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

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| In the Matter of | * | |
| CITY OF SOMERVILLE | * | Case No. MUP-17-5980 |
| and | * | Date Issued: October 2, 2020 |
| SOMERVILLE POLICE EMPLOYEES ASSOCIATION | * | |

CERB Members Participating:

Marjorie F. Wittner, Chair
Joan Ackerstein, CERB Member
Kelly Strong, CERB Member

Appearances:

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| Shannon T. Phillips, Esq. | - | Representing the City of Somerville |
| Jack J. Canzoneri, Esq. | - | Representing the Somerville Police Employees Association |

## CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISION

### SUMMARY

The issue on appeal is whether the City of Somerville (City or Employer) interfered with, restrained or coerced employees in the exercise of their rights under M.G.L. c. 150E (the Law) when it required the president of the Somerville Police Employees Association (Union) and a former Union vice-president to answer questions about an off-duty conversation they had concerning voluntary training, and prohibited them from discussing the issue or the City's investigation into the issue with anyone other than their Union

representatives or legal counsel. For the reasons set forth below, the Commonwealth Employment Relations Board (CERB) affirms the Hearing Officer's conclusion that the off-duty discussion constituted concerted, protected, activity that was neither disruptive nor indefensibly disloyal and thus, the City's conduct independently violated Section 10(a)(1) of the Law.

Facts

The facts of this case, as set forth the parties' stipulations and as found by the Hearing Officer, are unchallenged on appeal. We accept the stipulations and findings and briefly summarize them below.

This matter concerns an investigation by the Somerville Police Department into a conversation between Union president Michael McGrath (McGrath) and then Union vice-president Alan Monaco (Monaco) on the eve of a voluntary five-day maritime training, which Monaco was scheduled to attend from April 3 - April 7, 2017. The training was being paid for by the Boston Urban Area Security Initiative (UASI), which is a group of nine communities, including Somerville, that receives federal funds from Homeland Security to pay for training exercises and planning to ensure security at certain events. The purpose of the April 2017 training was to help Boston police prepare for SailOne Boston, a tall ship sailing regatta that was coming to Boston in June 2017. Homeland Security had deemed SailOne Boston a "Tier One" security event, crew members were needed for the boats securing Boston Harbor during the event.

McGrath had previously made a request to bargain over various aspects of this training and asked Police Chief David Fallon (Fallon) to postpone selecting officers until bargaining was completed. Fallon refused to do so and selected three sworn members

of the Police Department to attend one of the maritime trainings offered at the Boston Police Department[1] including Monaco and Sergeant Michael Kiely (Kiely).

Monaco called Deputy Chief Paul Trant (Trant) on April 6, 2017, the fourth day of training. According to an email that Trant sent to Fallon later that day, as well as a follow-up report that Trant prepared on May 2, 2017, during that conversation, Monaco told Trant that he had resigned from his position as Union vice president. According to Trant, Monaco explained that, although his "official" explanation for his resignation was "family matters," the "real reason" was because McGrath had called him on April 2 and stated that it would be "devasting to the union" if a Union executive board member attended. Trant reported that Monaco further stated that McGrath wanted him to notify Trant that he was backing out of the training and to wait until Sunday night (April 2) to do so in order to "burn the spot," i.e., not leave Trant sufficient time to find a replacement. It is undisputed that Monaco did not back out of the training. Instead, he reported to the training on April 3 as scheduled and completed all five days.

Upon receiving Trant's April 6 email, Fallon ordered the Police Department's Office of Professional Standards (OPS) to conduct an investigation. The Hearing Officer found that Fallon was concerned that an officer's failure to report to the training could harm the City's reputation as a UASI member. Fallon was also concerned that an officer's absence could potentially impact public safety if the necessary number of officers were not

[1] The Massachusetts Port Authority Fire Department offered the same basic crew member training classes from March 27-31. Fallon selected three different sworn officers to attend that training, which is not at issue in this proceeding.

available to work SailOneBoston.[2] Fallon appointed Lt. Timothy Mitsakis (Mitsakis) from OPS to lead the investigation. Three aspects of the investigation are at issue in this appeal: 1) Mitsakis' April 19, 2017 letter to Monaco requiring him to answer questions about his communications with McGrath; 2) the restrictions contained in letters that Fallon sent to Monaco and McGrath on May 3 and May 4, respectively, regarding their conversation and the investigation; and 3) the interviews that OPS conducted with Monaco and McGrath on May 12, 2017. These events are briefly described below.

Mitsakis' Letter

On April 19, 2017, Mitsakis sent a letter to Monaco informing him that OPS was investigating his April 6 conversation with Trant and requiring Monaco to answer questions about that conversation. The questions in the letter included whether McGrath had asked him not to attend the maritime training, and whether McGrath had encouraged him to wait until Sunday (April 2) evening to withdraw. In the letter, Mitsakis cautioned Monaco that "[f]ailure to answer questions directly or honestly or intentional vagueness, intentional omissions of significant facts or misleading answers, will be considered to be untruthful answers and will be treated as such."

Fallon's Letters

On May 3, 2017, Fallon sent a letter to McGrath informing him that the Department was conducting an investigation regarding his April 2 conversation with Monaco regarding Monaco's participation in the specialized training for SailOne Boston and, more specifically, whether McGrath had "made statements to discourage or dissuade Officer

[2] Trant also expressed similar concerns in his April 6 email and May 2 report that McGrath's conduct could undermine the Somerville Police Department's efforts to aid Boston Police and undermine public safety.

Monaco from participating in that training, and/or to suggest to him how and when he should withdraw from that training." The letter further stated in part:

> The Department takes this allegation very seriously and until this allegation is fully explored and investigated, I am ordering you not to discuss the investigation or the issues surrounding the investigation with any other persons with the exception of a duly authorized union representative, who is not involved in this matter, and/or legal counsel. Violation of this order will be considered insubordination and will result in discipline with my recommendations of discharge from service.
>
> Failure to appear at the interview or answer questions that are material and relevant to this investigation that would not tend to incriminate you may result in disciplinary action by the Police Department in the form of discharge.

On May 4, 2017, Fallon sent a letter to McGrath regarding the OPS investigation that contained identical restrictions on communication under threat of discipline.

May 2017 Interviews

The City engaged an outside investigator, Alfred P. Donovan of APD Management (Donovan), to interview McGrath, Monaco, Kiely and Trant. Donovan interviewed Monaco and McGrath separately on May 12. According to the transcripts of both interviews,[3] Donovan questioned both McGrath and Monaco about the specifics of their conversation on March 29, 2017[4] and April 2, 2017. Donovan also asked Monaco about

[3] Neither Monaco nor McGrath testified during the hearing, but the parties submitted their interview transcripts as joint exhibits. Both parties agreed that the Hearing Officer did not have to make findings regarding McGrath's exact comments to decide the case, and she did not.

[4] During the interview, Monaco stated that McGrath had spoken to him twice about the maritime training - on April 2, as he initially reported to Trant, but also on March 31, when Monaco reported that McGrath stated that it would be detrimental to the Union if an executive board member participated in the training.

his April 6 telephone call with Trant and about a conversation that Monaco purportedly had with Kiely on April 4 regarding those conversations.[5]

Based on the interview transcript, McGrath confirmed that he spoke to Monaco on March 31, 2017 and April 2, 2017. Although McGrath denied asking or suggesting that Monaco not attend the training or to withdraw at the last minute, he indicated that he had told Monaco that he was thinking of filing a grievance over the training, and that Monaco's participation might jeopardize the grievance. He denied telling McGrath to call Trant late on Sunday, April 2 to prevent Trant from finding a replacement. McGrath also denied contacting any other bargaining unit members about withdrawing from this training.

Subsequent Events

As indicated above, Monaco attended all five days of training, and the record does not reflect that any of the selected personnel did not attend. The patrol officers who attended the maritime training participated in SailOne Boston in June 2017, working as crew members on boats from other UASI member communities.

## Opinion[6]

Count I of the Complaint alleged that the City independently violated Section 10(a)(1) of the law when, in an April 19, 2017 letter, it required Monaco to answer certain questions in writing about his communications with McGrath on April 2, 2017 regarding the maritime training. The Hearing Officer concluded that it did, and we affirm.

[5] Kiely also answered written questions from Mitsakis and was interviewed by Donovan. According to his report and the transcript of his interview, which was submitted as a joint exhibit, Kiely reported that on April 4, 2017, Monaco told him about the two conversations with McGrath at issue here. During his interview, Monaco admitted speaking to Kiely, but challenged Kiely's description of "jamming" up the spot.

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

As a threshold matter, the Hearing Officer found, and we agree, that a discussion between a Union president and vice president about an issue that was the subject of a bargaining demand and a possible grievance constitutes concerted activity, protected under Section 2 of the Law. It is well established, however, that concerted activity can lose its protected status if it is unlawful, violent, in breach of contract in certain circumstances, disruptive or indefensibly disloyal to the employer. Town of Bolton, 32 MLC 13, 18 MUP-01-3255 (June 27, 2005) (citing Bristol County Sheriff's Department, 31 MLC 6, 18, MUP-2872 (July 15, 2004)). Likewise, conduct which is physically intimidating, egregious, or disruptive or indefensibly disloyal to the employer's business is beyond the pale of protection. Id. (citing City of Boston, 7 MLC 1216, 1226, MUP-3480 (August 21, 1980). The question for the Hearing Officer therefore, and for the CERB on review, is whether McGrath's conduct lost its protected status such that the Employer was free to question employees about it and restrict further communications about it.

Throughout this proceeding, the City has claimed that the conversation between McGrath and Monaco lost its protected status. The City contends that McGrath asking Monaco to withdraw from safety-related training at the last minute to ensure that no replacement could be found posed a risk to public safety and harm to the City's reputation, and was thus "indefensibly disloyal" and/or "disruptive" as those terms were construed in Town of Bolton, supra and Commonwealth of Massachusetts, 8 MLC 1462, SUP-2328 (November 4, 1981). The Hearing Officer rejected this argument, distinguishing both cases on the grounds that none of McGrath's suggestions came to fruition, i.e., Monaco reported to the training as scheduled, and there was no evidence that McGrath spoke to Monaco further or contacted other officers about the training. The Hearing Officer

similarly found that because the City fully participated in the training as promised, the City's reputation had not been harmed such that McGrath's conduct rose to the level of indefensible disloyalty, as that term was explained in City of Lawrence, 15 MLC 1162, 1167 MUP-6086 (September 13, 1988) or Southeastern Regional School Committee, 7 MLC 1801, MUP-2970 (February 2, 1981). Having found that the conversation was concerted conduct protected under Section 2 of the Law, the Hearing Officer found that requiring Monaco to answer questions regarding such conduct would have a chilling effect on a reasonable employee, in accord with City of Lawrence.

On appeal, the City argues that the Hearing Officer erred by requiring actual disruption to take place before it lawfully could launch an investigation into the wrongdoing. The City contends that none of the cases that the Hearing Officer relied upon focused on whether there had been an actual effect on the employer's operations. Instead, citing Harwich School Committee, 2 MLC 1095, MUP-720 (August 26,1975), the City argues that the Hearing Officer should have conducted a balancing test that weighed the rights of employees to engage in certain activities and the rights of employers not to be subjected to egregious, insubordinate, or profane remarks that disrupt the business or demean employees. We are not persuaded by the City's arguments for several reasons.

First, the Hearing Officer's case analysis was sound. Contrary to the City's argument, since at least 1976, the CERB has construed the term "indefensibly disloyal" to include elements of harm or disruption to the employer's operations or reputation. The term "indefensibly disloyal" first appeared in City of Boston, 3 MLC 1101, MUP-2135 (September 7, 1976), when the CERB was listing the types of behaviors (unlawful, violent, breach of contract, etc.) that remove concerted protected activity from the Law's

protection. The CERB's use of the term "indefensibly disloyal" included a footnote to a 1953 Supreme Court decision, National Labor Relations Board v. Local Union No. 1229, IBEW, 346, 464, 467 (1953). According to the footnote, in that case, "union members in the midst of a contract dispute, distributed handbills which launched a vitriolic attack on the quality of their company's television broadcast and contained no reference to the labor dispute." Noting that the Supreme Court held that such conduct, though concerted, had lost its statutory protection, the CERB concluded that an "attack on public policies of a company may constitute such **detrimental** disloyalty to provide just cause for discharge, where it is unrelated to a labor dispute." 3 MLC at 1108, n.9 (emphasis added).

The CERB elaborated on "indefensibly disloyal" conduct in Southeastern Regional District School Committee, 7 MLC at 1808-1809. That decision specifically identified three separate categories of behavior that rise to the level of unprotected disloyalty: 1) abusive or intimidating behavior; 2) "extremely disruptive" job actions; and 3) citing NLRB v IBEW, supra, the same case cited by the CERB in the City of Boston case discussed above, public attacks on the employer by the union. Id.

The conduct at issue in this case falls within none of these categories. First, we disagree with the City that McGrath's behavior was threatening, demeaning, or intimidating as in Town of Bolton. Unlike in that case, McGrath's conduct did not convey "an implicit threat of unspecified negative consequences" if Monaco did not do as he suggested. 32 MLC at 18. Furthermore, as the Hearing Officer pointed out, in Bolton, the union succeeded in pressuring a member to leave her workstation to attend a meeting whereas here, McGrath's efforts failed. Id.

Second, as the Hearing Officer noted, because Monaco did not acquiesce, the City's operations were never actually disrupted by McGrath's suggestions, much less "extremely" disrupted.

Finally, McGrath's conduct did not rise to the level of "detrimental" disloyalty contemplated by the CERB in City of Boston or Southeastern Regional because McGrath's conduct was neither a public attack on the City nor conduct that was divorced from union activity. And, notably, his efforts failed. Thus, at best, McGrath's conduct was an unsuccessful attempt to dissuade a Union officer from attending a voluntary training so as not to harm the Union's position in a potential grievance. To find that such an attempt caused an otherwise protected discussion to lose its statutory protections under these circumstances would enable employers to launch investigations into internal, off-duty union conversations about bargaining strategy based on mere speculation as to what might have occurred had the Union gone through with its plans. The chilling effect this would have on such internal conversations is self-evident. Moreover, as the Hearing Officer pointed out, statutory protections should not be stripped away solely based on speculation. Under these circumstances, as the CERB stated in a decision involving a police union president's letter to the editor about the poor condition of police cruisers, "[t]here being no disruption in the record, we will not assume it." City of Haverhill, 8 MLC 1690, 1692, MUP-4204 (December 16, 1981).

The City's claim that the Hearing Officer erred by not performing a balancing test to ascertain whether it could investigate the claims lacks merit for two reasons. First, the test the City suggests, which is ordinarily used in situations where an employee is disciplined for conduct that occurred during the course of protected activity, balances the

rights of employees to engage in concerted activities against an employer's right to not be subjected to egregious, insubordinate, or profane remarks that disrupt the employer's business or demean employees. Harwich School Committee, 2 MLC at 1100-1101. Here because McGrath's conduct and alleged statements did none of these things, his conduct is easily distinguishable from that described in the cases cited by the City.

Moreover, the Hearing Officer did perform a balancing test. Recognizing that, unlike in the cases the Union relied on its post-hearing brief, McGrath's conduct took place in the context of a potential disruption to public safety, the Hearing Officer, relying generally on City of Holyoke, 9 MLC 1876, 1881, MUP-4955 (May 27, 1983), balanced an employer's right to inquire about the potential for disruption of public safety against Union members' rights to discuss "controversial and provocative" ideas among themselves. Applying this test, the Hearing Officer found that the City would still not prevail because by the time that Mitsakis sent his questions to Monaco on April 19, Monaco and the other patrol officers who volunteered for the training had completed it without disruption or incident. Thus, while there may be circumstances where an investigation might be justified to determine if there is a potential threat to public safety, those circumstances are not present here.

For these reasons and those stated in the Hearing Officer's decision, we conclude that Monaco and McGrath's conversation constituted protected, concerted activity, and that the City independently violated Section 10(a)(1) when it required Monaco to answer questions about his April 2 conversation with McGrath under threat of discipline. City of Lawrence, 15 MLC at 1166.

Count III[7]

The third count in the Complaint alleges that: a) Fallon's May 3 and May 4 letters to McGrath and Monaco ordering them not to discuss their investigation with other employees; and b) Donavan's subsequent interviews with them, independently violated Section 10(a)(1) of the Law.[8] The Hearing Officer found that the City violated the Law as alleged. We affirm.

The City does not specifically challenge the Hearing Officer's conclusion that restricting McGrath's and Monaco's communications about either the investigation or the underlying issue itself violated the Law because the restrictions interfered with what was otherwise protected, concerted activity. Instead, it argues more generally that its investigation was "narrowly tailored" to discover whether McGrath actually made the comments attributed to him. However, because the City justifies its actions by claiming only that McGrath's comments could *potentially* have impacted public safety or harmed its reputation, and because we have found that no such potential existed by the time the City interviewed Monaco and McGrath, those arguments lack merit. As to part b) of Count III, therefore, we agree with the Hearing Officer that, because Donovan's sole focus during the investigation was a conversation deemed to be protected, concerted activity, interviewing employees about this topic would tend to restrain, coerce and chill reasonable employees in the exercise of their rights under Section 2 of the Law in violation of Section 10(a)(1) of the Law. Bristol County Sheriff's Department, 31 MLC at 17

[7] The Union withdrew Count II, pertaining to an information request, at hearing.

[8] The Hearing Officer dismissed a third allegation in Count III that is not at issue in this appeal.

(interview questions about protected activity violated the Law where the employer was not inquiring into a separate, legitimate concern).

It follows therefore that any efforts to restrict discussions about the investigation or the allegations prompting the would have a similarly chilling effect on employees' rights to participate in such protected conversations. For this reason, we affirm the Hearing Officer's conclusion that the Employer independently violated Section 10(a)(1) of the Law by restricting employee communications in the manner described in Fallon's May 3 and May 4 letters.[9]

## Conclusion

For the foregoing reasons, we affirm the Hearing Officer's decision in its entirety and issue the following Order.

## Order

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the City shall:

1. Cease and desist from:

   a) Interfering with, restraining or coercing employees in the exercise of their rights under the Law by requiring a former union official to answer certain

[9] Contrary to the Hearing Officer, because we have found that McGrath's and Monaco's discussions were protected under the Law, we do not agree that the restrictions on discussing the investigation might have been lawful had the Employer attempted to restrict communications about the investigation merely between the interview subjects. We do agree with the Hearing Officer however, that there are circumstances under which an employer can restrict employee communications about an internal investigation to protect the integrity of the investigation. See generally, Globe Newspaper Company v. Police Commission of Boston, 419 Mass. 852 (1995) (discussing public policy underlying the investigatory exemption set forth in the definition of public record in G.L. c. 4, Section 7, Twenty-sixth (f). Thus, if the investigation had a legitimate purpose that did not interfere with Section 2 rights, telling those suspected of wrongdoing or witnesses not to discuss those aspects of the investigation with anyone except their union representatives and legal counsel could be a reasonable step to protect the integrity of the investigation by, among other things, ensuring that there was no collaboration between the witnesses.

questions about his internal union communications that constituted concerted, protected activity;

b) Interfering with, restraining or coercing employees in the exercise of their rights by imposing overly broad restrictions upon employee communications;

c) Interfering with, restraining or coercing bargaining unit members in the exercise of their rights under the Law by unlawfully interrogating them regarding activities protected under Section 2 of the Law; and

d) In the same or similar manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law.

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

a) Refrain from interfering with, restraining or coercing employees in the exercise of their rights under Section 2 of the Law.

b) Immediately post signed copies of the attached Notice to Employees in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the City customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

c) Notify the DLR in writing of the steps taken to comply with this decision within ten (10) days of receipt of this decision.

**SO ORDERED.**

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F Wittner

_____
MARJORIE F. WITTNER, CHAIR

Joan Ackerstein

_____
JOAN ACKERSTEIN, CERB MEMBER

KELLY STRONG, 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.

THE 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 has held that the City of Somerville (City) independently violated Section 10(a)(1) of M.G.L. c.150E pursuant to a charge of prohibited practice in Case No. MUP-17-5980 that the Somerville Police Employee Association filed on May 9, 2017.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

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

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights under the Law by requiring a former union official to answer questions about internal union communications that constitute concerted activity protected under Section 2 of the Law or by

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights by imposing overly broad restrictions upon protected, concerted employee discussions.

WE WILL NOT interfere with, restrain, or coerce bargaining unit members in the exercise of their rights under the Law by unlawfully interrogating them regarding activities protected under Section 2 of the Law.

WE WILL take the following affirmative that will effectuate the purposes of the Law:

Refrain from interfering with, restraining or coercing employees in the exercise of their rights under Section 2 of the Law.

_____ _____

City of Somerville Date

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

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