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

In the Matter of	*	Case No. MUP-13-2687
	*	
CITY OF MEDFORD	*	
	*	Date issued: June 29, 2015
and	*	
	*	
MEDFORD FIRE FIGHTERS UNION, LOCAL 1032	*	

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, CERB Member
Harris Freeman, CERB Member

Appearances:

Jillian Ryan, Esq. - Representing Medford Fire Fighters Union, Local 1032
Albert Mason, Esq. - Representing City of Medford

CERB Decision on Appeal of Hearing Officer Decision

Summary

On July 7, 2014, a Department of Labor Relations Hearing Officer issued a decision holding that the City of Medford (City) had violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) when Fire Chief Frank Giliberti (Giliberti) issued letters of reprimand to two members of the Medford Fire Fighters Union, Local 1032 (Union), President William O'Brien (O'Brien) and Timothy Beckwith (Beckwith), a lieutenant firefighter. The City appeals from the decision, claiming errors of fact and law. The Union filed a cross-appeal arguing that the Hearing Officer improperly failed to address its independent Section 10(a)(1)

allegation. After reviewing the record and the parties' arguments on appeal, we affirm the Hearing Officer's conclusion and reject the Union's cross appeal.

Facts

The City challenges only one of the Hearing Officer's findings, which we address in the Opinion section below. After a thorough review of the record, we adopt the Hearing Officer's findings, except as modified, and reiterate only those facts necessary to an understanding of our opinion. Further reference may be made to the facts set out in the Hearing Officer's decision, reported at 41 MLC 1 (2014) and attached to the slip opinion of this decision.

Opinion[1]

The Hearing Officer held that the City had violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law when, on March 7 and March 8, 2013, it issued letters of reprimand to Union President O'Brien and Beckwith in retaliation for their protected, concerted activity. The Hearing Officer first analyzed whether the Union had established a prima facie case of discrimination under Trustees of Forbes Library, 384 Mass. 559, 565-566 (1981).[2] Turning to the first prong of that test, she concluded that Beckwith and O'Brien had engaged in protected, concerted activity, which she held consisted of: (1) the Union filing a grievance on Beckwith's behalf on March 5, 2013 (March 5 grievance) alleging that Giliberti had violated the parties'

[1] The CERB's jurisdiction is not contested.

[2] To establish a prima facie case of a Section 10(a)(3) retaliation 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 action was motivated by a desire to penalize or discourage the protected activity. City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (January 9, 2009).

collective bargaining agreement by refusing to allow Beckwith to return to work from sick leave without first completing a detailed medical questionnaire/checklist and (2) then meeting with Stephanie Burke (Burke), the City's Director of Personnel and Budget who serves as the Mayor's designate at Step 2 of the grievance procedure[3] to try to resolve the grievance (O'Brien/Burke meeting).[4]

The City challenges the factual underpinnings of this conclusion, arguing that the Union did not meet with Burke to resolve the March 5 grievance. Rather, the City claims that the Union met with Burke *before* filing the March 5 grievance and meeting with the Chief at Step 1 of the grievance procedure. Thus, the City argues that the

[3] The parties' grievance procedure states in pertinent part:

> Controversies of any kind which arise between one or more employees and the City or its agents concerning the working conditions, hours of work, wages, fringes or rates of pay referred to in this Agreement may be processed as a grievance under the following procedure:
>
> **Step 1.** The Union shall present the grievance in writing to the Chief of the Fire Department or his designate, who shall then meet with the Union's grievance committee within forty-eight (48) hours…to discuss and attempt to adjust the grievance. In the event the grievance cannot be adjusted satisfactorily within seven (7) calendar days of its presentation to the Chief of the Fire Department, it thereafter may be presented to the Mayor or his designate, for discussion in Step Two (2).
>
> **Step 2.** Within ten (10) calendar days after the presentation of a grievance to the Mayor or his designate, the grievance committee shall meet with the Mayor or his designate to discuss and attempt to adjust the grievance. If the grievance cannot be adjusted satisfactorily within three (3) weeks of its presentation to the Mayor or his designate, it thereafter may be submitted within sixty (60) days to the American Arbitration Association for arbitration in accordance with its rules….

[4] Giliberti did not permit Beckwith to return to work based on his doctor's note. Beckwith's physician eventually completed the questionnaire and, on March 5, 2013, the Union filed a Step 1 grievance for refusing to allow Beckwith to return to work without first completing the medical questionnaire. Giliberti denied the grievance on March 7.

O'Brien/Burke meeting was not a Step 2 grievance meeting as the Hearing Officer characterized. From this, the City argues that O'Brien and Beckwith were not engaged in protected activity when O'Brien met with Burke. It further argues that since it rightfully issued reprimands to them for circumventing the grievance procedure by not filing a grievance before meeting Burke, the Hearing Officer erred when she found that the reprimands were issued in retaliation for filing the March 5 grievance.

We agree with the City's factual arguments but disagree with its legal conclusions. The record shows and neither party disputes that O'Brien met with Burke *before* filing a formal grievance at Step 1 on March 5 2013 in an attempt to have Beckwith return to work without submitting a medical questionnaire as long as Beckwith's doctor submitted a one-sentence statement clearing him to return to work.[5] However, we reject the City's legal argument that its characterization of the meeting as not being a Step 2 meeting undermines the Hearing Officer's conclusion that the O'Brien/Burke meeting was protected, concerted activity or that the City violated the Law by issuing the reprimands.

To begin, there is no question that O'Brien met with Burke in his capacity as Union president to discuss a matter that implicated terms and conditions of employment and contract issues. Such activity is clearly both concerted and protected. See, e.g., Massachusetts Port Authority, 36 MLC 5, 11-12, UP-04-2669 (June 30, 2009)(the "criteria and procedure by which an employer determines whether

[5] Article 22, Section 2 of the parties' collective bargaining agreement states: "A doctor's report shall be required for all absences in excess of five (5) calendar days." The Hearing Officer found that, pursuant to this language, the parties had a practice where the Chief would permit unit members who had sustained off-the-job injuries to return to work after using more than five-days of sick leave if they provided a one-sentence return-to-work notice from their physicians.

individuals are fit for employment have a direct and profound effect on employees' job security and are, therefore quintessential conditions of employment, subject to collective bargaining"). See generally, Sheriff's Office of Plymouth County, 39 MLC 41, MUP-05-4475 (September 10, 2012) (Union president's efforts on behalf of bargaining unit members deemed protected, concerted activity).

The fact that the O'Brien/Burke meeting may have occurred outside the formal grievance procedure does not change this result. The grievance procedure affords the Union discretion as to whether or not to file a grievance and does not mandate or prohibit any process, including attempts to resolve a dispute prior to filing a formal grievance.[6] Moreover, the Hearing Officer found that O'Brien met with Burke to explore settlement of Beckwith's issue to avoid costs of further litigation.[7] Indeed, meeting with a representative of the Mayor is not problematic since, as the Hearing Officer found, the Mayor, not the Chief, signed the CBA. We know of no cases and the City cites none holding that a union official's meeting with the mayor's designee under the CBA to discuss terms and conditions of employment is not concerted, protected activity.

[6] For this reason, we affirmed the dismissal of the charge that the City filed against the Union in Case No. MUPL-13-2770 on April 22, 2013. That charge alleged that the Union violated Section 10(b)(2) of the Law by repudiating the parties' grievance procedure when it met with Burke before meeting with Giliberti at Step 1. On December 13, 2013, the CERB affirmed the Investigator's dismissal of the charge because the evidence did not show that the plain and unambiguous language of the grievance procedure prevented the Union from having this meeting.

[7] In August 2012, Giliberti sought similar information from Lieutenant Daniel Lennox's (Lennox) physician allowing Lennox to return to work. Lennox submitted the completed medical questionnaire under protest and the Union filed a grievance on his behalf and processed the matter to arbitration. The arbitration decision was pending when the hearing was held and was therefore not part of the hearing record.

The City also claims that as a matter of public safety and policy, Giliberti had the exclusive right to obtain information from Beckwith's doctor regarding Beckwith's fitness for duty and that the Union improperly interfered with that right when it bypassed him at Step 1 of the grievance procedure and met with Burke to allow Beckwith to return to work with a one-line doctor's note. We disagree.

This argument ignores the fact that this dispute arises under Section 10(a)(3) of the Law, which makes it a prohibited practice for an employer to discriminate against employees to discourage or encourage union membership. Accordingly, whether the City had the exclusive managerial right to make fitness for duty determinations is not the appropriate inquiry,[8] notwithstanding Article 22 of the contract. Rather, the issue is whether the City unlawfully retaliated against Beckwith and O'Brien for engaging in the protected concerted activity described above.

To the extent the City argues that Beckwith and O'Brien's conduct somehow lost its protected status, we note that activity that is otherwise protected may lose that status where it is shown that the conduct was unlawful, violent, disruptive, or indefensibly disloyal to the employer, see Bristol County Sheriff's Department, 31 MLC 6, 18, MUP-2872 (July 15, 2004) or physically intimidating, egregious or disruptive of the employer's business, see Harwich School Committee, 2 MLC 1095, 1110, MUP-720 (August 26, 1975). Here, there is no evidence and the City does not argue that the O'Brien/Burke meeting falls within any of these categories. For these reasons, we affirm the Hearing Officer's conclusion that the Union established the first prong of its

[8] The City's argument that it is improper to characterize the O'Brien/Burke meeting as an attempt to resolve a contractual sick leave issue (the City claims it is a fitness for duty issue) is in no way material to our analysis. Regardless of how the substance of the meeting is characterized, it plainly concerned terms and conditions of employment.

prima facie case and turn to the remainder of the prima facie case.

We easily dispose of the second and third prongs, knowledge and adverse action. The City's knowledge of the protected activity here, the O'Brien/Burke meeting, is evident from the letters of reprimand, which admonished Beckwith and O'Brien for their role in the O'Brien/Burke meeting. The letters also warned that if they engaged in similar action in the future, they would be subject to disciplinary action. It is well-established that letters containing threats of future disciplinary action constitute adverse action. City of Peabody, 28 MLC 281, 284-285, MUP-2612 (March 6, 2002) (letters containing threat of future disciplinary action constitute adverse actions). See also City of Somerville, 23 MLC 11, 14, MUP-8450 (June 6, 1996) (treating reprimands and warnings issued to charging party as adverse action for purpose of Section 10(a)(3) analysis). Given this case law, we reject the City's arguments to the contrary.

We therefore turn to the fourth prong of the prima facie case, whether the reprimands issued to O'Brien and Beckwith were motivated by an unlawful anti-union animus. We agree with the Hearing Officer that the substance of the two reprimands constitutes direct evidence of unlawful motivation. Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 667 (2000) (direct evidence is evidence that, "if believed, results in an inescapable, or at least a highly probably inference that a forbidden bias was present in the workplace.") This is made evident by the fact that Giliberti's letter to O'Brien expressly reprimands him for meeting with Burke rather than following the "mutually agreed-to collective bargaining procedure," an action that Giliberti states is an "unacceptable circumventing of me as your chief and a designated bargaining representative, as well as the process that has been mutually agreed to and contractualized." Further, when read as a whole, and as the Hearing Officer found, the

reprimand criticized O'Brien for questioning Giliberti's authority to require Beckwith to complete a medical questionnaire before allowing him to return to work. Finally, the March 7 reprimand repeatedly admonishes O'Brien for circumventing the grievance process by not filing a grievance before meeting with Burke. Thus, given that the March 5 grievance both protested the medical questionnaire and was filed after the O'Brien/Burke meeting rather than before, it is part and parcel of the protected activities criticized in O'Brien's reprimand.

Giliberti's letter to Beckwith similarly warns him for protesting the medical questionnaire and "circumvent[ing] the process and . . . me as both your Chief and the first step collectively bargained and designated bargaining representative" and thus also constitutes direct evidence of unlawful motivation.

Where, as here, the employees have demonstrated that a proscribed factor played a motivating part in the challenged employment decisions, the burden of persuasion shifts to the employer who may avoid a finding of liability only by proving that it would have made the same decision even without the illegitimate motive. Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002) (citing Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 667 (2000), *aff'd sub nom*, Town of Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005).[9] Here, the Hearing Officer examined

[9] In its response to the Union's supplementary statement and cross-appeal, the City argues that because the Hearing Officer analyzed this case under the three-part shifting burden of proof analysis set forth in Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981), she erred when she did not impose the ultimate burden of proving unlawful motivation on the Union. The Hearing Officer does cite Trustees of Forbes Library in her decision. However, having determined that the Union had satisfied the fourth-prong of the prima facie case set forth in Trustees of Forbes Library by proffering direct evidence of unlawful motivation for the written reprimands, she then, appropriately, proceeded to analyze this case under the two-part Wynn v. Wynn analysis, which places the ultimate burden on the employer to

the City's proffered reasons for taking the disputed action, i.e., his concerns for Beckwith's well-being, the well-being of other firefighters and the public at large, as well as his concerns over the purported circumvention of the grievance procedure and found that the reprimands showed that he nevertheless admonished and threatened Beckwith and O'Brien with discipline for their meeting with Burke.[10] She therefore concluded that the City had failed to demonstrate that its legitimate reasons, standing alone, would have caused Giliberti to issue the reprimands.

We agree with the Hearing Officer that the City did not meet its burden. Indeed, in its response to the Union's request for review, the City concedes this point by stating that, "The letters in this case speak for themselves, they were issued based on the Chief's good faith belief that the union was circumventing or repudiating a mutually agreed to contractual grievance procedure step in an attempt to, foolishly, and imprudently accomplish a fitness for duty return to duty matter based on a 'one-sentence' report from a doctor." Given this statement and having addressed and rejected the City's good faith belief argument above, we agree with the Hearing Officer and find that the City has not met its burden of showing that it would have issued the reprimands even without the illegitimate motive. See Town of Brookfield, 28 MLC at 327-328; see also Andover School Committee, 40 MLC 1, MUP-12-2994 (July 2, 2013) (where School Committee did not dispute that teacher was terminated for engaging in

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show that it would have taken the same action even absent the unlawful motive. Wynn v. Wynn, 431 Mass. at 670. The City's argument therefore lacks merit.

[10] The fact that the Hearing Officer characterized the meeting with Burke as an attempt to resolve a grievance does not alter our conclusion since we have held that Beckwith's and O'Brien's efforts to reach a settlement with Burke over what was then Beckwith's *potential* grievance over the medical questionnaire constitutes protected, concerted activity. As explained above, there is no question that Giliberti's reprimands were aimed at this activity.

activity that CERB deemed to be protected conduct, School Committee failed to meet its burden under Wynn v. Wynn of showing that teacher would have been terminated absent her protected activity).

Union's Cross Appeal

We reject the Union's argument that the Hearing Officer improperly declined to consider its argument that the City independently violated Section 10(a)(1) of the Law. Although we agree with the Union that it did not raise the independent 10(a)(1) allegation for the first time in its post hearing brief as the Hearing Officer found, the Union's argument overlooks the fact that, on August 28, 2013, the Investigator issued a two-count complaint alleging violations of Section 10(a)(3) and derivative Section 10(a)(1) violations and that the Investigator expressly noted that the independent Section 10(a)(1) allegations were subsumed by the Section 10(a)(3) allegations.[11] Moreover, as the Hearing Officer correctly pointed out, the Union sought to file a motion to amend the complaint on August 29, 2013 to add allegations that the City violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law in retaliation for the O'Brien/Burke meeting. At that time, the Union had the opportunity, but did not seek, to amend the complaint to add independent Section 10(a)(1) violations. Therefore, because the 10(a)(1) charge was subsumed under the 10(a)(3) count and the Union failed to amend the complaint when an opportunity to do so arose, we reject the Union's argument that the Hearing Officer improperly declined to consider its

[11] The Union correctly points out that its initial charge alleged an independent Section 10(a)(1) violation based on the O'Brien reprimand. There is also no dispute that the Union sought to amend the charge during the in-person investigation to allege a Section 10(a)(3) violation based on the same facts and to add a Section 10(a)(3) and another independent Section 10(a)(1) based on the letter of reprimand that Giliberti gave to Beckwith.

argument that the City independently violated Section 10(a)(1) of the Law. See Town of Brookfield (declining to consider independent Section 10(a)(1) violations because complaint never amended to include allegations) Cf. Andover School Committee, 40 MLC at 16, n. 15, (declining to consider independent Section 10(a)(1) violations where investigator dismissed them pre-complaint and union did not appeal from dismissal).

Conclusion

For the foregoing reasons, we affirm the Hearing Officer's conclusion that the City violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by reprimanding Beckwith and O'Brien for engaging in protected, concerted activities.

ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the City of Medford shall:

1. Cease and desist from:

   a. Discriminating against Timothy Beckwith and William O'Brien or any other employee for engaging in concerted, protected activity;

   b. In any like manner, interfering with, restraining and coercing Timothy Beckwith and William O'Brien or any other employee in any right guaranteed under the Law.

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

   a. Rescind the March 7, 2013 and March 8, 2013 reprimands;

   b. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted, including electronically, if the City customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter signed copies of the attached Notice to Employees; and

c. Within thirty (30) days, notify the DLR in writing of the steps taken to comply with this decision and Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

_____
MARJORIE F. WITTNER, CHAIR

_____
ELIZABETH NEUMEIER, CERB MEMBER

_____
HARRIS FREEMAN, CERB 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.

COMMONWEALTH OF MASSACHUSETTS
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 (CERB) has held that the City of Medford (City) has violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of M.G.L. L. c. 150E (the Law) by retaliating against Timothy Beckwith and William O'Brien for engaging in concerted, protected activities. The City 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 NOT discriminate against Timothy Beckwith and William O'Brien or any other employee for engaging in the concerted, protected activity;

WE WILL NOT, in any like manner, interfere with, restrain and coerce Timothy Beckwith and William O'Brien or any other employee in the exercise of their rights guaranteed under the Law.

WE WILL rescind the March 7, 2013 and March 8, 2013 reprimands.

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