vacancy arose. Curran held no interviews and did not notify Kivlan of
19 the list, even though he now occupied the third place on the list to fill the vacancy.
20 Curran promoted Pare on January 16, 2012. On February 3, 2012, Curran promoted
21 Manley, without giving Kivlan notice or an interview, leaving Kivlan the only remaining
22 name on the list. On April 3, 2012 Curran returned the list to HRD, even though there

⁹ Chapter 504 of the Acts of 2008 (Approved January 13, 2009).

1 was no pending vacancy and the list would not expire until May 23, 2013. Curran
2 testified that he did not believe that Kivlan was ready to fill a Captain's position in 2012,
3 but was ready at the time of hearing.¹⁰

4 On August 1, 2012, Curran provisionally promoted Bruce Donovan (Donovan),
5 the senior firefighter to the next captain vacancy. Curran neither considered, notified nor
6 interviewed Kivlan for the position.

7 OPINION

8 The Union alleges that the Town violated Section 10(a)(3) of the Law by first
9 verbally reprimanding Kivlan on January 26, 2012 and then returning the List in April,
10 2012 and by failing to promote him to the rank of Captain in August, 2012, each action
11 in retaliation for his protected activity. In addition, the Union alleges that the Town
12 independently violated Section 10(a)(1) of the Law when Curran made certain remarks
13 during the January 26th disciplinary meeting. The Town contends that Curran had good
14 reason to discipline Kivlan and to decide to return the promotional List without
15 appointing Kivlan, the only name remaining eligible for promotion. Finally, the Town
16 argues that Curran never made any alleged remark regarding escalation of the
17 discipline at the January 26th meeting; thus the Section 10(a)(1) allegation should be
18 dismissed.

19 I. The Section 10(a)(3) Allegations

20 To establish a prima facie case of a Section 10(a)(3) retaliation violation, a
21 charging party must show that: (1) the employee engaged in concerted activity
22 protected by Section 2 of the Law; (2) the employer knew of the concerted, protected

¹⁰ Curran told Town Administrator Paul Cohen (Cohen) that he was not "comfortable" promoting Kivlan, but Cohen never asked what Curran meant by that statement.

1 activity; (3) the employer took adverse action against the employee; and, (4) the
2 employer's action was motivated by a desire to penalize or discourage the protected
3 activity. City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (Jan. 9, 2009); Town of
4 Carver, 35 MLC 29, 47, MUP-03-3094 (June 30, 2008); Quincy School Committee, 27
5 MLC 83, 92, MUP-1986 (Dec. 29, 2000); Town of Clinton, 12 MLC 1361, 1365, MUP-
6 5659 (Nov. 9, 1985).

7 A. Concerted, Protected Activity

8 The Union argues that Kivlan was engaged in protected activity when he served
9 as Union President from 2004 until September, 2011. It cites several examples of the
10 broad range of protected activities during that time: the filing of at least one grievance,
11 engagement in negotiations for at least two collective bargaining agreements, protesting
12 the Town's purchase of equipment, and opposing then Chief Jack Parrow's (Parrow)
13 decision about the location of a new fire station. Kivlan served as lead spokesperson for
14 the Union regarding these issues. The most significant issue was the Union's decision
15 not to participate in the annual Fourth of July Parade in 2008, which Kivlan
16 communicated to the Town's administration. The Townspeople disapproved of the
17 parade decision, and the resulting antipathy has had a longstanding effect. While the
18 Town sought to downplay the continued impact of the parade decision, there is
19 undisputed evidence that Kivlan engaged in many protected activities during his term as
20 Union president.

21 In addition, I find that Kivlan's complaint to Donoghue regarding staffing a piece of
22 apparatus, leading to the discipline of Kivlan on January 26, 2012, also constitutes
23 protected, concerted activity. The Commonwealth Employment Relations Board (Board)

1 has long held that complaining about working conditions constitutes protected activity
2 under Section 2 of the Law. See generally, Bristol County Sheriff's Department, 26 MLC
3 105, 109, MUP-2100 (Jan. 28, 2000). Therefore, the Union has established the first
4 prong of the four part test with respect to each action.

5 B. The Town's Knowledge

6 The Town does not dispute that Kivlan has been engaged in protected activity. It
7 is aware that Kivlan had been Union president for seven years and has advocated for
8 Union issues during that time. Curran was aware that Kivlan complained to Donoghue
9 about the equipment staffing in January, 2012. Accordingly, the Union satisfies the
10 second element of its *prima facie* case.

11 C. The Town's Two Adverse Action Against Kivlan

12 i. The January 26, 2012 Reprimand

13 Relying on City of Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009), the
14 Town argues that Curran never reprimanded Kivlan on January 26, 2012 because he
15 did not suffer any material disadvantage in salary, grade or other objective term of
16 employment as a result of their alleged confrontation on that date. The Town further
17 relies on Suffolk County Sheriff's Department, 27 MLC 155, MUP-1498 (June 4, 2001)
18 arguing that counseling about job duties, without more, does not constitute adverse
19 action and that Curran counseled, rather than reprimanded Kivlan.

20 I am not persuaded by the Town's arguments. First, it is well settled that a
21 disciplinary reprimand rather than a counseling session, constitutes adverse action. City
22 of Peabody, 28 MLC 281, MUP-2162 (March 6, 2002). Curran told Kivlan that he was
23 reprimanding him for a chain of command violation. Curran also directed that he bring

1 Houle with him. This is further indicative of discipline rather than counseling. In addition
2 to the reprimand, Curran took adverse action against Kivlan within a week of the
3 meeting. On February 3, 2012, Curran appointed Manley as Fire Captain. At the time of
4 the appointment, Manley and Kivlan were the only two names on the eligibility list.
5 Kivlan was therefore eligible for appointment; however Curran neither interviewed,
6 notified or otherwise considered him for appointment. Failure to consider an employee
7 for assignment constitutes adverse action. Suffolk County Sheriff's Department, 27 MLC
8 155, MUP-1498 (June 4, 2001). Therefore, I find that the failure to consider Kivlan for
9 the February 3rd captain appointment within a week after the verbal reprimand
10 constitutes sufficient credible evidence to satisfy the adverse action element of its *prima*
11 *facie* case of unlawful discrimination.

12 ii. The Failure to Promote Kivlan to Captain

13 The Town argues the failure to promote Kivlan does not constitute an adverse
14 action, because he had no guarantee that being on a promotional list would assure that
15 he would be promoted. While that statement may be accurate, it is irrelevant. The
16 promotion carries with it an increase in rank and compensation, as well as the possibility
17 of future promotion within the Department and thus constitutes adverse action. Town of
18 Andover, 14 MLC 1571, 1582, MUP-6443 (H.O. March 3, 1988), aff'd 17 MLC 1475,
19 1482, MUP-6443 (Feb. 6, 1991). Therefore, the Union has established the third element
20 of its *prima facie* case under Section 10(a)(3).

21 D. The Employer's Unlawful Motivation

22 A charging party can prove unlawful employer motivation, the last element of its
23 *prima facie* case, with direct or indirect evidence of discrimination. Lawrence School

1 Committee, 33 MLC 90, 97, MUP-02-3631 (Dec. 13, 2006). Direct evidence is evidence
2 that, "if believed, results in an inescapable, or at least a highly probable inference that a
3 forbidden bias was present in the workplace." Wynn & Wynn, P.C. v. Massachusetts
4 Commission Against Discrimination, 431 Mass. 655, 667 (2000), (quoting Johansen v.
5 NCR Comten, Inc., 30 Mass. App. Ct., 294, 300 (1991)). Unlawful motivation may also
6 be established through circumstantial evidence and reasonable inferences drawn from
7 that evidence. See Town of Carver, 35 MLC at 48 (citing, Town of Brookfield, 28 MLC
8 at 327-28; see also, Southern Worcester County Regional Vocational School District,
9 386 Mass. at 418-19 (citing Universal Camera Corp. v. National Labor Relations Board,
10 340 U.S. 474 (1951))). Several factors may suggest unlawful employer motivation,
11 including timing of the alleged discriminatory act, triviality of reasons given by the
12 employer, an employer's deviation from past practices, or expressions of hostility toward
13 a union or the protected activity. Town of Carver, 35 MLC at 48; Cape Cod Regional
14 Technical High School District Committee, 28 MLC 332, 335, MUP-2541 (May 15,
15 2002); Bristol County, 26 MLC 105, 109, MUP-2100 (Jan. 28, 2000); Town of Andover,
16 14 MLC 1571, 1582, MUP-6443 (H.O. March 3, 1988), aff'd 17 MLC 1475, 1482, MUP-
17 6443 (Feb. 6, 1991). Timing alone is insufficient to establish unlawful employer
18 motivation. City of Malden, 5 MLC 1752, 1764, MUP-3017 (March 20, 1979).

19 The Town argues that there is no direct evidence of discrimination and that the
20 circumstantial evidence is scant and insignificant. It further argues that timing is not a
21 factor because the verbal warning occurred several months after Kivlan's resignation as
22 Union president and the promotions were even more remote in time. In addition, the
23 Town claims that 1) Curran had significant legitimate reasons for his actions, 2) the

1 Town did not deviate from past practice and 3) there is no evidence of animus or
2 hostility. I disagree, and find that the Union has satisfied its threshold burden to
3 demonstrate that unlawful animus motivated both Curran's January 26, 2012 reprimand
4 and Curran's failure to promote Kivlan.¹¹

5 i. The January 26, 2012 Verbal Reprimand

6 The Union argues that unlawful animus motivated the January 26th reprimand
7 based on Curran's statement to Kivlan that "You're not the Union president and you're
8 not a captain." The Town offered no explanation as to why Curran may have made such
9 a statement or why Curran brought up Kivlan's past Union involvement during a
10 disciplinary meeting. It appears that Kivlan's former role as Union president was
11 uppermost on Curran's mind that day. This implied criticism of Kivlan's role as Union
12 President evidences unlawful animus. See Bristol County, 26 MLC at 109; Town of
13 Andover, 14 MLC at 1582, aff'd 17 MLC at 1482.

14 The Union also argues that Curran imposed a new work rule on Kivlan that day
15 that constituted a deviation from past practice. I agree. When Kivlan questioned Curran
16 regarding the directive to contact Donahue only with a Captain present, Curran stated
17 that it was the rule "since today." In addition, Curran acknowledged that he never
18 investigated the incident with Donoghue or obtained Kivlan's side of the events. Curran
19 did not receive a complaint from either Captain Houle or O'Brien regarding Kivlan's
20 conduct, but initiated the discipline based on a conversation he overheard between

¹¹ The Union argues that Curran's comments at the January 26th meeting constitute direct evidence of discrimination. However, I do not need to decide whether or not his comments constitute direct evidence of animus towards Kivlan because the Union has satisfied the higher burden of proof as set forth in Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981). See Lawrence School Committee, 33 MLC 90, MUP-02-3631 (December 13, 2006).

1 Houle and Donoghue. He obtained no complaints in writing even though he
2 characterized the complaints as "serious."

3 Consequently, I find that the reasons that the Town provided to support Curran's
4 reprimand were insubstantial and revealed that Curran harbored unlawful animus
5 against Kivlan. See Commonwealth of Massachusetts, 14 MLC 1743, 1748, SUP-3081
6 (May 19, 1988); Town of West Springfield, 8 MLC 1041, MUP-3914 (June 4, 1981).
7 Based on the totality of the evidence presented, I find that the reprimand was motivated
8 by an unlawful desire to penalize Kivlan's protected activity. Accordingly, the Union has
9 successfully established its *prima facie* case of discrimination with respect to the
10 January 26, 2012 reprimand.

11 ii. The Failure to Promote

12 I similarly find that the Union has met its burden of establishing that anti-union
13 animus motivated Curran not to promote Kivlan. The Union argues that the Curran
14 treated Kivlan differently from the other three candidates on the 2012 promotional List
15 by failing to: 1) notify Kivlan of the existence of a promotional list so that he could
16 indicate his willingness to accept the promotion; 2) interview Kivlan who was the third
17 name on the list when promoting Pare; 3) interview Kivlan before promoting Manley; 4)
18 produce legitimate reasons for returning the list, and 5) consider Kivlan's credentials
19 during the promotional process including the provisional appointment of Donovan in
20 August, 2012.

21 The Town contends that it has real and substantial issues for not promoting
22 Kivlan. With respect to the past practice argument, it states that it had also returned a
23 list the previous year which contained a single name. It offers no explanation for

1 returning the list in April, 2012 well before its expiration date and why firefighters were
2 treated differently during the 2012 promotional process.

3 The manner in which Curran handled the four candidates for the four promotional
4 opportunities during the 2012 year shows that Curran treated Kivlan differently than any
5 other candidate. Curran interviewed and subsequently promoted three of the four
6 candidates. Kivlan was the one exception. In addition, Kivlan was the only firefighter of
7 the four who was not notified as required by HRD procedures of the vacancy. Curran
8 returned the promotional list to HRD without any notice or explanation to Kivlan. These
9 actions all occurred within four months of Kivlan's complaint to Donahue and the
10 reprimand. Curran claims that the reprimand and complaint had no role in returning the
11 list to HRD. Instead, he stated that he did not believe that Kivlan was "ready" to be
12 promoted, without further specifics. The timing, as well as Curran's failure to follow the
13 practices followed for other firefighters within the same promotional cycle, persuasively
14 establishes unlawful motivation.¹²

15 In so finding, I am not persuaded by the Town's argument that the practice did
16 not deviate from the prior promotional cycle, and therefore does not prove the Town
17 acted with an improper motive. In that case, the prior Chief promoted one individual
18 from the list with only two names remaining and did not apply the Rule. When

¹² Curran was also critical of Kivlan's Union activities in three separate conversations with department employees, Daniel Funaro (Funaro), Keith Lindsay (Lindsay) and William Shellbach (Shellbach). In late 2012, Curran told Shellbach, then Union president, that he was still "dealing with the backlash from the past president (Kivlan) regarding the parade." When Furnaro, Kivlan's commanding captain, went to see Curran to advocate for Kivlan's promotion in 2012, Curran said Kivlan was to blame for the parade issue. Finally, Curran told Lindsay, who was successor Union president to Kivlan, "prior president (Kivlan) may not have had the best interests of the Department in mind."

1 Koutsoufis was the only name left on the list name, he did not possess an Associate's
2 Degree and did not have the requisite ten years' experience as a firefighter. His
3 credentials cannot be compared to Kivlan, who had both the degree and ten years of
4 service within the Department.

5 E. Employer's Burden of Production

6 i. The January 26, 2012 Reprimand

7 Once the charging party establishes a *prima facie* case of retaliation, the Board
8 applies the three-step analysis pursuant to Trustees of Forbes Library v. Labor
9 Relations Commission, 384 Mass. 559, 566 (1981), which shifts the burden to the
10 employer to produce a legitimate, non-discriminatory motive for taking the adverse
11 action. The employer must state a lawful reason for its decision and produce
12 supporting facts indicating that the proffered reason was actually a motive in the
13 decision. Trustees of Forbes Library, 384 Mass. at 566; Quincy School Committee, 27
14 MLC at 92; Commonwealth of Massachusetts, 25 MLC at 46.

15 The Town argues that failing to follow the chain of command is a serious
16 infraction in the orderly operation of a para-military organization such as a fire
17 department. I agree that Curran had grounds to discipline Kivlan for such a breach of
18 duty and therefore, the Town has established a legitimate reason for its discipline of
19 Kivlan.

20 ii. The Failure to Promote

21 It is insufficient for an employer to simply state lawful reasons for its adverse
22 actions. Town of Clinton, 12 MLC 1361, 1365, MUP-5659 (Nov. 9, 1985). It must "state
23 a lawful reason for its decision and produce supporting facts indicating that this reason

1 was actually a motive in the decision." Forbes Library, 384 Mass. 559, 563 (1981). "The
2 decision maker must find it more than plausible that legitimate reasons motivated the
3 employer's decision. Those reasons must actually have been a motive in the decision in
4 order to be a case of dual motive." Boston City Hospital 11 MLC at 1065, 1072, MUP-
5 4893 (July 24, 1984).

6 The Town argues that Curran also had legitimate reasons for returning the List
7 and appointing a provisional captain rather than Kivlan. Curran stated only that it was in
8 the best interests of the Town to return the list and that Kivlan was "not ready" to be
9 promoted to Captain. He did not elaborate further or specify as to why it was in the best
10 interests of the Town or why Kivlan was not ready to be a Captain. He told Cohen that
11 he was not "comfortable" with Kivlan, but did not explain his reasoning. Although Curran
12 acknowledged that Kivlan was ready to be a captain at the time of the hearing, he did
13 not say what changed in the ensuing eighteen months. Curran never reviewed Kivlan's
14 credentials, personnel file, education or experience, nor did he interview him. The Town
15 did not suggest that Kivlan did not possess the necessary qualifications, and the record
16 shows that Kivlan has an Associate's, Bachelor's and Master's Degrees in fire sciences,
17 numerous certifications and leads the regional Hazmat team. He also had a clean
18 disciplinary record for fourteen years. Therefore, I conclude the reasons offered by the
19 Town were pretextual. While the Union bears the ultimate burden persuasion, the
20 employer must meet its intermediate burden to produce evidence and dispel the
21 presumption of discrimination fostered by the prima facie case. Forbes Library 384
22 Mass. at 566. Because the Town failed to produce credible evidence of a legitimate,

1 non-discriminatory reason for its failure to promote Kivlan to Captain, I find that its
2 actions in failing to promote Kivlan violated Section 10(a)(3) of the Law.

3 F. Mixed Motives (Reprimand only)

4 Once the employer produces evidence of a legitimate, non-discriminatory reason
5 for taking the adverse action, the case becomes one of "mixed motives" and the Board
6 shifts the burden to the charging party to demonstrate that "but for" the protected
7 activity, the employer would not have taken the adverse action. Trustees of Forbes
8 Library, 384 at 565-566; Suffolk County Sheriff's Department, 27 MLC at 160; Quincy
9 School Committee, 27 MLC at 92. The Union contends that but for engaging in
10 protected activity, Kivlan would not have been disciplined in January, 2012. I agree.
11 Curran's remark, "You are not the Union president....." is significant, because he had
12 Kivlan's former role as Union president uppermost in his mind at the start of the
13 conversation. Also persuasive is the fact that Curran did not investigate the incident,
14 did not receive complaints in writing and tied Kivlan's culpability to an incident several
15 years in the past in an attempt to create a pattern of misconduct. Consequently, I find
16 that the Union has satisfied its burden to show that Curran's reprimand would not have
17 occurred but for his protected activity as Union President and his complaints about
18 staffing levels on a fire engine.

19 II. The Independent Violation of Section 10(a)(1)

20 An employer independently violates Section 10(a)(1) of the Law when it engages
21 in conduct that can reasonably be said to interfere with employees in the free exercise
22 of their rights under Section 2 of the Law. Quincy School Committee, 27 MLC 83, 91,
23 MUP-1986 (December 29, 2000) When conduct is protected by Law, the employer has

1 no right to interfere with it, and the expression of employer anger, criticism or ridicule
2 directed to an employee's protected activity has been recognized to constitute
3 interference, restraint and/or coercion of employees. Groton-Dunstable Regional School
4 Committee 15 MLC 1551, 1557, MUP-6748 (March 20, 1989), cited in Boston School
5 Committee MUP-09-5543 (June 6, 2013).

6 Count III of the complaint alleges that Curran, during the course of the meeting
7 with Kivlan and Houle stated "If I give you something in writing, consider it a written
8 warning", in response to Kivlan's request for information. The Union alleges that the
9 Town independently violated Section 10(a)(1) when, in the course of issuing the verbal
10 reprimand, the Chief refused to answer Kivlan's questions and threatened him with
11 further discipline. The Town argues that there is no evidence that Curran made any of
12 the statements alleged in the Complaint and that Count III should therefore be
13 dismissed.

14 Curran's response to the request for information is critical in establishing a
15 violation of Section 10(a)(1), and the Union failed to prove that Curran made the alleged
16 remark. Curran denied making the statement. Kivlan did not testify in his description of
17 the January meeting that Curran made the statement. Houle, the Union Vice President,
18 testified that Curran stated he did not have anything in writing and the meeting ended at
19 that point with the participants shaking hands, and I credited Houle's testimony. Absent
20 proof that Curran made the alleged statement, I need not further consider this issue. I
21 dismiss Count III of the complaint.

1 III. Remedy

2 In addition to revocation of the verbal reprimand, the Union requests that I order
3 the Town to award Kivlan the promotional position to Captain and make him whole for
4 his loss of that position in August, 2012 when Curran appointed Donovan as provisional
5 captain after returning the list with Kivlan's name to HRD. When an employer unlawfully
6 discriminates against a candidate for promotion based on his protected activity, the
7 Board has the authority to order the employer offer the candidate promotion to the
8 position in question, even when the appointment is made under the Civil Service Laws
9 of the Commonwealth. City of Malden, 5 MLC 1952, MUP-3017 (March 20, 1979); Town
10 of Clinton, 12 MLC 1361, 1365, MUP-5659 (Nov. 9, 1985).¹³

11 I agree with the Union that it is appropriate to direct the Town to appoint Kivlan
12 as Captain retroactive to August, 2012. Curran testified that Kivlan was ready for
13 promotion at the time of hearing. The Town's general practice was to promote the next
14 name on a promotional list, regardless of how many names appeared on the list. But for
15 the demonstrated anti-union animus, Kivlan would have been promoted in August,
16 2012. This case is distinguishable from Town of Randolph, 8 MLC 2044, MUP-4589
17 (April 23, 1982) where the Board could not determine which of the three candidates
18 would have received the appointment had the employer followed lawful procedures.
19 Here it is clear that Kivlan, as the only candidate on the List, would have received the
20 appointment. Town of Clinton, 12 MLC 1361, 1365, MUP-5659 (Nov. 9, 1985).

¹³ The Town does not address the issue of remedy in its brief.

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ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the Town of Chelmsford shall:

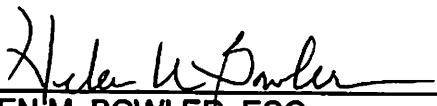
1. Cease and desist from:
 - a. Discriminating against John Kivlan or any other employee for engaging in concerted, protected activity;
 - b. In any like manner, interfering with, restraining and coercing John Kivlan or any other employee in any right guaranteed under the Law;
 - c. Discriminating against John Kivlan in regard to any term or condition of employment.
2. Take the following affirmative action which will effectuate the policies of the Law:
 - a. Rescind the January 26, 2012 verbal reprimand;
 - b. Offer John Kivlan the position of Fire Captain in the Chelmsford Fire Department, which position he shall be deemed in terms of seniority, benefits and all rights and privileges to have held as of August 1, 2012;
 - c. Make John Kivlan whole for loss of earnings, if any, suffered as a result of the discriminatory denial of promotion to Fire Captain. He shall be paid a sum equal to the difference between what he would have earned as fire captain and what he earned as firefighter for the period from the date of August 1, 2012 to the date of compliance with this order. Any amount due shall bear interest at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly;
 - d. Sign and post immediately in conspicuous places where employees usually congregate and where notices to employees are usually posted,

1 including electronically, if the Town customarily communicates to its
2 employees via intranet or e-mail, and maintain for a period of thirty (30)
3 consecutive days thereafter signed copies of the attached Notice to
4 Employees; and

- 5
6 e. Within thirty (30) days notify the DLR in writing of the steps taken to
7 comply with this decision and Order.
8

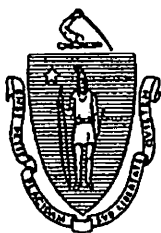
9 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS


HELEN M. BOWLER, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.



**COMMONWEALTH OF MASSACHUSETTS
NOTICE TO EMPLOYEES
POSTED BY ORDER OF A HEARING OFFICER OF THE
THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the Town of Chelmsford (Town) has violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of G.L. Chapter 150E (the Law) by retaliating against John Kivlan for engaging in concerted, protected activities. The Town posts this Notice to Employees in compliance with the Hearing Officer's order.

Section 2 of the Law gives all employees: (1) the right to engage in concerted protected activity, including the right to form, join and assist unions, to improve wages, hours, working conditions, and other terms of employment, without fear of interference, restraint, coercion or discrimination; and, (2) the right to refrain from either engaging in concerted protected activity, or forming or joining or assisting unions.

WE WILL Cease and desist from:

Discriminating against John Kivlan or any other employee for engaging in concerted, protected activity;

In any like manner, interfering with, restraining and coercing John Kivlan or any other employee in any right guaranteed under the Law;

Discriminating against John Kivlan in regard to any term or condition of employment.

WE WILL rescind the January 26, 2012 verbal reprimand;

WE WILL offer John Kivlan the position of Fire Captain in the Chelmsford Fire Department, which position he shall be deemed in terms of seniority, benefits and all rights and privileges to have held as of August 1, 2012;

WE WILL make John Kivlan whole for loss of earnings, if any, suffered as a result of the discriminatory denial of promotion to Fire Captain. He shall be paid a sum equal to the difference between what he would have earned as fire captain and what he earned as firefighter for the period from the date of August 1, 2012 to the date of compliance with this order. Any amount due shall bear interest at the rate specified in M.G.L. c. 231, Section 6I, to be compounded quarterly;

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 Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone:(617) 626-7132).