

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of: *
CITY OF FRAMINGHAM *
and *
FRAMINGHAM POLICE OFFICERS UNION *

Case No.: MUP-18-6704

Date Issued: March 16, 2021

Hearing Officer:

Meghan Ventrella, Esq.

Appearances:

Christopher L. Brown, Esq. - Representing the City of Framingham
Dennis M. Coyne, Esq. - Representing the Framingham Police Officers Union

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of Framingham (City) violated Section
2 10(a)(3), and derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter
3 150E (the Law) by denying Matthew Gutwill's (Gutwill) request for assignment to the
4 positions of School Resource Officer, Detective, or Forensic Investigator.

5 I find that the City did not violate the Law.

STATEMENT OF CASE

7 On June 21, 2018, the Framingham Police Officers Union (Union) filed a charge of
8 prohibited practice (Charge) with the Department of Labor Relations (DLR) alleging that
9 the City had violated Section 10(a)(3) and, independently, Section 10(a)(1) of the Law.

1 On November 1, 2018, a DLR Investigator investigated the Charge. On January 11, 2019,
 2 the Investigator issued a one-count Complaint of Prohibited Practice and Partial Dismissal
 3 (Complaint) alleging that the City violated Section 10(a)(3) and, derivatively, Section
 4 10(a)(1) of the Law.¹ On January 16, 2019, the City filed its Answer to the Complaint. On
 5 January 30, 2020, March 4, 2020, and August 12, 2020, I conducted three days of hearing
 6 during which the parties received a full opportunity to be heard, to examine and cross-
 7 examine witnesses, and to introduce evidence.² On October 19, 2020, the parties filed
 8 post-hearing briefs. Based on my review of the record, including my observation of the
 9 demeanor of the witnesses, I make the following findings of fact and render the following
 10 opinion.

STIPULATIONS OF FACT

- 11 1. The Framingham Police Officers Union (“Union”) is an employee organization
 12 within the meaning of Section 1 of General Laws Chapter 150E (“the Law”). The
 13 Union is the exclusive bargaining representative for patrol officers of the
 14 Framingham Police Department.
 15
- 16 2. The City is an employer within the meaning of Section 1 of the Law.
 17
- 18 3. Matthew Gutwill (“Gutwill”) is a police officer for the City, and a member of the
 19 bargaining unit referred to in paragraph 1.
 20
- 21 4. The City has employed Officer Gutwill as a police officer since 2004.
 22
- 23 5. From 2004-2006, he worked in the Police Department's Patrol Division.
 24
- 25 6. In 2006, he transferred to the Detective Bureau, where he worked until 2008.
 26
- 27 7. In 2008, Officer Gutwill was assigned to a Drug Enforcement Administration

¹ The Investigator dismissed the Union’s allegation that the City independently violated Section 10(a)(1) of the Law.

² On January 30, 2020 and March 4, 2020, the hearing was held in person at the DLR’s office in Boston, MA. On August 20, 2020, due to the on-going COVID-19 pandemic, the hearing was held by video conference.

- 1 Taskforce. While he was assigned to the DEA Taskforce, he was still employed by
2 the City as a detective in the City's Detective Bureau.
3
- 4 8. Steven Trask ("Trask") is the City's current Chief of Police.
5
- 6 9. Kenneth Ferguson ("Ferguson") was the City's prior Chief of Police.
7
- 8 10. Lieutenant Blaise Tersoni ("Tersoni") is the Commander of the City's Bureau of
9 Investigative Services, which is also known as the Detective Bureau.
10
- 11 11. In September of 2015, Gutwill complained to the City, via Deputy Chief Kevin
12 Slattery ("Slattery") and Assistant to Police Chief Brian Simoneau ("Simoneau"),
13 that a Framingham Police Detective was untruthful while testifying in a criminal
14 case in Framingham District Court.
15
- 16 12. Then Framingham Police Chief Kenneth Ferguson ordered an investigation into
17 Gutwill's complaint.
18
- 19 13. Chief Ferguson ultimately determined that Gutwill's allegations of untruthfulness
20 against the detective were unfounded.
21
- 22 14. On or about January 29, 2016, Gutwill was notified that he was going to be rotated
23 out of the DEA Taskforce.
24
- 25 15. On or about October 28, 2016, Gutwill filed a complaint against the City in the
26 United States District Court in Boston. The complaint contained two counts for
27 "retaliation under 42 U.S.C. § 1983," and one count for an alleged "violation of
28 M.G.L. c. 149, §185(b)(1)."
29
- 30 16. On February 5, 2016, Gutwill had a telephone conversation with then Framingham
31 Police Chief Kenneth Ferguson.
32
- 33 17. Chief Ferguson has alleged that during the February 5, 2016 telephone
34 conversation, Gutwill threatened to "turn the place upside down" or "blow the place
35 up."
36
- 37 18. Gutwill stated that he would be filing a complaint with the Massachusetts
38 Commission Against Discrimination (MCAD) on Monday, which was the business
39 day immediately following the February 5, 2016 telephone conversation.
40
- 41 19. After the February 5, 2016 telephone conversation, the City retained outside
42 investigator (Julie Moore or "Moore") to investigate allegations concerning the
43 City's Police Department.
44
- 45 20. On August 16, 2016, Gutwill was placed on paid administrative leave.
46

- 1 21. On December 12, 2016, then Acting Chief Trask suspended Gutwill for five (5)
2 days without pay for untruthfulness related to his statements to the investigator,
3 Moore. Gutwill served the suspension on December 12, 13, 14, and 15, and 16,
4 2016.
5
- 6 22. On May 31, 2017 and June 16, 2017, a hearing regarding the aforementioned
7 findings was held before Steven A. Torres, Esq., a hearing officer selected by the
8 Appointing Authority (City of Framingham).
9
- 10 23. The hearing officer upheld the five (5) day unpaid suspension.
11
- 12 24. On September 18, 2017, Gutwill appealed the five (5) day unpaid suspension to
13 the Civil Service Commission. See Gutwill v. Framingham Police Department,
14 Docket No.: D-17-182.
15
- 16 25. On January 17, 2018, Gutwill voluntarily withdrew his Civil Service Disciplinary
17 Appeal and the Civil Service Commission dismissed the case. In his letter of
18 withdrawal to the Commission, Gutwill wrote that he was withdrawing the appeal
19 "in order to pursue his pending claims against the Town of Framingham in the
20 United States District Court that were filed prior to the imposition of discipline."
21
- 22 26. The parties' collective bargaining agreement ("CBA") mandates that officers file
23 appeals of disciplinary suspensions to the Civil Service Commission.
24
- 25 27. On or about December 19, 2016, Chief Trask informed Gutwill that he was being
26 assigned from his detective position to the Patrol Division because of his
27 untruthfulness.
28
- 29 28. Following this, the Union filed a grievance concerning Gutwill's reassignment. The
30 City denied the grievance, and the Union appealed the grievance to arbitration
31 through the American Arbitration Association, AAA #01-17-0000-4033.
32
- 33 29. On February 28, 2017, the City filed suit in Middlesex Superior Court to enjoin the
34 arbitration mentioned in ¶ 11, Superior Court docket number 1781-cv-00658, Town
35 of Framingham vs. Framingham Police Officers Union.
36
- 37 30. The Superior Court denied the City's motion for injunctive relief, and the City
38 eventually appealed the decision to the Massachusetts Appeals Court on or about
39 July 13, 2017, Appeals Court docket number 17-P1178.
40
- 41 31. On March 9, 2018, the Appeals Court held oral arguments.
42
- 43 32. On or about May 4 and May 10, 2018, Gutwill applied for the positions of School
44 Resource Officer, Detective, and Forensic Investigator.
45
- 46 33. The positions of School Resource Officer, Detective, and Forensic Investigator all

1 fall under the Bureau of Investigative Services.

2
3 34. Gutwill was denied assignment to the above-listed positions.

4
5 35. On June 13, 2018, Tersoni emailed Gutwill the following:

6
7 Matt,

8
9 Yesterday I met with Chief Trask, Deputy Chiefs Baker, Perreira, and
10 Brandolini. We discussed the current position openings and officers that
11 applied. I was told at that time by Chief Trask that you would not be
12 considered for any positions resulting from you recently being suspended
13 five days for untruthfulness. As a result of his decision you will not be part
14 of the interview process for any of the three positions you submitted your
15 name for. If you have any questions please direct them to Chief Baker.

16 Respectfully,
17 Lt. Tersoni

18
19 36. On July 10, 2018, the Appeals Court reversed the judgment of the Superior
20 Court, ruling that the Union's grievance of Gutwill's reassignment was non-
21 arbitrable.

22 FINDINGS OF FACT

23 General Background

24 The Union is the exclusive bargaining representative for a unit of patrol officers in
25 the Framingham Police Department (FPD) employed by the City. In 2004, Gutwill was
26 hired as a patrol officer for the FPD. In approximately 2007, Gutwill became a Detective
27 and was assigned to the FPD's Narcotic Bureau. From April of 2008 to August of 2016,
28 Gutwill was assigned to the Drug Enforcement Administration (DEA) Group II out of
29 Boston.³ As part of the DEA Group II task force, Gutwill acted as a liaison between the
30 local police departments and the DEA.

31 Brady Letters

³ The DEA Group II was a task force with federal agents and officers from various police departments in the Boston Area.

1 Under both state and federal law, the prosecution in a criminal case must disclose
2 exculpatory information, including information which bears upon the credibility of any
3 witness, to the defendant even if no specific request for that information is made. The
4 United States Supreme Court ruled that “suppression by the prosecution of evidence
5 favorable to an accused upon request violates due process where the evidence is
6 material either to guilt or to punishment, irrespective of the good or bad faith of the
7 prosecution.” Brady v. Maryland, 373 U.S. 83, 87 (1963).

8 Several years later, the U.S. Supreme Court extended the obligation to share
9 exculpatory information with the defendant to include information concerning the
10 credibility of government witnesses. The Court applied the “collective knowledge doctrine”
11 to the rule that any exculpatory information known by the government will be known by
12 all governmental agencies.” Giglio v. United States, 405 U.S. 150 (1972).

13 In 1976, the U.S. Supreme Court ruled that the prosecution had a duty to disclose
14 exculpatory information even where the defendant did not specifically request it. United
15 States v. Agurs, 427 U.S. 97 (1976). Finally, in 1995, the U.S. Supreme Court ruled that
16 the prosecution has an affirmative “duty to learn of any favorable evidence known to the
17 others acting on the government’s behalf in the case, including the police, and disclose
18 that information to the defendant.” Kyles v. Whitley, 514 U.S. 419 (1995).

19 When a police officer involved in a criminal case has been disciplined for
20 untruthfulness, the prosecution must disclose such a fact to defense counsel in what is
21 colloquially referred to as a “Brady Letter.” The prosecution can still decide to call an
22 officer with a Brady Letter to testify in a criminal case. However, an officer’s credibility

1 may be negatively impacted when testifying due to the Brady Letter. Within the FPD,
2 officers who receive a Brady Letter are put in positions where they are less apt to testify.

3 FBI Complaint

4 In or about April of 2015, Gutwill participated in a stop and arrest of individuals in
5 a vehicle. Gutwill pursued the vehicle based on information developed by a confidential
6 informant of FPD Officer Joseph Godino (Godino), who stated that the individuals in the
7 vehicles had a firearm and were on their way to conduct a home invasion. In a
8 subsequent 2015 criminal trial of the individuals in the vehicle, Godino testified that he
9 had no idea why Gutwill pulled the vehicle over, and he had no knowledge of a confidential
10 informant. Subsequently, Gutwill informed Sergeant Christopher Montuori (Montuori),
11 from Internal Affairs, and Deputy Chief Kevin Slattery (Slattery) that Godino had misled
12 the court to believe the individual was Gutwill's informant.

13 Slattery assigned Montuori to investigate Gutwill's complaint about Godino's
14 testimony. Initially, Montuori found that Godino's testimony regarding the reason he was
15 on the road the night of the traffic stop was untruthful and misleading. Ultimately, the
16 City's investigative report concluded that Gutwill's allegation was unfounded. In January
17 of 2016, Chief Ferguson (Ferguson) issued a memo to Godino and Gutwill that stated
18 that the official investigation resulted in a finding that the allegations against Godino were
19 unfounded, meaning that the alleged act did not occur.⁴

⁴ Godino was not disciplined for this matter and remained assigned to the FPD Detective's unit until he left the FPD in 2019. In July of 2019, Godino had an active Brady Letter. However, the Union did not provide any evidence to indicate when the letter was issued or to explain why it was issued.

1 In January of 2016, Gutwill met with Agent Kevin Constantine (Constantine), an
2 agent at the Federal Bureau of Investigation's (FBI) Corruption Unit. Gutwill reported to
3 Constantine several concerns that he had about the FDP, including its handling of the
4 Godino matter and complaints about Brian Simoneau (Simoneau), legal aid to the Chief
5 of Police at the FPD. The FBI did not open an investigation into any of Gutwill's reports.
6 On January 29, 2019, the FPD informed Gutwill that he would be rotated out of the DEA
7 taskforce.

8 Complaint to City Manager

9 After receiving notification that he would be rotated out of the DEA taskforce,
10 Gutwill spoke with Assistant City Manager Jim Duane (Duane) on the phone. Gutwill
11 reported to Duane the same complaints he had made to the FBI about the FPD. In early
12 February of 2016, Gutwill met with Duane in person. During this meeting, Gutwill provided
13 Duane with a CD containing phone records between himself and Godino.⁵ On February
14 5, 2016, Gutwill had a telephone conversation with then Framingham Police Chief
15 Kenneth Ferguson (Ferguson). During the February 5 phone conversation, Gutwill
16 informed Ferguson that he was being harassed for complaining about Godino.⁶
17 Additionally, Gutwill and Ferguson talked about Gutwill's meeting with the FBI. After the
18 phone conversation, Ferguson alleged to the City that Gutwill had stated that he was
19 going to "turn the place upside down" or "blow the place up."

20 After the February 5, 2016 telephone conversation, the City retained an outside

⁵ Gutwill informed Duane that Slattery used his position as a high-ranking officer to obtain information about an Officer Brandolini and his wife.

⁶ Gutwill alleged that his desk was assigned to another detective because of his Godino complaint.

1 investigator named Julie Moore (Moore) to investigate allegations concerning the FPD,
2 including Gutwill's claims of experiencing harassment in the FPD. During the
3 investigation, Moore interviewed Gutwill on several occasions. Gutwill denied ever
4 informing Ferguson that he would "turn the place upside down" or "blow the place up."

5 In July of 2016, Moore issued a report stating that Gutwill's retaliation claims lacked
6 merit, but that he raised his concerns in good faith. In August of 2016, Moore issued a
7 second report that concluded that Gutwill stated to Ferguson during the February 5, 2016
8 phone conversation that he was going to "turn the place upside down" or "blow the place
9 up". On August 19, 2016, the FPD placed Gutwill on paid administrative leave because
10 Moore determined that Gutwill was untruthful during her investigation by denying
11 statements that he made to Ferguson during the February 5 conversation. On September
12 15, 2016, Moore issued a third investigative report concluding that Gutwill had violated
13 FPD policies by failing to be honest and forthcoming about statements he made to
14 Ferguson on February 5 regarding Brandolini.

15 Whistleblower Court Case

16 On October 28, 2016, Gutwill filed a complaint in the United States District Court
17 of Massachusetts alleging retaliation under 42 U.S.C. § 1983 against Chief Ferguson in
18 his individual capacity and against the City. Additionally, Gutwill's complaint alleged that
19 the City violated M.G.L.c. 149, § 185 (b)(1), the Massachusetts Whistleblower Statute.
20 Gutwill's case was docketed as Civil Action No. 1:16-cv-12191-IT. The City and Ferguson
21 filed Motions for Summary Judgement.

22 On June 22, 2020, the Court granted the City's and Ferguson's Motions for
23 Summary Judgment. The Court concluded that the summary judgment record supported

1 Gutwill's claims that he originally sought to raise serious matters of public concern, and
2 that the officers assigned by Chief Ferguson to investigate his concerns found that Gutwill
3 made his reports in good faith. However, the Court found that Gutwill did not proffer
4 evidence from which a jury could find that this protected speech was the substantial or
5 motivating factor in the adverse actions he suffered.⁷

6 Five Day Suspension

7 On December 12, 2016, then Acting Chief Trask suspended Gutwill for five days
8 without pay for untruthfulness related to his statements to the investigator, Moore.⁸ Gutwill
9 served the suspension on December 12, 13, 14, and 15, and 16, 2016. On or about
10 December 19, 2016, Chief Trask informed Gutwill that he was being reassigned from his
11 detective position to the Patrol Division because of his untruthfulness.

12 Civil Service Case

13 In December of 2016, Gutwill appealed his five-day suspension pursuant to
14 applicable civil service laws.⁹ On January 17, 2017, Gutwill withdrew his Civil Service
15 appeal to pursue the claims he had filed against the FPD in the United States District
16 Court prior to the issuance of discipline. Currently, and at all relevant times in this case,
17 Gutwill had a five-day suspension for being untruthful.

18 Arbitration

⁷ Gutwill's complaint alleged that the City and Ferguson took the following adverse actions against him: suspension, paid administrative leave, and two investigations.

⁸ On or about November of 2016, Ferguson went out on medical leave, and Trask became Acting Chief.

⁹ The parties' CBA requires officers to appeal their discipline through the Civil Service process.

1 After Gutwill served his suspension, the Union filed a grievance concerning
2 Gutwill's reassignment to the Patrol Unit. The City denied the grievance, and the Union
3 appealed the grievance to arbitration. On February 28, 2017, the City filed suit in
4 Middlesex Superior Court to enjoin the arbitration and it was docketed as Superior Court
5 Case 1781-cv-00658, Town of Framingham vs. Framingham Police Officers Union.¹⁰ The
6 Superior Court denied the City's motion for injunctive relief, and the City appealed the
7 decision to the Massachusetts Appeals Court on or about July 13, 2017. On March 9,
8 2018, the Appeals Court held oral arguments. On July 10, 2018, the Appeals Court
9 reversed the judgment of the Superior Court, ruling that the Union's grievance of Gutwill's
10 reassignment to Patrol was non-arbitrable.

11 Age Discrimination Complaint

12 On January 11, 2018, Gutwill complained to Dolores Hamilton (Hamilton), the
13 Director of Human Resources, that all the older officers were removed from the interview
14 process for the Housing Officer position. Hamilton investigated Gutwill's allegation of age
15 discrimination. On April 2, 2018, Hamilton found that twelve officers, including Gutwill,
16 applied for the position of Housing Officer, and only five officers received interviews.
17 Gutwill was not offered an interview or considered for the position because of his five-day
18 suspension.¹¹ The City had interviewed officers who had a combination of the following
19 experience: community policing, the downtown walking beat, community engagement,

¹⁰ On March 22, 2017, Gutwill signed and submitted to the District Court an affidavit which stated in relevant part that: "As a patrol officer my duties include making traffic stops, assisting stranded motorists, and responding to various calls as directed by the Town's dispatchers. As patrol officer[,] I do not regularly conduct criminal investigations."

¹¹ Hamilton created an investigation report with the enclosed conclusions dated April 2, 2018.

1 Pelham substation, and familiarity with SMOC. Hamilton concluded that there was
2 insufficient credible evidence to support the allegation of age discrimination.

3 School Resource Officer, Detective, and Forensic Investigator Positions

4 On or about May 4 and May 10, 2018, Gutwill applied for the positions of School
5 Resource Officer (SRO),¹² Detective,¹³ and Forensic Investigator,¹⁴ which all fall under
6 the Bureau of Investigative Services.¹⁵ By email dated June 13, 2018,¹⁶ Tersoni informed
7 Gutwill that he had met with Chief Trask, Baker, Pereira, and Brandolini to discuss the
8 applicants for the open positions of SRO, Detective, and Forensic Investigator. Tersoni's
9 email stated: "I was told at that time by Chief Trask that you would not be considered for
10 any position resulting from you recently being suspended five days for untruthfulness. As
11 a result of his decision you will not be part of the interview process for any of the three

¹² Within the FPD, SROs are the liaison between the police department and the School Department. Due to the nature of the cases, SROs work within the Detective Bureau. SROs are often assigned to cases dealing with so-called "sexting," sexual abuse, and sexual assault. SROs testify in court less frequently than Detectives. However, SROs testify in cases dealing with sensitive and serious crimes such as sexual assault. During the summer, SROs are assigned cases in the Detective Bureau.

¹³ In the FPD, Detectives are responsible in part for following up on major crimes, writing detailed reports, and presenting major crimes to the DA's prosecution office. Detectives have a high level of follow-up investigative work. Additionally, Detectives are assigned cases that deal with serious crimes, and they testify in court for those cases frequently.

¹⁴ The Forensic Investigator works within the Detective Bureau. The Forensic Investigator is in charge of the cell phones, tablets, computers, and other technology that is involved in a crime or provides evidence of a crime. The Forensic Investigator provides testimony about the devices used in the crime or detective work which utilized technology.

¹⁵ As the positions of SRO, Detective, and Forensic Investigator work within the Detective Bureau, the positions are considered desirable. If Gutwill had been assigned to any of the three positions, he would have received a pay increase.

¹⁶ Trask forwarded this email chain to Simoneau, Brandolini and Pereira.

1 positions you submitted your name for. If you have any questions[,] please direct them to
2 Deputy Chief Baker.”

3 By email dated June 14, 2018, Gutwill responded to Tersoni with the following
4 message: “Did you (and Deputy Chief Baker) understand Chief Trask’s comments to
5 mean that I will not be considered for any position that may open up in the future, or was
6 his comment limited to the three positions I submitted my name for recently?”

7 By email dated June 19, 2018, Tersoni sent Baker the following message:¹⁷

8 “Matt has submitted his name for the day shift general duty
9 position, which I posted after the initial posting of General duty
10 nights, SRO and Forensic Computer Lab positions. Chief Trask
11 informed me in a meeting we were all in last week that he was
12 not to be considered for the positions and not to schedule him
13 for an interview. I do not know his status regarding his discipline
14 and do not know how to respond to his recent request to be
15 considered for the day shift general duty detective position.
16 Would you let me know if I should schedule him an interview?
17 The posting closes tomorrow and I plan to schedule the
18 interviews for Friday of this week. Please let me know.”

19
20 Approximately an hour later, Trask emailed Baker stating: “My comment to Lt Tersoni was
21 that he [Gutwill] would not be considered for the phone forensic job.”

22 On the following morning, Baker forwarded the Chief’s response to Tersoni. By
23 email dated June 20, 2018, Tersoni sent Baker the following message:¹⁸

24 “His comment was that he has recently taken a 5-day hit for
25 untruthfulness and he was not to be considered. I questioned how
26 recent the discipline was, to which DC Brandolini stated a year to a year
27 and a half ago. The Chief also said he can’t put him there if he is
28 untruthful. We started with Dave Laureiro switching from days to
29 evening then we talked about the Forensic Lab, then SRO’s and
30 general duty. The Chief’s decision was that he couldn’t interview for any
31 position.

¹⁷ Trask forwarded this email chain to Simoneau, Brandolini and Pereira with the message “FYI.”

¹⁸ Trask forwarded this email chain to Simoneau, Brandolini and Pereira.

1
2 [Am] I to understand that the Chief is only preventing him from
3 consideration for the forensic job and not the SRO or general duty
4 detective spots? When we discussed the SRO's at that meeting, Matt
5 was discussed as out. We spoke about O'Rourke where the Chief talked
6 about a text he received. We spoke about Hayes and Jordon. We
7 discussed three officers that were not going to have interviews were
8 Officer Krishtal for recently being removed from the Detective Bureau,
9 Officer Gutwill for his truthfulness and Sgt. Brown, to which they stated
10 that it was not about him he was highly qualified but rather they were
11 moving in a different direction. We both discussed the Chief's decision
12 after the meeting and didn't know why he initially told us we could
13 conduct the interviews and decide who would fill the positions but then
14 change his mind.

15
16 We have been discussing the interviews the past few days and it was
17 never discussed that Officer Gutwill was able to interview for the other
18 position. In fact[,] I discussed with you the officers being interviewed
19 specially for the SRO positions. Officer Gutwill was on the list[,]
20 however[,] based on our meeting with the Chief we notified the school
21 that there were only 3 interviews scheduled for Monday. At no time did
22 you bring up Officer Gutwill and the fact he could interview.

23
24 We recently had interviews for the 4-12 general duty detective to which
25 he was not a part of. I can schedule him the end of this week but I just
26 want to have a clear understanding that he can interview and could be
27 considered for the remaining positions.”

28
29 By email dated June 21, 2018, Tersoni informed Gutwill that:

30 “I have forwarded your concern by [e]mail to Deputy Chief Baker. I
31 asked about your ability to interview for the Day shift position not
32 knowing the details of your discipline that Chief Trask spoke about in
33 our meeting. He forwarded it to Chief Trask whose email response
34 was that you were not to be considered for the phone forensic job. I
35 sent another email asking for clarity if you can interview and if you
36 would be considered for the remaining positions and his response to
37 the DC Baker was if he wants to do it, let him. DC Baker provided me
38 with this information this morning. This is a change from the previous
39 decision the Chief made at our meeting last week not to allow you to
40 interview. As a result, I am sending this to you informing you that we
41 did fill the forensic detective position[,] however, you are now able to
42 interview for the remaining two detective positions and SRO position
43 if you want. Please let me know today as I am scheduling them for
44 Friday and Monday. If you have any questions direct them to Deputy
45 Chief Baker.”

1
2 On June 21, 2018, Gutwill responded by email to Tersoni with the following message:

3 "This is clearly a change from the last email you sent saying that Chief
4 Trask said to you that I'm not eligible for any position therefore I will not
5 be interviewed. I clearly applied for the position of housing and was
6 denied an interview because of past discipline (from the HR direction
7 and a total different reason from the Police Administration) I was again
8 told I can't be interviewed when I applied for the other 3 (forensic, night
9 detective, and SRO) because of past discipline. Is this recent change
10 an attempt to appease me or will I be considered for this position based
11 on my training and qualifications and the recommendations of those
12 sitting on the panel[?] Please provide me assurances from the
13 [C]hief['s office that this is not a waste of yours, others and my own
14 time. The recommendations of the panel will be the factor and that I
15 won't be bypassed or not selected due [to] past discipline or [the]
16 current federal lawsuit I have pending against the City or any other
17 reason from what appears to be a consistent retaliatory and personal
18 vendetta against me as its clear you have no selection authority in this
19 matter."
20

21 Tersoni replied to Gutwill via email that the Chief's response to Baker was the same, and
22 that if he wished to be interviewed please let him know by the end of the day. Gutwill
23 informed Tersoni that he wished to be interviewed for the positions he applied for, and
24 that he would address his other concerns with the Union. Tersoni replied to Gutwill by
25 email that he forwarded Gutwill's concerns to Deputy Chief Baker.

26 Gutwill interviewed for the SRO and Detective positions.¹⁹ After the interviews,
27 Tersoni and Gutwill spoke on the phone.²⁰ Tersoni informed Gutwill that he was one of
28 the top candidates for both the SRO and Detective positions. Tersoni asked Gutwill which
29 position he would prefer, and Gutwill replied SRO. Tersoni informed Gutwill that the

¹⁹ Neither party provided the date of the interviews or any other details about the interviews.

²⁰ The Union did not provide a date for this phone conversation.

1 School approved Gutwill.²¹

2 By email dated June 25, 2018, Tersoni informed Baker of the following message:

3 "After the interviews and discussions on each candidate, I have
4 attached a list in order of preference for the open positions in General
5 Duty Detective (day shift and evening shift) and SRO's. The Sergeant
6 position and forensic lab position were already determined and are
7 listed in this email.

8

9 General Duty Evening shift:

10 Dave Loureiro

11 Francis Torres

12 Matt Gutwill

13 Sean Wilson

14 Michael McDonald

15 Shannon Drumm

16 Paul Duncan

17 Nicholas Caruso

18

19 General Duty Day Shift:

20 Sean Wilson

21 Matt Gutwill

22 Christopher Burrell

23 Paul Duncan

24 William Vargas

25

26 School Resource Officer:

27 Stephen O'Rourke

28 Matt Gutwill

29 Eric Hayes

30 Wayne Jordan

31

32 Detective Forensic Lab:

33 Sean O'Hare

34

35 Detective Sergeant Evenings:

36 Tyson Mohr

37

²¹ The Union did not provide any evidence that the School had the final decision on who was selected for the SRO position. Tersoni did not represent to Gutwill that he was speaking on Trask's behalf.

1 On June 28, 2018, Tersoni emailed Baker the following message:²²

2
3 "Just confirming the selection of Officers for the open positions
4 below based on the Chef's final decision. The General Duty
5 Detectives for the evening shift are Dave Louriero and Francis
6 Torres. The General Duty Day shift position is Sean Wilson. The
7 SRO positions are Stephen O'Rouke and Eric Hayes. The forensic
8 lab Sean O'Hare and the Evening shift Sergeant Tyson Mohr. I
9 have begun notifying the officers and will let you know once I have
10 been able to notify everyone. I will meet with you tomorrow to
11 discuss the personnel changes. Would you provide me an email
12 from the chief with his final selections so I can have it for file."
13

14 Again, Tersoni and Gutwill spoke on the phone.²³ Tersoni informed Gutwill he was not
15 selected for either the SRO or Detective position because of his past discipline for
16 untruthfulness.

17 Trask decided that Gutwill was not an appropriate candidate to fill the positions of
18 Detective, Forensic Investigator or SRO because his discipline for untruthfulness would
19 create credibility issues when testifying in court cases. Trask did not consult Simoneau or
20 request his legal opinion prior to deciding that Gutwill would not be assigned to the
21 positions of SRO, Forensic Investigator or Detective. Trask based his decision that Gutwill
22 would not be appropriate for any of the positions in part on advice from an April 4, 2016,
23 memorandum that he received as the Chief of Police for the City from the Massachusetts
24 Chiefs of Police Association's (MCPA) General Counsel Office. In the April 4, 2016 memo,
25 Trask was advised that officers with a finding for untruthfulness may pose several
26 problems including: 1) inability to serve as a credible witness, 2) untruthfulness constitutes

²² At a staff meeting that Simoneau attended, Trask and the command staff discussed the candidates for each open position. The command staff made recommendations of candidates for each position, but Trask made the final decision for all assignments.

²³ The Union did not provide an exact date for the phone conversation.

1 “conduct unbecoming an officer,” 3) law enforcement is held to a higher standard in the
2 community and there is a strong public policy against employing police officers who are
3 untruthful, 4) untruthfulness undermines policy legitimacy, 5) untruthfulness undermines
4 overall success of a department, and 6) the Legislature imposes a higher standard on
5 police. The 2016 memo described in detail the Brady rule and the need to disclose
6 exculpatory evidence, including information concerning the credibility of a witness in
7 criminal cases. As the three positions that Gutwill sought frequently testify in cases that
8 deal with major crimes, a Detective, SRO, or Forensic Investigator with credibility issues
9 could damage cases and create exposure for the FPD.²⁴

10 On April 7, 2020, the Middlesex District Attorney’s Office sent Trask a letter
11 regarding Gutwill pursuant to Massachusetts Rules of Criminal Procedure 14(a)(1)(A)(iii)
12 and Massachusetts Rules of Professional Conduct 3.8(d). In the letter, Assistant District
13 Attorney, Jessica Langsam (Langsam), notified Trask that the DA’s office intends to
14 continue to call Gutwill as a witness, and where appropriate, will make all available
15 arguments opposing questioning the officer or admitting into evidence any documents
16 pertaining to the underlying incident, including internal affairs documents in the
17 possession of our office, that prompted the issuance of the discovery notice. Langsam
18 included the Commonwealth’s Notice Regarding a Potential Witness. The Notice states:
19 “The violations were based on statements the detective made in a telephone conversation
20 with former Chief Kenneth Ferguson on February 5, 2016. Cf. Town of Framingham v.
21 Framingham Police Officers Union, 93 Mass. App. 537, 539-540 & n.3 (“Despite the

²⁴ Unlike Gutwill, the selected candidates for the open positions had not been disciplined for being untruthful.

1 absence of any suggestion in the investigator's report that Officer Gutwill was dishonest,
2 the police chief accused Officer Gutwill of denying to the investigator that he made various
3 statements in the February 5, 2016, telephone call."), rev. den., 480 Mass. 1108 (2018).
4 The Commonwealth possesses documents pertaining to the internal investigation."²⁵

5 Brian Simoneau Complaint ²⁶

6
7 On March 31, 2016, Richard Thompson (Thompson), the Town of Sherborn Chief
8 of Police, spoke on the phone with Simoneau, who was acting as legal counsel for the
9 Town of Sherborn.²⁷ During the March 31 conversation, Simoneau told Thompson that
10 the Gutwill investigation was coming to a conclusion and that it appeared that "the Town
11 has Gutwill [']on the hook['] for untruthfulness." Thompson noted that he heard the same
12 "comment from Ferguson" last time they spoke. Simoneau informed Thompson that he
13 would encourage and support Ferguson terminating Gutwill's employment for lying in an
14 official investigation. Additionally, Simoneau said that "a message needed to be sent" and
15 that "the Chief would get some credibility by terminating Gutwill [because] there is talk of
16 [a] vote of no confidence, [and] this will send the message not to f*** with administration."
17 Simoneau and Thompson discussed Gutwill's complaint to the MA State Police regarding
18 Thompson. Later in the conversation, Thompson mentioned that Gutwill had tried to
19 discredit his reputation. Simoneau agreed, and referred to Gutwill as "the Taliban, an

²⁵ The Notice Regarding a Potential Witness is not signed or dated.

²⁶ In the Union's post-hearing brief, it included links to several newspaper articles. However, because the newspapers articles are not in the record, I did not open the links or take the contents of those articles into consideration.

²⁷ At the time of the conversation on March 31, 2016, Simoneau was performing legal work on behalf of a law firm associated with the Town of Sherborn, and Thompson was the Chief of Police in Sherborn.

1 organizational terrorist.”²⁸

2 By email dated December 23, 2018, Gutwill sent Baker a report entitled “Taliban.”²⁹

3 In the report, Gutwill informed Baker that he received a report written by Thompson where

4 Thompson detailed a phone conversation he had with Simoneau in March of 2016.³⁰

5 According to Thompson’s report, Simoneau referred to Gutwill as “the Taliban,” “an

6 organizational terrorist,” and said that Gutwill would be found to be untruthful in the 2016

7 investigation. Gutwill stated that calling a person of Middle Eastern descent the “Taliban”

8 is racist and hurtful. Gutwill requested that Trask take action to protect him from

9 Simoneau, including removing Simoneau from any activity relating to Gutwill.

10 On December 24, 2018, Baker forwarded Gutwill’s email to Trask, and Trask

11 forwarded the email to Hamilton and Thatcher Kezer, the City’s Chief Operating Officer.

12 In that same email, Trask informed Hamilton and Thatcher that he would instruct

13 Simoneau to have no further direct contact with Gutwill and inquired if Hamilton would

14 investigate the matter. On December 31, 2018, Hamilton informed Gutwill that she

15 received his complaint regarding Simoneau’s alleged statements to Thompson. Hamilton

16 agreed that such an alleged statement would be offensive and problematic for a

17 workplace setting. However, Hamilton declined to investigate his complaint further

²⁸ Thompson testified to the events of this conversation, and I credit his testimony that Simoneau referred to Gutwill as the “Taliban, an organizational terrorist”. Additionally, I credit Thompson’s testimony that Simoneau stated the following: “a message needed to be sent” and that “the Chief would get some credibility by terminating Gutwill [because] there is talk of [a] vote of no confidence, [and] this will send the message not to f*** with administration” or words to that effect. Simoneau did not testify.

²⁹ Previously, Gutwill verbally submitted a complaint to Baker at a ‘Shop with a Cop’ event, but Baker informed Gutwill to put his allegations in writing.

³⁰ Gutwill received the Thompson memo through the discovery process for the Whistleblower case.

1 because the alleged statements stemmed from a conversation that took place in 2016
2 and were spoken to Thompson, who was not an employee of the City.

3 By email dated January 8, 2019, Gutwill informed Hamilton that he disagreed with
4 her conclusion, and that Simoneau's conduct had violated several rules of conduct.
5 Additionally, Gutwill requested that Trask assign this complaint to be investigated. On
6 January 10, 2019, Trask informed Gutwill by email that Simoneau had been instructed
7 not to have any further direct dealings with Gutwill. Trask stated that Simoneau was still
8 involved with the on-duty system,³¹ but each entry was tracked and can be audited by
9 Trask or another member of the command staff. Finally, Trask asked Gutwill to clarify if
10 he was seeking to have these allegations investigated as a violation of policy or rules of
11 the FPD.

12 On January 11, 2019, Gutwill responded via email to Trask stating that he wanted
13 the FPD to take action in December, but the complaint was sent to Human Resources.
14 Gutwill stated that Hamilton had sent him degrading emails and had disregarded the
15 City's policies. Gutwill requested an investigation of his original complaint, and Hamilton's
16 actions. Later that day, Trask responded to Gutwill's email. Trask informed Gutwill that
17 he was obligated to pass the complaint to Human Resources, but would open an
18 investigation into possible violations of policy and rules. Additionally, Trask stated that he
19 did not have authority to open an investigation into Hamilton's actions.

20 By email dated January 11, 2019, Gutwill thanked Trask for his actions. However,
21 Gutwill still had concerns that Simoneau had control and access to his sick time, vacation
22 time, days off and days on. Gutwill requested that Simoneau have nothing to do with him

³¹ The on-duty system tracks officers' hours of work and attendance.

1 and avoid encountering Gutwill in the hallways. On January 14, 2019, Trask asked Lt.
2 Sean Riley to investigate Gutwill's allegations against Simoneau.

3 On January 22, 2019, Riley interviewed Thompson, who confirmed that he wrote
4 the March 31, 2016 memo that outlined a conversation he had with Simoneau on the
5 phone that day. On April 2, 2019, Riley concluded his investigation into Gutwill's
6 complaints regarding Simoneau. Riley concluded that there was insufficient evidence to
7 sustain the complaint against Simoneau for conduct unbecoming a FPD employee. Riley
8 concluded that the complaint of disparaging comments was unfounded. However, Riley
9 sustained the complaint against Simoneau regarding Dissemination of Official
10 Information.

11 Other Officers with Discipline for Untruthfulness³²

12
13 On December 1, 2003, Albert Blais (Blais), an Officer with the FPD, was
14 suspended for ten days for conduct unbecoming an officer and violating the Policy on
15 Sexual Harassment. On December 11, 2003, Blais was suspended for 30 days for
16 conduct unbecoming an officer, discourtesy, untruthfulness, and insubordination. Blais
17 appealed both suspensions, and the hearings were consolidated before the Civil Service
18 Commission (Commission). The Commission upheld the suspensions. During the
19 hearing, FPD Officer David Carlo (Carlo) testified, and the Commission found he
20 "couched" his answers to straightforward questions.³³ At the time of the 2003 hearing for

³² The Union did not provide any evidence that the City had disciplined an officer for untruthfulness, and then assigned that officer to the positions of Detective, School Resource Officer, Forensic Investigator or any other position within the FPD's Detective Bureau.

³³ DelPrete testified that for a witness to "couch" their testimony means that they testified without being completely forthcoming.

1 Blais, Carlo was a patrol officer in the FPD. After the hearing, Carlo applied for and was
2 awarded the position of Detective.³⁴

3 In 2006, FPD Patrol Officer Peter Tessicini (Tessicini) received a one-day
4 suspension and written reprimand for violating the following FPD rules: Rule 7.7-
5 Truthfulness; Rule 8.02- Insubordination; Rule 4.04- Conduct Unbecoming an Officer; and
6 Obedience to Rules and Orders. Tessicini grieved his one-day suspension, and an
7 arbitration was held on May 2, 2007. On July 2, 2007, an arbitrator upheld the discipline.
8 Following the arbitration award, Tessicini applied for and was awarded an FPD Housing
9 Officer position.³⁵ Subsequent to becoming the Housing Officer, Tessicini applied for and
10 was awarded the FDP Safety Officer Position.³⁶

11 Additionally, at some unspecified point in time, the FPD disciplined Lieutenant Pini
12 (Pini) for untruthfulness. At the time of the discipline, Pini was assigned to the Detective's
13 Unit. However, the FPD removed Pini from the Detective's Unit after the untruthfulness
14 discipline.³⁷ Finally, the FPD disciplined Officer Calvao for untruthfulness, and

³⁴ The Union did not provide any evidence that Carlo received discipline for being untruthful or that he had a Brady Letter that would impact his testimony in court.

³⁵ The Union did not provide the date that Tessicini received the Housing Officer position.

³⁶ The Union did not provide evidence that Tessicini served as a SRO, Detective, or Forensic Investigator for the FPD after receiving discipline for untruthfulness. Additionally, the Union did not provide evidence that Tessicini had a Brady Letter that would potentially impact his testimony in court.

³⁷ The City did not provide the date of Pini's discipline, his first name, or date of his removal from the Detective's Unit.

1 subsequently removed him from the FPD's Detective Unit.^{38 39}

2 Opinion

3 Prima Facie Case

4 A public employer that retaliates or discriminates against an employee for
5 engaging in activity protected by Section 2 of the Law violates Section 10(a)(3) of the
6 Law. Southern Worcester Reg. Voc. School District v. Labor Relations Commission, 388
7 Mass. 414 (1982); School Committee of Boston v. Labor Relations Commission, 40 Mass.
8 App. Ct. 327 (1996). To establish a prima facie case of discrimination, a charging party
9 must show that: 1) an employee was engaged in activity protected by Section 2 of the
10 Law; 2) the employer knew of that conduct; 3) the employer took adverse action against
11 the employee; and 4) the employer took the adverse action to discourage the protected
12 activity. Quincy School Committee, 27 MLC 83, 92, MUP-1986 (December 29, 2000);
13 Town of Clinton, 12 MLC 1361, 1365, MUP-5659 (November 9, 1985).

14 Protected Activity and Employer Knowledge

15 The Union demonstrated that Gutwill engaged in numerous acts protected by
16 Section 2 of the Law, e.g.: 1) appealing his five-day suspension with the Civil Service
17 Commission as outlined in the parties' CBA, 2) complaining to former Chief Ferguson
18 about working conditions and retaliation concerns, and 3) using the grievance procedure
19 to challenge his assignment to the Patrol Unit; which led to litigation and an Appeals Court

³⁸ The City did not provide Officer Calvao's first name or the exact date of his discipline or his removal from the Detective's Unit.

³⁹ I credit DelPrete's testimony that Housing and Safety Officers are less likely to testify in court than Detectives.

1 decision. As the City was a named party in Gutwill's appeals and litigation, the City was
2 aware of Gutwill's protected, concerted activity.

3 Adverse Action

4 The next question is whether Gutwill suffered an adverse action. The
5 Commonwealth Employment Relations Board (CERB) has consistently defined adverse
6 action as an adverse personnel action, such as a suspension, discharge, involuntary
7 transfer or reduction in supervisory authority. City of Boston, 35 MLC 289, 291, MUP-04-
8 4077 (May 20, 2009); Town of Dracut, 25 MLC 131, 133, MUP-1397 (February 17, 1999).
9 Many management decisions, though possibly inconvenient or even undesirable, do not
10 constitute adverse employment actions unless the charging party is materially
11 disadvantaged in some way. See City of Boston, 35 MLC 289, 291, MUP-04-4077 (May
12 20, 2009)(citing MacCormack v. Boston Edison Co., 423 Mass. 652, 662 (1996)(plaintiff
13 failed to prove adverse action element of a prima facie case of unlawful retaliation where
14 there was no evidence that he had been disadvantaged in respect to salary, grade, or
15 other objective terms and conditions of employment); Sallis v. Univ. of Minnesota, 408
16 F.3d 470, 476 (8th Cir. 2005)(termination, reduction in pay or benefit, and changes in
17 employment that significantly affect an employee's future career prospects constitute
18 material employment disadvantage but minor changes that merely inconvenience an
19 employee or alter work responsibilities do not)).

20 The Union contends that the City took adverse action against Gutwill when it
21 declined to assign him to the open positions of Detective, Forensic Investigator, or SRO.
22 The Union established that Gutwill would have received a pay raise if he had been chosen
23 for any of the three positions. Additionally, the Union established that all three positions

1 were desirable and distinguished positions within the FPD. As such, I find that the City's
2 refusal to assign to Gutwill to the open positions of Detective, Forensic Investigator or
3 SRO constituted an adverse action under the Law.

4 Unlawful Motivation

5 To support a claim of unlawful motivation, the last element of the Union's prima
6 facie case, a charging party may proffer direct or indirect evidence of
7 discrimination. Lawrence School Committee, 33 MLC 90, 97, MUP-02-3631 (December
8 13, 2006) (citing Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002),
9 aff'd sub nom. Town of Brookfield v. Labor Relations Commission, 443 Mass. 315
10 (2005)). Direct evidence is evidence that, "if believed, results in an inescapable, or at
11 least a highly probable inference that a forbidden bias was present in the workplace."
12 Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass.
13 655, 667 (2000) (quoting Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300
14 (1991)).

15 Unlawful motivation also may be established through circumstantial, or indirect,
16 evidence and reasonable inferences drawn from that evidence. Town of Carver, 35 MLC
17 at 48 (citing Town of Brookfield, 28 MLC at 327-328). Several factors may suggest
18 unlawful motivation, including: the timing of the alleged discriminatory act in relation to
19 the protected activity; triviality of reasons, or shifting and inconsistent reasons given by
20 the employer; disparate treatment; an employer's deviation from past practices; or
21 expressions of animus or hostility towards a union or the protected activity. Town of
22 Carver, 35 MLC at 48 (citing Melrose School Committee, 33 MLC 61, 69, MUP-02-3549
23 (September 27, 2006)); Lawrence School Committee, 33 MLC 90, MUP-02-3631

1 (December 13, 2006); Cape Cod Regional Technical High School District Committee, 28
2 MLC 332, 335, MUP-2541 (May 15, 2002).

3 Direct Evidence of Unlawful Motivation

4 The Union first argues that it established direct evidence of the City's unlawful
5 motivation. The Union asserted that Simoneau made anti-union statements concerning
6 Gutwill to Chief Thompson on March 31, 2016. According to the Union, Simoneau's
7 statements are direct evidence of retaliation because he was involved in Chief Trask's
8 decision to deny Gutwill's request to fill the positions of Detective, Forensic Investigator,
9 or SRO. I agree with the Union that Simoneau made problematic statements involving
10 Gutwill during the March 31, 2016 conversation with Thompson. Specifically, Simoneau
11 told Thompson that: 1) he would encourage and support Chief Ferguson in terminating
12 Gutwill; 2) he thought firing Gutwill would give Ferguson some credibility in light of a
13 potential vote of "no confidence" from the bargaining unit; 3) firing Gutwill would send a
14 message not to f*** with the administration; and 4) that he considered Gutwill to be an
15 organizational terrorist.

16 Simoneau expressed anti-union animus when he made the above comments
17 intended to discourage and/or punish the bargaining unit members from engaging in
18 concerted, protected activity. Although the record shows that Simoneau made anti-union
19 comments in 2016, there is no evidence that Chief Trask knew about Simoneau's
20 comments at the time he denied Gutwill's assignment to the SRO, Forensic Investigator,
21 or Detective positions in 2018. The Union has not provided any evidence to establish that

1 Trask knew about the comments Simoneau made to Thompson regarding Gutwill before
2 Gutwill filed a complaint about the comments in late December of 2018.⁴⁰

3 Simoneau's Role in the Decision

4 Stray remarks in the workplace, statements by people without the power to make
5 employment decisions, and statements made by decision makers unrelated to the
6 decisional process itself do not suffice to satisfy a charging party's threshold burden.
7 Bristol County Sherriff's Department, 31 MLC 6, MUP-2872 (July 15, 2004). In this case,
8 the Union has not provided any evidence that Simoneau has the power to make
9 employment decisions in the FPD.

10 Additionally, the Union has not established that Simoneau was involved in any
11 meaningful way with the decision-making process or that he influenced Trask's decision
12 to deny Gutwill's assignment to the Detective, SRO, or Forensic Investigator positions.
13 Stated another way, the Union has not established that Simoneau's conduct infected
14 Trask's decision with the anti-union animus that Simoneau harbored. The CERB has
15 found that in cases where the decision-maker does not make an independent review of
16 the facts and bases the decision to act on the evaluations and recommendations of other
17 supervisors, the motives of the supervisors in a discrimination case will be imputed to the
18 decision-maker. Board of Regents, 12 MLC 1315, 1335. SUP-2758 (October 25,
19 1985)(See Trustees of Forbes Library, 384 Mass. 559, 569-70 (1981)). However, in this
20 case, Simoneau does not supervise Gutwill, and Trask did not base his decision on
21 Simoneau's evaluations or opinions of Gutwill.

⁴⁰ The interview and decision regarding the three positions of Detective, SRO, and Forensic Investigator happened in June and July of 2018.

1 The Union asserted that Simoneau was involved in the decision regarding Gutwill's
2 assignment requests because he oversaw staff meetings and must have been present in
3 the meeting where command staff discussed the 2018 assignments. However,
4 Simoneau's presence in the command staff meetings does not mean he commented on
5 or had any meaningful input into Trask's decision for assignments in 2018. The Union did
6 not present evidence that Simoneau was regularly involved with or influenced Trask's
7 assignment choices.

8 The Union also argued that Simoneau was involved in the decision to deny
9 Gutwill's 2018 assignment request because he is the assistant to the Chief of Police and
10 provided legal counsel to Trask. However, Trask repeatedly testified that he did not
11 consult with Simoneau on the legality of his decision until after he declined to assign
12 Gutwill to the positions of Detective, SRO, or Forensic Investigator. Since Simoneau did
13 not give his legal opinion until after the adverse action occurred, Simoneau's limited
14 involvement does not establish direct evidence of unlawful motivation.

15 The Union further argued that Simoneau was involved prior to Trask's decision
16 because Trask copied Simoneau on or forwarded him all emails with Gutwill's request for
17 assignments. Simoneau was the assistant to the Chief of Police, and in that capacity, was
18 involved with keeping officers' time, attendance, and other personnel information. Given
19 Simoneau's role and involvement in administrative matters, the fact that Trask informed
20 Simoneau of the status of Gutwill's assignment requests and Gutwill's concerns about the
21 assignment process, does not show that Simoneau influenced Trask's decision.⁴¹

⁴¹ The Union did not establish that Simoneau was never copied on other administrative matters or on other officers' requests for assignment to the Detective, SRO, or Forensic Investigator positions.

1 Additionally, the Union argued that Trask should not have cc'd Brandolini⁴² and
2 Pereira⁴³ on the 2018 assignment emails regarding Gutwill because they are not an
3 "objective audience." However, the Union has not presented any evidence that either
4 Brandolini or Pereira made any anti-union or inappropriate comments regarding Gutwill.
5 For all the above stated reasons, the Union has not established direct evidence of
6 unlawful motivation.

7 Indirect Evidence of Unlawful Motivation

8 The Union also argued that it provided sufficient evidence to establish indirect
9 evidence of unlawful motivation. First, it asserts that Simoneau's involvement in Trask's
10 decision to deny Gutwill's assignment to one of the open positions of Detective, SRO, or
11 Forensic Investigator in 2018 is indirect evidence of anti-union animus. However, as
12 noted, the Union has not satisfied its burden of proving that Simoneau's conduct infected
13 Trask's decision with Simoneau's anti-union animus.

14 Timing

15 The Union also maintains that the timing of the decision was dubious. The Appeals
16 Court held oral arguments for Gutwill's arbitration case on March 8, 2018, and issued its
17 decision on July 10, 2018. During that time period, Gutwill applied for and was denied
18 three open positions. The Union argued that the close proximity between the Appeals
19 court case and the City's adverse action is suspicious and demonstrates unlawful

⁴² The Union argues that Brandolini was not "objective" because Gutwill mentioned Brandoli and his ex-wife being on a wiretap to the FBI and in his federal suit.

⁴³ The Union argues that Periera was not "objective" because was involved in the Godino investigation for untruthfulness.

1 motivation. However, timing alone is insufficient to support a finding of illegal employer
2 motivation. City of Holyoke, 38 MLC at 156, MUP-05-4503 (January 9, 2009).

3 Shifting Rationales

4 The Union argued that along with the suspicious timing of the Appeals Court case,
5 the City's shifting rationale regarding Gutwill's ability to interview for the positions shows
6 discriminatory animus. At first, Tersoni informed Gutwill he could not interview for the
7 open positions because he had received discipline for untruthfulness. After checking with
8 Trask, Tersoni informed Gutwill that he could interview for the open positions of Detective
9 and SRO. Tersoni told Gutwill that the Forensic Investigator position had been filled. After
10 Gutwill interviewed for the Detective and SRO positions, the City informed Gutwill that he
11 was not chosen because of his prior discipline for being untruthful. The Union is correct
12 that the City changed positions on Gutwill's ability to interview for the positions of SRO
13 and Detective. However, the reason behind the City's reluctance and concern for
14 assigning Gutwill to a position in the Detective Bureau remained the same. At all relevant
15 times, the City had concerns with placing Gutwill in a position within the Detective Bureau
16 due to his discipline for untruthfulness.

17 According to the Union, the only logical explanation for the City's changing
18 positions on Gutwill's ability to interview was that Simoneau advised the City to grant him
19 an interview to provide "legal cover" for denying him one of the positions that he sought.
20 The Union argued that Trask's decision to copy or forward Simoneau all emails regarding
21 Gutwill's interview requests proves that Trask asked Simoneau for his legal opinion about
22 the interview denial. However, as stated above, Trask's decision to forward emails does
23 not show that Simoneau provided a legal opinion on the subject. If Simoneau advised

1 Trask to offer Gutwill an interview simply to create legal cover for the City's unlawful
2 motivation, it would logically follow that Gutwill would have been offered an interview for
3 all three positions. However, Trask informed Tersoni by email that Gutwill could not
4 interview for the "phone forensic job." Also, Tersoni's emails indicated that the Chief did
5 not extend an interview for the open positions to another officer because he was recently
6 removed from the Detective Bureau. As such, the Union has failed to prove that the City's
7 changing position on Gutwill's ability to interview for the open positions of Detective and
8 SRO was evidence of anti-union animus.

9 Disparate Treatment

10 The Union next argued that the City treated similarly situated bargaining unit
11 members differently than Gutwill by: 1) permitting Carlo to fill a detective position, 2)
12 keeping Godino in the Detective Bureau; and 3) permitting Tessicini to fill the Housing
13 Officer position. Despite the Union's assertions that the City treated Gutwill differently
14 when it denied his assignment request for the SRO, Forensic investigator, and Detective
15 positions, the Union has not provided examples of the City treating similarly situated
16 officers differently. Although the Union pointed to the City's decision to allow Carlo to fill
17 a Detective position after a Civil Service decision panned his credibility as a witness in a
18 case, the Civil Service Decision did not result in discipline for Carlo or a finding of
19 untruthfulness. Moreover, a statement in a Civil Service Decision that Carlo may have
20 couched his testimony is not equivalent to Gutwill's five-day suspension for being
21 untruthful. Additionally, the Union did not provide evidence that Carlo had received a
22 Brady Letter like Gutwill had.

1 Similarly, the Union asserted that Godino was kept in the Detective Unit after
2 receiving a Brady Letter. However, the Union did not establish when Godino received the
3 Brady Letter. The Union claimed that Godino's Brady Letter was connected to Gutwill's
4 complaint, but it provided no evidence to support such a claim. Additionally, the City's
5 final investigation report into Gutwill's claim did not determine that Godino had been
6 untruthful, and he was not disciplined for being untruthful like Gutwill was.

7 Further, the Union cited the City's decision to allow Tessicini to fill the Housing
8 Officer position as evidence of disparate treatment. However, the Housing Officer position
9 does not fall within the Detective Bureau like the SRO, Detective, or Forensic Investigator
10 positions. Also, the Union did not provide evidence that Tessicini was issued a Brady
11 Letter.

12 For the aforementioned reasons, the Union did not provide any examples of
13 similarly situated officers being assigned to a position in the Detective Bureau after
14 receiving discipline for untruthfulness. However, the City did provide evidence that Gutwill
15 was treated the same as other officers who received discipline for untruthfulness. For
16 example, the City disciplined Pini for untruthfulness, and then removed him from the
17 Detective's Bureau. Also, Calvao was disciplined for untruthfulness, and subsequently
18 removed from the FPD's Detective Bureau. Similarly, the City removed Gutwill from the
19 Detective Bureau after he received a five-day suspension for untruthfulness.

20 Inconsistent Treatment

21 The Union next asserted that the City treated Gutwill inconsistently. After receiving
22 a five-day suspension for untruthfulness, the City allowed Gutwill to remain in the Patrol
23 Unit where he could have been called to testify in cases. The Union argued that the City's

1 concern for Gutwill's credibility in court is a façade because he is still subject to testify as
2 a patrol officer.⁴⁴ I am not persuaded by this argument because patrol officers are not
3 involved in criminal investigations to the same degree as positions in the Detective Unit.
4 Also, officers in the position of SRO, Forensic Investigator, and Detective are more likely
5 to testify in criminal cases that deal with serious crimes such as sexual assault. Given the
6 difference in the job duties of a patrol officer and the positions at issue in the Detective
7 Bureau, the City's assignment of Gutwill to the Patrol unit is not inconsistent with its
8 reasons for denying him assignments in the Detective Bureau.

9 The Union further argued that the DA's office sent a letter to the FPD indicating
10 that it would call Gutwill as a witness in a criminal case. Therefore, in the Union's view,
11 the City's rationale for denying Gutwill's assignment to the Detective Bureau positions
12 was unlawful. However, the letter from the DA's office was sent in 2020, well after Trask
13 denied Gutwill's request for assignment to the SRO, Forensic Investigator, or Detective
14 position. Also, the DA office's willingness to call Gutwill as a witness in a case does not
15 change the FPD's consistent practice of refusing to assign officers with discipline for
16 untruthfulness to positions in the Detective Bureau. It is clear from the record that the City
17 did not engage in disparate treatment when Trask denied Gutwill's request to be assigned
18 to one of the open positions of Detective, SRO, or Forensic Investigator.

19 Triviality of Reasons

20 The Union also contends that Trask's reasoning for denying Gutwill's assignment
21 to the open positions was trivial. According to the Union, Trask's decision deviated from

⁴⁴ The Union did not provide an example of a position within FPD that the City could have assigned Gutwill to after his discipline where he would never potentially be called to testify.

1 expert and objective guidance because the DA's office sent a letter that indicated Gutwill
2 would be called as a witness in a case. However, as noted above, the letter from the DA's
3 office was sent almost two years after Trask declined to assign Gutwill to the positions.
4 The timing of these events shows that Trask could not have taken the DA's letter into
5 account. Trask based his decision to deny Gutwill's assignment to the positions in the
6 Detective Bureau on a legal memo regarding the problems that arise when an officer is
7 found to be untruthful.

8 Finally, the Union argued that Trask ignored the request from Tersoni, the officer
9 in charge of the Detective Bureau, for Gutwill to fill one of the positions. However, the
10 Union did not provide sufficient evidence that Tersoni asked Trask to place Gutwill into
11 one of the positions. And even if it was true that Tersoni specifically requested Gutwill to
12 be placed in one of the positions, that fact would not show that Trask's reason for denial
13 was trivial. In fact, other officers in the FPD who had been disciplined for untruthfulness
14 were removed from the Detective Bureau. Also, officers in the FPD who have been issued
15 Brady Letters are routinely placed in positions where they are less apt to testify. Thus, the
16 Union has not established that Trask's reasons for denial were trivial.

17 In sum, the Union did not present any circumstantial evidence demonstrating that
18 the City's decision to deny Gutwill's assignment to the positions of Detective, SRO, or
19 Forensic Investigator was motivated by a desire to penalize or discourage protected
20 activity. Further, the Union did not present any evidence of disparate treatment, deviation
21 from past practices, triviality of reasons, or expressions of animus or hostility towards the
22 Union or the protected activity. Thus, the Union has not satisfied the fourth element of the
23 prima facie case of retaliation.

1 Adverse Inference

2 The Union has requested that I draw an adverse inference because the City did
3 not call Simoneau as a witness. For the following reasons, I decline to do so.

4 The Union first asks that I draw an adverse inference and find that Simoneau made
5 anti-union statements during his March 31, 2016 conversation with Thompson. I need
6 not draw the requested inference because I have credited Thompson's testimony about
7 the anti-union statements that Simoneau made during their March 31, 2016 conversation.
8 Additionally, the Union argued that I should draw an adverse inference and find that
9 Simoneau was involved in Trask's decision not to allow Gutwill's assignment to the three
10 concerned positions.

11 The adverse inference rule provides that "when a party has relevant evidence
12 within his control which he fails to produce, that failure gives rise to an inference that the
13 evidence is unfavorable to him." International Union, United Automobile, Aerospace and
14 Agricultural Implement Workers of America (UAW) v. N.L.R.B., 459 F.2d 1329, 1336 (D.C.
15 Cir. 1972) (hereinafter referred to as United Auto Workers). Application of the rule is a
16 matter of discretion for the fact finder. Quincy School Committee, 27 MLC 83, 91, MUP-
17 1986 (December 29, 2000). In a civil action, even if a party refuses to testify on the
18 grounds of self-incrimination, a reasonable inference to a party may be drawn from the
19 refusal of that party to testify. Labor Relations Commission v. Fall River Educator's
20 Association, 382 Mass. 465, 471 (1981). But see United Auto Workers, 459 F.2d at 1339
21 n.45 (stating that the rule is inapplicable where the party has a constitutional right to
22 suppress the evidence in question, including when the evidence would incriminate him or
23 its production would chill First Amendment freedoms).

1 Applicability of the adverse inference rule does not depend on the existence of a
2 subpoena compelling production of evidence. United Auto Workers, 459 F.2d at 1338.
3 The rule is based on the theory that a party will introduce the strongest evidence available
4 of his own volition. Id. If a party has control of evidence that would strengthen a case,
5 the party can be expected to introduce it without a subpoena. Id. Conversely, if a party
6 fails to introduce such evidence, “it may be inferred that the evidence is unfavorable to
7 the party suppressing it.” Id.

8 The CERB applies the adverse inference rule articulated in United Auto Workers
9 where a party fails to: (1) introduce a rebuttal witness where there is direct evidence of
10 that witness’ involvement in the issue;⁴⁵ (2) provide witnesses or documents in support of

⁴⁵ Town of Somerset, 15 MLC 1523, 1530 n.8, MUP-6406 (March 9, 1989) (finding that the hearing officer improperly drew an adverse inference from the respondent’s failure to call the town accountant as a witness in the absence of direct evidence of the town accountant’s involvement in the decision at issue in the case); Greater New Bedford Infant Toddler Center, 13 MLC 1620, UP-2493 (April 7, 1987) (affirming use of the adverse inference rule where respondent’s rebuttal witness failed to specifically confirm or deny that a conversation occurred); Bellingham Teachers Association, 9 MLC 1536, 1548, MUPL-2336 (December 30, 1982) (affirming the use of the adverse inference rule where the respondent failed to call the third member of the executive board to testify about a vote on whether to take a grievance to arbitration).

1 an affirmative defense;⁴⁶ or (3) introduce a second witness to corroborate earlier
2 testimony.⁴⁷

3 Exceptions to the adverse inference rule exist, although the CERB has not
4 discussed exceptions in applying the rule. For instance, an adverse inference may not
5 be used to establish a prima facie case. Riverdale Nursing Home, Inc., 317 NLRB 881,
6 882 (1995) (finding that use of the adverse inference rule to fill an evidentiary gap proving
7 joint employment status “sweeps too broadly”); McGinnis v. Aetna Life & Cas. Co., 398
8 Mass. 37, 39 (1986) (stating that an adverse inference is not sufficient, by itself, to meet
9 an opponent’s burden of proof); Layne v. Vinzant, 657 F.2d 468, 472 (1st Cir. 1981)
10 (stating that the adverse inference rule cannot, of itself, be used to satisfy a burden of
11 proof). But see United Auto Workers, 459 F.2d at 1344 (rejecting the suggestion that the

⁴⁶ Plainville School Committee, 21 MLC 1001, 1011, MUP-8763 (H.O. June 7, 1994) (applying the adverse inference rule where the respondent failed to call any member of the school committee to testify about its conduct at issue in the case) aff’d. 22 MLC 1690, MUP-8763 (April 17, 1996); City of Boston, 8 MLC 1928, MUP-3994 (February 25, 1982) (affirming the use of the adverse inference rule where the respondent articulated a non-discriminatory reason for a transfer, but failed to produce supporting evidence); City of Leominster, 8 MLC 1592, 1597, MUP-4487 (H.O. November 18, 1981) (applying the adverse inference rule where the respondent failed to produce witness testimony in support of its defense that its primary negotiator lacked authority) aff’d. 8 MLC 2034, MUP-4487 (April 13, 1982).

⁴⁷ Quincy School Committee, 27 MLC 83, 91, MUP-1986 (December 29, 2000) (affirming the use of the adverse inference rule when making a credibility determination where the respondent failed to call a second witness that could have corroborated another witness’ inconsistent testimony). But see Massachusetts Board of Regents of Higher Education, 14 MLC 1397, 1399, SUP-2901 (December 21, 1987) (finding that the hearing officer was not required to draw an adverse inference from the charging party’s failure to produce a corroborating witness where the record did not establish that there existed any identifiable witness who overheard the conversation at issue, stating that “the rule is less applicable where a party does not produce corroborating testimony for this may be simply a matter of litigation strategy.”)

1 adverse inference rule cannot be utilized by a party who has failed to produce a prima
2 facie case without the rule, although that issue was not before the court). The adverse
3 inference rule is also inapplicable where a party has good reason to believe his opponent
4 has failed to meet his burden of proof, and that there is no need to introduce his strong
5 evidence. United Auto Workers, 459 F.2d at 1338; NLRB v. Chester Valley, Inc., 652
6 F.2d 263, 271 (2d Cir. 1981). Additionally, the adverse inference rule does not apply
7 where the other party or the judge plays a role in suppression of the evidence. United
8 Auto Workers, 459 F.2d at 1338.

9 In this case, the Union did not present evidence through documents or testimony
10 that established that Simoneau's conduct in 2016 infected Trask's 2018 decision with
11 Simoneau's anti-union animus. Without an adverse inference that Simoneau was
12 meaningfully involved in Trask's decision to deny Gutwill's assignment to one of the
13 positions of Detective, SRO, or Forensic Investigator, the Union has not established direct
14 evidence of unlawful motivation. And as discussed above, the Union has also not
15 established indirect evidence of unlawful motivation. Because the Union did not present
16 sufficient evidence to establish a prima facie case, I will not draw an adverse inference
17 based on the City's failure to call Simoneau as a witness.

18 Legitimate, Non-Discriminatory Motive

19 However, even assuming that the Union established a prima facie case of
20 retaliation, which it did not, the Employer may produce evidence that it had a legitimate,
21 non-discriminatory motive for taking the adverse action. Higher Education Coordinating
22 Council, 23 MLC 90, 93, SUP-4090 (September 17, 1996); Town of Clinton, 12 MLC 1361,
23 1365, MUP-5659 (November 9, 1985) (citing Trustees of Forbes Library, 364 Mass. at

1 563). Here, the Employer satisfied its burden to produce credible evidence that it denied
2 Gutwill's assignment to the open positions of SRO, Detective, and Forensic Investigator
3 because he had received discipline for untruthfulness that may create substantial
4 credibility issues when he was called to testify in a criminal court case.

5 The City established that Trask based his decision on legal memorandum
6 cautioning Chiefs of Police on the issues officers face when they have been found to be
7 untruthful, including credibility issues when testifying. The City demonstrated that it was
8 common for those who received Brady Letters to be assigned to roles within the FPD
9 where they are less likely to testify. Also, the City demonstrated that the FPD has
10 reassigned officers who had been disciplined for untruthfulness out of the Detective
11 Bureau in the past. Additionally, the City has demonstrated that positions in the Detective
12 Bureau, such as the positions of Detective, SRO, and Forensic Investigator, are more
13 involved with investigations of crimes that are egregious in nature, such as sexual assault,
14 than officers in the Patrol Unit.

15 The Union argued that the City's reasons for denying Gutwill's request to be
16 assigned to the three open positions are a facade. Specifically, the Union argued that the
17 letter from the DA's office showed that there were no problems with Gutwill's ability to
18 testify. However, as explained above, the DA's letter is dated April 7, 2020, and therefore
19 could not have been a factor in Trask's decision-making process. Moreover, the City does
20 not deny that Gutwill may have to testify in criminal cases as a patrol officer. The City
21 denied Gutwill's request to be assigned to the Detective, SRO, or Forensic Investigator
22 positions to minimize the risks of compromising a criminal case because of potential
23 credibility issues with Gutwill's previous discipline.

1 Second, the Union asserted that Tersoni, wanted Gutwill to fill one of the open
2 positions. However, Tersoni's desire to work with Gutwill does not delegitimize the City's
3 reasons for choosing not to assign Gutwill to the positions of Detective, SRO, or Forensic
4 Investigator. The City clearly had a practice of removing officers who had been disciplined
5 for untruthfulness from the Detective Bureau; therefore, Tersoni's opinion does not
6 change the legitimate nature of Trask's reason for the denial.

7 Third, according to the Union, the City's asserted reason for its action is a ruse
8 because it left Gutwill in the Patrol Division where he has testified multiple times in criminal
9 cases. However, the Union did not establish an alternative position within FPD that Gutwill
10 could have been assigned after his discipline for untruthfulness where he would never be
11 called to testify. Further, the Union's argument implies that in order for the City's reasoning
12 to be legitimate, it should terminate all officers after they are found to be untruthful. The
13 City recognizes that patrol officers, like Gutwill, may have to testify in cases. However, it
14 had a past practice of assigning officers who have been disciplined for untruthfulness to
15 positions where they would testify less frequently, would not be as heavily involved in the
16 criminal investigations, and would not deal as frequently with serious crimes. Accordingly,
17 I conclude that even if the Union had satisfied its initial burden of establishing a prima
18 facie case of retaliation, the City satisfied its burden to produce evidence demonstrating
19 that legitimate reasons motivated its adverse action against Gutwill.

20 *But for Test*

21 Finally, the Union cannot prove that but for the protected activity, the City would
22 not have denied Gutwill's request to be assigned to a Detective, SRO, or Forensic
23 Investigator position. The Union argued that since Gutwill's untruthfulness discipline was

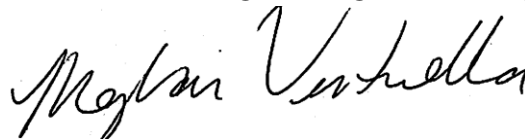
1 the only asserted legitimate reason for denying him the positions, and the DA's office
2 advised Trask that it planned to call Gutwill to testify in a case, there is simply no reason
3 why the City denied him the positions apart from an anti-union reason. However, the letter
4 that the DA wrote almost two years after the adverse action does not change the fact that
5 Gutwill had a five-day suspension for untruthfulness which resulted in a Brady Letter.
6 Additionally, the City's denial of Gutwill's request for a position within the Detective
7 Bureau is not unique, as the City has removed other officers from the unit upon receiving
8 discipline for untruthfulness. The record contains no factually supported evidence to prove
9 that Gutwill would not have been denied assignment to the position of Detective, SRO, or
10 Forensic Investigator but for Gutwill's protected, concerted activity.

11 CONCLUSION

12 The City did not violate the Law by denying Gutwill's request to be assigned to one
13 of the open positions of Detective, School Resource Officer, or Forensic Detective. I
14 therefore dismiss the Complaint.

15 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MEGHAN VENTRELLA, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11 and 456
CMR 13.19, to request a review of this decision by the Commonwealth Employment
Relations Board by filing a Notice of Appeal with the Department of Labor Relations not

later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, this decision shall become final and binding on the parties.