

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

\*\*\*\*\*

In the Matter of:

TOWN OF ASHLAND

and

ASHLAND POLICE UNION, MCOP

\*\*\*\*\*

\*  
\*  
\*  
\*  
\*  
\*

Case Number: MUP-18-6821

Date Issued: February 12, 2020

Hearing Officer:

James Sunkenberg, Esq.

Appearances:

John J. Clifford, Esq.  
Richard Massina, Esq.

–

Representing Town of Ashland

Jennifer Smith, Esq.  
Leigh Panettiere, Esq.

–

Representing Ashland Police Union, MCOP

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this matter is whether the Town of Ashland (Town) violated Section  
2 10(a)(3) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter  
3 150E (the Law) by: 1) on March 14, 2018, placing Police Officer Erik Fay (Fay) on  
4 administrative leave with pay; and 2) on October 31, 2018, discharging Fay. Based upon  
5 the record and for the reasons explained below, I find that the Town did not violate the  
6 Law.

STATEMENT OF CASE

7  
8 On August 3, 2018, the Ashland Police Union, MCOP AFL-CIO (Union) filed a  
9 charge of prohibited practice (Charge) with the Department of Labor Relations (DLR)

1 alleging that the Town had violated Section 10(a)(3) and Section 10(a)(1) of the Law. On  
2 December 14, 2018, a DLR Investigator investigated the Charge. On January 3, 2019,  
3 the Investigator issued a two-count Complaint of Prohibited Practice and Partial Dismissal  
4 (Complaint) alleging that the Town violated Section 10(a)(3) and, derivatively, Section  
5 10(a)(1) of the Law.<sup>1</sup> On January 14, 2019, the Town filed its Answer to the Complaint.<sup>2</sup>  
6 On July 23, 2019, August 5, 2019, and August 23, 2019, I conducted a hearing during  
7 which the parties received a full opportunity to be heard, to examine and cross-examine  
8 witnesses, and to introduce evidence. On December 2, 2019, the parties filed post-  
9 hearing briefs.

#### 10 STIPULATIONS OF FACT

- 11  
12 1. The Town of Ashland (the "Town") is a public employer within the meaning of  
13 M.G.L. c. 150E, §1.  
14
- 15 2. The Ashland Police Union, MassCOP, AFL-CIO (the "Union") is an employee  
16 organization within the meaning of M.G.L. c. 150E, §1 that serves as the exclusive  
17 representative for a bargaining unit of police officers and sergeants employed by  
18 the Town.  
19
- 20 3. At all relevant times, Officer Erik Fay ("Fay") was a member of the bargaining unit  
21 represented by the Union and served as the Union's secretary-treasurer.  
22
- 23 4. At all relevant times, Sergeant Kevin Piers ("Piers") was a member of the  
24 bargaining unit represented by the Union and served as the Union's bargaining  
25 committee chairperson and grievance committee chairperson.

---

<sup>1</sup> The Investigator dismissed the Union's allegations that the Town had independently violated Section 10(a)(1) of the Law. The Union sought review of the Partial Dismissal from the Commonwealth Employment Relations Board (CERB). On March 13, 2019, the CERB affirmed the Partial Dismissal.

<sup>2</sup> On June 24, 2019, the Town filed a Motion to Defer, seeking to resolve the matter through the parties' contractual grievance and arbitration procedure. On July 2, 2019, the Union filed its Opposition to the Town's Motion to Defer. I deferred ruling on the Town's Motion until the conclusion of the hearing, and, to the extent necessary, hereby deny that motion.

- 1 5. At all relevant times, Craig Davis ("Chief Davis") was the Ashland Police  
2 Department's Chief of Police and acted as an agent of the Town.  
3
- 4 6. By a letter dated March 14, 2019, the Town placed Officer Fay on Administrative  
5 Leave.  
6
- 7 7. On or about July 27, 2018, the Town held an Appointing Authority Hearing for  
8 Officer Fay's contemplated termination.  
9
- 10 8. By a letter dated October 31, 2018, the Town terminated Officer Fay's  
11 employment.  
12

### 13 FINDINGS OF FACT

#### 14 General Background

15 The Town is in Middlesex County. Michael Herbert (Herbert) began working for  
16 the Town in 2013 as the Assistant Town Manager and Finance Director. In January 2016,  
17 Herbert became the Town Manager. As the Town Manager, Herbert is the appointing  
18 authority for the Ashland Police Department (Department). During the events at issue in  
19 this matter, approximately twenty-six uniformed officers worked for the Department. Craig  
20 Davis (Chief Davis) was Chief of the Department from October 2013 until he retired in  
21 March 2019.<sup>3</sup> Prior to becoming Chief, he worked for the Town of Framingham for twenty-  
22 eight years as a police officer, including approximately thirteen years as a deputy chief.

23 Erik Fay (Fay) became a police officer for the Department in 2012. In 2014 or  
24 2015, Fay was elected to serve as the Union's Secretary-Treasurer. Sergeant Kevin  
25 Piers (Piers) began working for the Department in 2010, and in 2015 Chief Davis

---

<sup>3</sup> Chief Davis testified that at the time of his hiring the Department was in "turmoil," "did not have a good reputation," and there was a lot of "in-fighting" between the administration and the officers. To address the Department's issues, Chief Davis increased training, hired new officers, sought additional funding, and "gave everybody a clean slate that had been disciplined by the prior administration."

1 promoted him to sergeant.<sup>4</sup> Piers has served as the Union's Bargaining and Grievance  
2 Committee Chairman for approximately three or four years. Sergeant Gregory Fawkes  
3 (Fawkes) worked for the Department for approximately twenty years. Fawkes became a  
4 sergeant in or around 2006. Fawkes has been an active Union member throughout his  
5 career, and during the events at issue in this matter was the Union's Vice President.

6 In or around 2013, under circumstances unrelated to this matter, the Town  
7 discharged and subsequently re-instated Fawkes.<sup>5</sup> In or around February 2015, Fawkes  
8 was the subject of a restraining order and an investigation by the Essex County District  
9 Attorney's Office that prevented him from being able to carry a firearm.<sup>6</sup> During that  
10 investigation, Fawkes was placed on a ninety-day unpaid administrative leave. Once the  
11 restraining order was lifted, Fawkes returned to work. Due to certain ongoing issues,  
12 however, the Department arranged for Fawkes to receive wellness counseling that  
13 concluded in or around May 2015.

14 Additionally, in or around August 2017, a non-Departmental Town employee  
15 alleged that she saw Officer Michael Dionne (Dionne), then the Union's President, take  
16 money from an intoxicated individual's wallet in a Town park. The Town placed Dionne  
17 on paid administrative leave for approximately two weeks and hired Paul White (White),

---

<sup>4</sup> Chief Davis testified that this promotion was part of his attempt to "increase the level of street supervision" in the patrol division.

<sup>5</sup> The Town discharged Fawkes before Chief Davis was hired, and Chief Davis testified that he did not oppose the decision to reinstate Fawkes.

<sup>6</sup> Chief Davis testified that he believed he could have recommended that the Town discharge Fawkes due to his inability to carry a firearm, but he did not so recommend.

1 an outside investigator, to investigate. The investigation cleared Dionne of the allegation,  
2 and he returned to work.<sup>7</sup>

3 Arrest and Prosecution of Fay's Brother-In-Law

4 The City of Gardner is in Worcester County. On the night of July 15, 2016, two  
5 Gardner police officers, Officer Ryan Coates (Coates) and Detective Matthew Arsenault  
6 (Arsenault), arrested Fay's then juvenile brother-in-law in a park in Gardner. Fay's  
7 brother-in-law was charged with assault and battery on a police officer, disorderly  
8 conduct, resisting arrest, assault with a dangerous weapon, and possession of unlawful  
9 fireworks.<sup>8</sup> The police report states that at the time of booking, Fay's brother-in-law had  
10 sustained a "CUT ON NOSE."<sup>9</sup>

---

<sup>7</sup> Dionne did not testify at the hearing. The record does not contain any documents related to this incident or the investigation of this incident.

<sup>8</sup> Fay's brother-in-law and two of his friends were trespassing in a park after dark, lighting off fireworks. Arsenault engaged the two friends, who cooperated. The officers alleged that as Coates approached Fay's brother-in-law, the juvenile fired a Roman Candle at Coates' head; and after Coates identified himself as a police officer, Fay's brother-in-law attempted to flee. Coates caught up with him, a struggle ensued, and Coates and Arsenault subsequently arrested Fay's brother-in-law. The officers did not arrest the two friends.

At the hearing in the instant matter, Fay accused both officers of lying in their police report about identifying themselves to the youths as police officers. Both officers testified that they announced themselves as police officers. I do not credit Fay's testimony because he was not present during this July 2016 incident.

<sup>9</sup> After his arrest, Fay's brother-in-law was transported to the Gardner Police Department, booked, and then released to his mother. Notwithstanding Fay's repeated accusations during his testimony that the officers used excessive force on his brother-in-law, the record contains no corroborating evidence, and I therefore do not credit this testimony. Likewise, I also do not credit Fay's accusation that the officers purposefully overcharged his brother-in-law to compensate for their own wrongdoing.

1 In or around January 2018, Fay decided to become more involved in his brother-  
2 in-law's criminal case, which was pending in Worcester Juvenile Court. He contacted  
3 Brian Pearly (Pearly), the Assistant District Attorney prosecuting the case, identified  
4 himself as an Ashland police officer, and inquired whether his brother-in-law would be a  
5 candidate for a juvenile diversion program.<sup>10</sup> Pearly told him to speak to Pearly's  
6 supervisor. At one point, Pearly told Fay that if his supervisor wanted to speak to Fay,  
7 the supervisor would get in touch with Fay, but the supervisor did not contact Fay. Fay  
8 did not attempt to contact the public defender representing his brother-in-law.

9 Sergeant Fawkes' Discipline

10 The Department had access to a computer program that allowed officers to look  
11 up an individual's personal information without creating a record that identified the officer  
12 who accessed the information. At some point in the summer of 2017, Chief Davis, who  
13 considered this system ripe for possible abuse of the public's privacy rights, was  
14 contemplating implementing new software that would require an officer to individually log  
15 into the program in order to access an individual's personal information. At Chief Davis'  
16 direction, the Department obtained a thirty-day trial for software that would require such  
17 individual log-ins.

18 On August 3, 2017, Fawkes sent an email discouraging other officers from using  
19 this new software.<sup>11</sup> By letter dated August 28, 2017, and delivered to Fawkes shortly

---

<sup>10</sup> Fay testified that he identified himself as a police officer for credibility, but he denied that he sought any special treatment.

<sup>11</sup> Fawkes testified that he did not tell the other officers to not follow the directive related to the new software, he "simply said I'm going to recommend people don't use that service." According to Fawkes, the reason for requiring individual officer log-ons before

1 after noontime on September 1, 2017, Herbert suspended him for three days for conduct  
2 unbecoming an officer, to be served from September 5, 2017 through September 7, 2017.

3 This letter states, in relevant part:

4 For a ranking officer to essentially encourage department-wide insubordination  
5 with regard to a pending policy change is completely unacceptable....While  
6 individual employees and officers of the Union have recourse to object to changes  
7 in working conditions, neither an individual employee nor the union have the right  
8 to call for department wide job actions or insubordination.<sup>12</sup>

9  
10 On Friday, September 1, 2017, which was the Friday before Labor Day, Fawkes  
11 was working a double shift: 7 am – 3 pm and 3 pm – 11 pm. Upon receiving the  
12 suspension, he was upset, and he asked a dispatcher to attempt to find coverage for his  
13 3 pm – 11pm shift, but coverage was unavailable. Around 8 pm, Fawkes, the officer in  
14 charge (OIC) of the 3 pm – 11 pm shift, left work without reporting to the next senior officer  
15 that he was leaving and without adjusting his time card to reflect that he left work early.<sup>13</sup>  
16 On his way home, Fawkes stopped into a local restaurant – the Hanto – where he had  
17 two gin and tonics and vented to an off-duty Department officer about his suspension.

---

officers could access the private information of individuals was “to target somebody most likely.” I do not credit this factually unsubstantiated accusation.

<sup>12</sup> Fawkes testified that this discipline was “very obviously meant to intimidate me and very obviously retaliatory,” and he was “disgusted” by it. According to Fawkes, Chief Davis was retaliating against him because Fawkes had a prior dispute with another officer about letting civilian contractors into the attic of the police station. Fawkes also alleged that Chief Davis was retaliating against him because of a dispute he had with Chief Davis about obtaining funds for updating a memorial outside the police station. Fawkes also alleged that around this time Chief Davis resurrected a prior complaint against Fawkes about smoking. The Union did not produce evidence to elaborate on or substantiate these vague allegations, and I therefore do not credit them. See also footnote 35 below.

<sup>13</sup> Although Fawkes, who claimed to be ill, told Dionne that he was leaving, there is no dispute that Fawkes did not report his departure to the next senior officer within the chain of command.

1 After Labor Day, Chief Davis learned during a conversation with a member of the  
2 community that Fawkes had been seen at the Hanto on the evening of September 1.  
3 After verifying that Fawkes was the OIC of that shift, Chief Davis directed Detective James  
4 Girotti (Girotti) to go to the Hanto and obtain video footage from that evening. Girotti  
5 obtained video footage that confirmed that Fawkes was indeed at the Hanto on the  
6 evening of September 1, 2017. On September 11, 2017, Chief Davis initiated a formal  
7 investigation into Fawkes' conduct on September 1, 2017. The complaint states:

8 On September 11, 2017 I learned that on September 1<sup>st</sup> Sgt. Greg Fawkes was  
9 scheduled to work as uniformed patrol supervisor until 2300 hours but instead left  
10 wo[r]k prematurely without notifying his superiors, without properly filling his  
11 vacancy, and without making notice in the police log or work schedule, and by  
12 submitting payroll records that he worked the entire shift. [sic]  
13

14 Upon his return to work on September 13, 2017, Fawkes was placed on  
15 administrative leave pending the investigation.<sup>14</sup> Chief Davis retained White to conduct  
16 an outside investigation. On October 10, 2017, White interviewed Fawkes. White  
17 determined that Fawkes was untruthful during this interview.<sup>15</sup> The Town subsequently  
18 notified Fawkes that it intended to discharge him, and his pre-termination hearing was  
19 scheduled for February 2018.

#### 20 Complaint against Piers

21 In or around February 2018, while the discipline of Fawkes was pending, a resident  
22 of the community informed Chief Davis that a police cruiser was regularly being parked

---

<sup>14</sup> Fawkes testified that this was "extremely retaliatory" because he had "hundreds and hundreds of hours of sick time." It does not follow that having available sick time proves that the Town unlawfully retaliated against him for walking off his shift, and I therefore do not credit this assertion.

<sup>15</sup> White's investigation report is not part of the record.



1 behind Piers' house for extended periods of time during the evening hours. Piers regularly  
2 worked the 3 pm – 11 pm shift as the OIC. Unbeknownst to Piers, the Town hired White  
3 to surveil Piers' house. The Town did not place Piers on administrative leave but  
4 continued the surveillance to establish whether this was an isolated incident or a pattern  
5 of repeated conduct. This investigation established that Piers was regularly going home,  
6 sometimes for upwards of six hours at a time, while he was the OIC of his shift.<sup>16</sup>

#### 7 Fawkes' Pre-Termination Hearing

8 Pursuant to M.G.L. c. 31, section 41, on February 20, 2018, and February 23,  
9 2018, James Lampke, Esq. (Lampke), an outside hearing officer, conducted a pre-  
10 termination hearing for Fawkes. Fawkes made an audio recording of this hearing. On  
11 February 20, 2018, the first day of the hearing, Chief Davis testified that when he sent  
12 Girotti to the Hanto to obtain the video footage, he did not tell Girotti that Fawkes was the  
13 subject of the investigation. Girotti testified that Chief Davis did not initially tell him who  
14 was the subject of the investigation, but subsequently did because Girotti needed to know  
15 who he was looking for to complete his assignment. Fawkes concluded that Chief Davis  
16 lied under oath, so he reported this conclusion to Piers and Dionne and played them  
17 excerpts from the recording he had made. Within a day or two of February 20, 2018,  
18 Fawkes turned the audio recording over to Piers.<sup>17</sup>

---

<sup>16</sup> Chief Davis testified that he was "incredulous" when he received this allegation and did not at first believe it. The investigation confirmed that Piers was, "Not patrolling, not providing any proactive police services, not engaging with his officers, but at his house." The record does not establish the date on which the surveillance commenced or concluded.

<sup>17</sup> Fawkes testified: "I provided it to them the same day as the hearing I believe, so it was like within a day or two."

1 February 15, 2018 and March 2, 2018

2           Fay's brother-in-law's case was scheduled for trial on February 15, 2018. Fay took  
3 the day off work and accompanied his brother-in-law to Worcester Juvenile Court. Fay  
4 wore his full Department uniform, including a fully equipped duty belt containing his  
5 service firearm, to the Worcester court.<sup>18</sup> The trial was continued to March 2, 2018, and  
6 Fay left.

7           On March 2, 2018, Fay swapped his shift with another officer to get the day off,  
8 then, again dressed in his full Department uniform and wearing a fully equipped duty belt,  
9 including his service firearm, he again appeared at the Worcester Juvenile Court. Shortly  
10 before the trial was set to begin, Fay approached and initiated a discussion with Coates  
11 and Arsenault, who were preparing to testify as witnesses, outside the courtroom. He  
12 attempted to discuss his brother-in-law's case with the officers, who declined. Fay  
13 continued to attempt to discuss his brother-in-law with them, and they continued to  
14 decline.

15           Pearly, the prosecutor handling the case, observed this interaction and, after the  
16 exchange had concluded, inquired of Coates and Arsenault what had transpired. After  
17 they told Pearly, this information was relayed to Judge Anthony Marrotta (Judge  
18 Marrotta), who was presiding over the case. Judge Marrotta called Fay into his  
19 courtroom, where he formally addressed Fay on the record. The following exchange  
20 occurred, in relevant part:

21           Q. Are you here on any official police business?

22           A: No, sir.  
23

---

<sup>18</sup> Fay testified that he wore his uniform for "credibility." He wanted the judge, the ADA or the defense lawyer to "see a police officer" on his brother-in-law's side.

1  
2 Q: I don't want you to respond to what I'm going to say to you because you're not  
3 represented by counsel. But it has been brought to my attention that you have  
4 approached witnesses in this case this morning in uniform and spoken to them  
5 about a possible reduction or leniency in this case. If that is true, that is clearly  
6 intimidation of a witness. It's clearly a felony and it clearly could cost you your  
7 position as a police officer. Based upon that, I'm going to ask the court office[r] to  
8 escort you out of the building and not return during the duration of this trial. Do you  
9 understand that?

10  
11 A: Yes, Your Honor.

12  
13 Q: Thank you. Take it extremely seriously and you'll be fortunate if this does not  
14 result in further action.

15  
16 Fay left the courthouse as instructed. He reported this incident to Dionne and  
17 Piers. He did not report this incident to Chief Davis, Herbert or any other representative  
18 of management.

19 Later that day, at 1:58 pm, Coates reported this incident by email to Neil Erickson  
20 (Chief Erickson), the Gardner Chief of Police. Coates wrote, in relevant part:

21 As we were waiting for the trial to begin, we were informed by both attorneys that  
22 [redacted]'s step-brother, who is a police officer for Ashland PD, was present and  
23 standing with the defendant and his family. The defense attorney (Lacey) told us  
24 that he did not wish for this officer to assist this case in any way and had not been  
25 returning his phone calls. The DA, Brian Pearly, told us that this officer reached  
26 out to him many times for consideration in this matter. Pearly told us that he  
27 referred the officer to his supervisor and later learned that the DA's office was not  
28 interested in speaking with the officer.

29  
30 As Det. Arsenault and I were standing in the hallway near the balcony, waiting for  
31 the trial to begin, the Ashland PD officer approached us and identified himself as  
32 Eric Fay. He was in full uniform with a full duty belt. He asked us if we were the  
33 officers from Gardner involved with his step-brother.... I told him we were. He  
34 asked me, "what happened this night?" I told him that as a police officer he should  
35 know that we couldn't have this conversation right now. I told him I didn't want to  
36 conflict matters with the trial that was about to begin.

37  
38 I was able to divert the conversation...with Officer Fay for a few minutes by waiving  
39 over a MSP Trooper that I saw was standing close by. Det. Arsenault and I had a  
40 brief conversation with Trooper [redacted] while Officer Fay stood by. After Trooper  
41 [redacted] walked away, Officer Fay continued to talk to us about the case. He

1 stated, "OK, I'm just going to jump right to it...", "my step-brother isn't a bad kid."  
2 He told us how [redacted] has been taking classes at a community college and has  
3 turned his life around. He said, "all I ask is that you take it easy on him." He told  
4 us that his family was not going to pursue a civil suit if a plea could be made or if  
5 [redacted] was found not guilty today. He stated that [redacted] has a different  
6 side of the story than what was written in the report. I told Officer Fay to keep in  
7 mind that [redacted] shot at the police with a roman candle firework. He ended by  
8 asking us again to "take it easy on him."<sup>19</sup>

9  
10 As Officer Fay began to walk away from us, DA Pearly was walking towards us  
11 and saw the end of the conversation. He asked us what was said and we told him.  
12 Pearly then forwarded this information to Judge Mar[r]otta. Judge Mar[r]otta called  
13 for a meeting in the courtroom with myself, Det. Arsenault, [redacted], his mother,  
14 Officer Fay, and both attorneys. Judge Mar[r]otta ordered Officer Fay to take the  
15 stand, advised him that he had committed witness intimidation, and had a court  
16 officer escort him out of the building. Judge Mar[r]otta asked us who our chief was  
17 and if we reported this incident to any superior officer. We told him Chief Erickson  
18 and that we had been in communication with Lt. McAvene regarding our  
19 interactions with Officer Fay.<sup>20</sup>

20  
21 Also, later that day, at 2:47 pm, Arsenault reported this incident by email to Chief

22 Erickson. Arsenault wrote, in relevant part:

23 We met with the DA, Brian Pearly, who sat us in the court room to go over the  
24 case. The defense attorney came in and asked us if we know the Ashland officer  
25 outside. We stated no and he stated that he has come to every court date so far  
26 for this incident.

27  
28 While waiting for the case to begin, Ofc Coates and I were going over the report in  
29 the lobby area. The Ashland officer (Eric Fay) approached us in full uniform and  
30 asked if we were involved in the [redacted] case. We stated that we were. He told  
31 us he was [redacted]'s brother in law. He then asked what happened that night?  
32 Ofc Coates told him that he isn't going to tell him anything that will conflict with the  
33 case we are about to testify on. A trooper we know came over and talked with us  
34 for ten minutes while...Fay stood by and waited. After the trooper left, Fay came  
35 back in and told us that [redacted] is a good kid and that he is looking for us to go

---

<sup>19</sup> Coates testified that he understood Fay to be asking Coates and Arsenault to, "Try to make it so [Fay's brother-in-law] wasn't convicted."

<sup>20</sup> At the hearing, Fay accused Coates of lying in this statement and advanced the factually unsupported accusation that Coates was "trying to protect his own wrongdoing." I do not credit Fay's accusations.

1 easy on him. He stated that he has been trying to get the charges dropped through  
2 different sources and that the family may not sue at the point.<sup>21</sup>  
3

4 DA Pearly then came out of the court room and saw him talking to us. As [F]ay  
5 was walking away, Pearly asked what he was talking to us about. We told him the  
6 story. We later went to the court room where the Judge called Fay to the stand.  
7 He basically told Fay that he committed a felony in uniform in the courthouse and  
8 will be escorted off the [prop]erty by the court officers. We then notified Lt.  
9 McAvene regarding the incident.  
10

11 Chief Erickson Contacts Chief Davis

12 On Monday, March 5, 2018, at 10:15 am, Chief Davis received an email from Chief  
13 Erickson. This email states:

14 Hi Chief; I'm Chief Erickson from Gardner, not sure if we have met. I got a call  
15 from one of my Officers on Friday relative to a case they were on and were  
16 approached by one of your Officer (Eric Fay) in full uniform I guess relative to his  
17 brother in law. Not sure if you were aware of this. I just wanted to have a brief  
18 conversation. If you are aware fine if not[] can you give me a call on my  
19 cell...Thanks Chief Erickson.  
20

21 Chief Davis called Chief Erickson. During their conversation, Chief Erickson  
22 confirmed that this incident had in fact occurred, and Chief Davis asked Chief Erickson to  
23 forward him the statements that Coates and Arsenault had submitted.<sup>22</sup> Between  
24 approximately 10:30 – 11:00 am, after speaking with Chief Erickson, Chief Davis informed  
25 Herbert about Fay's conduct. At that time, Chief Davis and Herbert decided to investigate  
26 Fay's conduct on March 2, 2018.<sup>23</sup>

---

<sup>21</sup> Arsenault testified that he understood Fay to be asking for them to "do what we can to let the case kind of dissolve, and for him to, the charges be dismissed."

<sup>22</sup> Chief Davis testified: "I mean, I couldn't believe it. You know...it was just one more thing that was happening, and when I saw this email, I was hoping that it was just going to be a bigger misunderstanding."

<sup>23</sup> Chief Davis testified that he told Herbert he would start an investigation, brief Herbert along the way, and let him know how the investigation developed. Herbert testified that he "absolutely" agreed that the matter required an investigation.

1 March 5, 2018 Complaint of Perjury

2 Later on March 5, 2018, after Chief Davis and Herbert had decided to launch an  
3 investigation into Fay's March 2, 2018 conduct, Piers and Fay appeared at Herbert's  
4 office and formally accused Chief Davis of committing perjury during Fawkes' pre-  
5 termination hearing by testifying that he did not tell Girotti that Fawkes was the subject of  
6 the investigation at the Hanto.<sup>24</sup> Using the audio clips that Fawkes had assembled, they  
7 played for Herbert the portions of Fawkes' pre-termination hearing that they alleged  
8 established that Chief Davis had committed perjury. They provided Herbert with a copy  
9 of the entire audio recording and a letter, which Piers drafted, memorializing their position.

10 This letter states, in relevant part:

11 Chief Davis lied under oath and can no longer be trusted to be a police officer let  
12 alone to lead a police department. His continued employment tarnishes the  
13 reputation of every officer not only in the Town of Ashland but police officers  
14 everywhere.

15  
16 This conduct would never be excepted [sic] from rank and file officers and should  
17 never be accepted by a person in the position such as Chief Davis. His conduct  
18 has removed his ability to lead the department. Every minute that he remains in  
19 his position damages the department's ability to maintain the public trust. Any  
20 leader's legitimacy and ability to lead is based on trust. By his conduct, Chief Davis  
21 has destroyed this trust and with it, any legitimacy or ability to lead. We trust that  
22 you will do your due diligence and make the right decision for the Town, the  
23 Department and your employees. We will not accept a leader that is untruthful and  
24 take any means necessary to ensure that our department is not run by a liar.

---

<sup>24</sup> Piers testified that he made the complaint because, "[I]t's kind of the only thing that we have, is our integrity." On cross-examination, Piers opined that whether Chief Davis' testimony "meets the statutory definition of perjury doesn't matter." Additionally, Piers alleged that Dionne did not want to be involved in bringing this complaint because he had been "chilled" by the Town from engaging in Union activity. I do not credit this factually unsupported assertion. To the contrary, Dionne was still active in the Union at this time: Fay reported the March 2, 2018 incident to Dionne, and Fay testified to consulting with Dionne upon receiving the written questions that Chief Davis required him to answer after the March 5, 2018 incident came to light.

1 Herbert heard out Piers and Fay.<sup>25</sup> He then told them that he would look into their  
2 allegation. Herbert also stated words to the effect that for the time being he would not  
3 notify Chief Davis that they had accused him of perjury.

4 After speaking with Piers and Fay about the perjury allegation, Herbert changed  
5 the subject and asked Fay what had happened in Worcester Juvenile Court the previous  
6 Friday, March 2, 2018. Fay responded with words to the effect that he had messed up.  
7 At this point, Herbert informed Fay that the Town would be investigating this incident.<sup>26</sup>

8 Within a week or two of receiving the perjury complaint, Herbert spoke to Chief  
9 Davis about it without identifying Chief Davis' accusers. Chief Davis denied having  
10 committed perjury. Herbert also sought the advice of counsel. Herbert then concluded  
11 that the complaint required no further action.<sup>27</sup>

12 Fay Investigated and Placed on Administrative Leave

---

<sup>25</sup> Herbert testified that, "There was a lot of discussion about integrity of the badge, how that's the only thing that they have." He continued: "I will have to say, there was a little bit of incredulousness on my part because at the time...there was an investigation of Sgt. Piers that was underway, and then I had just found out the situation with Officer Fay earlier that day. They were not aware that I knew that, of either of those incidents. So...I found it kind of ironic that they were talking to me about the integrity of the badge."

<sup>26</sup> Herbert testified that he told Fay that the Town would be "looking into it." Fay testified that he "disclosed everything" to Herbert, and Herbert stated that "it was serious" and that Chief Davis would be following up on the matter. Piers testified that Herbert stated words to the effect of, "We're going to look into it."

<sup>27</sup> Herbert testified that after listening to the audio and speaking to counsel about the definition of perjury, he concluded that although Chief Davis' testimony was inconsistent with Girotti's, it was not perjury.

1 Chief Davis personally investigated the March 2, 2018 incident.<sup>28</sup> On March 6,  
2 2018, he visited the Worcester courthouse and interviewed, among others, Judge  
3 Marrotta and Pearly's supervisor, Kanchana Fernando (Fernando). On March 9, 2018,  
4 Chief Davis returned to the Worcester courthouse and conducted further interviews with  
5 courthouse staff. On March 12, 2018, Chief Davis received the record of Judge Marrotta's  
6 exchange with Fay. At some point, Chief Davis received the statements from Coates and  
7 Arsenault but did not interview them.<sup>29</sup> Chief Davis sought but was ultimately unable to  
8 obtain video footage of Fay in uniform at the courthouse on March 2, 2018.

9 By letter dated March 14, 2018, Chief Davis placed Fay on paid administrative  
10 leave. This letter states, in relevant part, "The aforementioned action is being taken  
11 because an investigation is being conducted regarding your attempts to interfere with a  
12 criminal trial held on March 2, 2018 at the Worcester Juvenile Court[.]" While on leave,  
13 Fay could not work details and overtime. Also, on March 14, 2018, Chief Davis ordered  
14 Fay to submit a "detailed written narrative containing the full and complete details of this  
15 incident." Upon receiving the order to submit a written statement, Fay contacted and  
16 consulted with Dionne in Dionne's official capacity as a Union official.

---

<sup>28</sup> Chief Davis testified that he personally conducted the investigation because in addition to wanting to "get some information very quickly to see if this did in fact happen," the investigation was "pretty clear cut." As already indicated, Chief Davis did not know at this time that Fay had accused him of perjury.

<sup>29</sup> Chief Davis testified that he did not interview Coates or Arsenault because: "I had their written statement that their Chief had forwarded to me. I had no reason to doubt them. Their information or their version I felt was corroborated by what I had heard the judge tell me, what the District Attorney's office had told me, and... from what I heard from my own ears on the audio tape."



1 On March 20, 2018, Fay submitted his written statement regarding his conduct on  
2 March 2, 2018. He wrote, in relevant part:

3 My next interaction with the Gardner Police was on March 2, 2018. [redacted] and  
4 I were waiting in the Courthouse hallway for his trial to start. [redacted] pointed  
5 out two men in suits, he informed me that the men were the arresting officers. I  
6 walked over to them and introduced myself. I was wearing my Ashland Police  
7 uniform and I told them I was a police officer.<sup>30</sup> The two men introduced  
8 themselves as Coates and Arsenault. I informed them that I was [redacted]'s  
9 brother-in-law.

10  
11 The purpose of that conversation was to let the officers know that [redacted] has  
12 a good character.<sup>31</sup> I wanted them to see [redacted] the way I do. I told them he  
13 is a good kid who made a mistake. I told them they probably hear it a lot, but  
14 [redacted] was trying to better himself. I told them he is enrolled in college classes  
15 and wants to join the Navy. At one point during the conversation Coates asked  
16 me what I wanted. My response was to throw my hands up and say "nothing!" I  
17 just wanted them to know that [redacted] is a good kid and wants this mistake  
18 behind him, so that he can move on with his life.<sup>32</sup>

19  
20 Coates['] response was that [redacted]'s family was suing them, and that "one of  
21 the charges needs to stick." I told Coates that I knew that [redacted]'s family in fact  
22 did not intend on suing anyone. Halfway through my conversation with the officers  
23 a third man approached us. He introduced himself to me, but I don't remember his  
24 name. I believe he was a state trooper. The trooper carried a conversation with

---

<sup>30</sup> On cross-examination, Fay testified regarding wearing his uniform: "Again, I wore my uniform for credibility, so that when I was speaking about my brother-in-law, that they might take it more seriously because, again, the theory of the brotherhood, of a culture of the brotherhood, we're in the same job, they might take me more seriously than... someone off the street, is what I was thinking."

<sup>31</sup> In addition to illuminating his brother-in-law's character, Fay testified that he wanted to "put in a good word for him."

<sup>32</sup> Fay testified that "in the back of my head" he thought that maybe the officers had opposed his brother-in-law being eligible for a juvenile diversion program, and Fay "just kind of wanted to clear the air and let them know that he's not a bad kid" who "doesn't want to go down this road of... entering the criminal system and having it affect him for the rest of his life." On cross-examination, Fay further testified that, "I was trying to give them more information about [redacted], about his character, I was trying to put in a good word for him. I realized at that time, that juvenile diversion could have been an opportunity."

1 Coates and Arsenault for approximately 3 – 5 minutes. Once he walked away I  
2 resumed my conversation with Coates and Arsenault.

3  
4 My sole purpose of this conversation was to let the officers know that [redacted]  
5 was remorseful and simply wanted to move on with his life. To my knowledge,  
6 they had only one, very bad, interaction with [redacted], and I wanted them to  
7 understand that there is more to [redacted] than they saw that night. I was not  
8 trying to influence or otherwise change their testimony.<sup>33</sup>

9  
10 On March 23, 2018, Chief Davis spoke with Pearly. After speaking to Pearly, Chief  
11 Davis did not gather any further information for his investigation.

12 On an unidentified date after March 23, 2018, Chief Davis completed his Internal  
13 Administrative Investigation Report.<sup>34</sup> In relevant part, Chief Davis concluded:

14 After reviewing all of the investigative materials, statements, audio recordings and  
15 transcripts, I am able to state the following:

16  
17 Following [redacted]'s arrest, Office Fay called the ... Gardner Police Department  
18 to find out more information about his brother-in-law's incident. Officer Fay was  
19 unable to obtain much information during said phone call.

20  
21 Before the originally scheduled trial date of February 15, 2018, Officer Fay called  
22 ADA Pearly to speak about the case. Officer Fay identified himself and asked ADA  
23 Pearly "if and what could be done" about [redacted]'s charges. ADA Pearly was  
24 uncomfortable with Officer Fay's questions and only provided him with ADA  
25 Fernando's contact information, stating that she was his supervisor. Officer Fay  
26 called ADA Pearly twice more and ADA Fernando once, and each time Officer  
27 Fay's questions made ADA Pearly uncomfortable. Officer Fay also called ADA  
28 Fernando and "asked for leniency" for [redacted].  
29

---

<sup>33</sup> Fay testified that he was not trying to influence the officers. I do not credit Fay. By his own admission, Fay wore his uniform so that he would be taken more seriously when speaking about his brother-in-law; he wanted to inform the officers about his brother-in-law's character and put in a good word for him; and he was thinking about a juvenile diversion program, which would be a reduced form of punishment, while he was speaking to the officers. I discern no plausible purpose in this conduct other than to influence the officers.

<sup>34</sup> Chief Davis testified that some delay occurred in concluding his report while he waited for the courthouse to produce the video footage of Fay that it was ultimately unable to produce. The record does not establish the length of the delay.

1 The above conduct is clearly a violation of Department Rule 4.02 – Conduct  
2 Unbecoming an Officer, Rule 4.03 – Violating Conflict of Interest Law, Rule 4.06 –  
3 Undue Influence, Rule 4.12 – Interfering with the Course of Justice, Rule 4.20 –  
4 Use of Official Position, and Rule 7.10 – Recommendation for Disposition of  
5 Cases. Officer Fay attempted to use his position as an Ashland Police Officer to  
6 gain impermissible information from the District Attorney's Office and negotiate a  
7 favorable outcome for his brother-in-law's impending criminal trial.

8  
9 By his own admission, Officer Fay went to court with [redacted] on February 15,  
10 2018 in full police uniform. As stated previously, Officer Fay was originally  
11 scheduled to work that day but took the day off instead. Therefore, there is no  
12 conceivable reason Officer Fay would dress in full uniform to attend the Worcester  
13 County Courthouse, as he was not there on police business nor was he going into  
14 work later that day.

15  
16 Officer Fay appearing in court on February 15, 2018 in full police uniform is a clear  
17 violation of Department Rule 4.02 – Conduct Unbecoming an Officer, Rule 4.20 –  
18 Improper Use of Position, Rule 9.4 – Wearing the Uniform, Rule 12.3 – Authorized  
19 Equipment.

20  
21 Being that the February 15, 2018 trial date was continued, Officer Fay once again  
22 appeared in court with [redacted] on March 2, 2018. According to Officer Fay and  
23 all parties who witnessed him in the Court that day, he wore his full Ashland Police  
24 uniform and utility belt (including his service firearm). Officer Fay was also  
25 scheduled to work in Ashland during the trial but swapped shifts with Officer Keefe  
26 so he could attend the trial instead. There is once again no conceivable reason  
27 that Officer Fay would wear his full uniform to court that day, being that he was not  
28 there on police business and had changed his schedule.

29  
30 Just as above, Officer Fay appearing in court on March 2, 2018 in full police  
31 uniform is a clear violation of Department Rule 4.02 – Conduct Unbecoming an  
32 Officer, Rule 4.20 – Improper Use of Position, Rule 9.4 – Wearing the uniform,  
33 Rule 12.3 – Authorized Equipment.

34  
35 While waiting for [redacted]'s trial to begin, Officer Fay approached two Gardner  
36 police officers, later identified to be Officer Coates and Officer Arsenault, while they  
37 were waiting in the hallway outside of the courtroom. Officer Fay introduced  
38 himself to the two Gardner officers and began telling that [redacted] was a "good  
39 kid" and had turned his life around. While their accounts differ, Officer Fay insists  
40 he was only trying to convey [redacted]'s good character. The Gardner officers  
41 stated that Officer Fay was attempting to get [redacted]'s charges dropped and  
42 notified the officers that [redacted]'s family would not file a civil suit against them if  
43 a plea bargain could be met.

44  
45 Officer Fay's conversation with Officers Coates and Arsenault who he knew were  
46 serving as witnesses in [redacted]'s trial was a clear violation of Department Rule

1 4.02 – Conduct Unbecoming an Officer, M.G.L. c. 268A – Conflict of Interest. Rule  
2 4.03 – Violating Conflict of Interest Law, Rule 4.06 – Undue Influence, Rule 4.12 –  
3 Interfering with the Course of Justice, Rule 4.20 – Use of Official Position, and Rule  
4 7.10 – Recommendation for Disposition of Cases, Rule 11.12 – Criminal Conduct,  
5 and M.G.L. c. 268 §13B – Intimidation of persons connected to criminal  
6 proceedings.  
7

8 The Gardner officers attempted to divert the conversation and began speaking to  
9 a Massachusetts State Police Trooper nearby. Officer Fay waited for that  
10 conversation to end before reinitiating with the officers. The Gardner officers  
11 informed ADA Pearly that Officer Fay approached them and asked them to “go  
12 easy” on [redacted]. ADA Pearly then took this information to Judge Marrotta and  
13 Attorney Lacey, [redacted]’s defense counsel.  
14

15 After a conference between both attorneys and Judge Marrotta, Officer Fay was  
16 called to the stand. A transcript of Judge Marrotta’s questions appears above.  
17 Judge Marrotta explained to Officer Fay that he may be committing a felony by  
18 intimidating a witness in a criminal trial. Officer Fay also admitted that he was not  
19 in court on official police business. Court Officer Gagnon noted that Officer Fay  
20 was wearing his gun in court, which is strictly prohibited unless an officer is in court  
21 on official police business. Officer Fay was then escorted out of the court by Judge  
22 Marrotta’s order.  
23

24 Judge Marrotta’s questioning raises violations of criminal statute M.G.L. c. 268  
25 §13B – Intimidation of persons connected to criminal proceedings, as well as  
26 violations of all the above-referenced Ashland Police Department Rules and  
27 Regulations.  
28

### 29 Fawkes’ Discharge

30

31 On April 4, 2018, Lampke issued his report finding just cause to discipline Fawkes  
32 up to and including termination. By letter dated April 13, 2018, the Town discharged  
33 Fawkes. This letter states, in relevant part:

34 On February 20, 2018 and February 23, 2018, pursuant to G.L. c. 31, § 41, the  
35 Town conducted a hearing before Hearing Officer James B. Lampke, Esq., to  
36 determine whether just cause existed to terminate you for conduct unbecoming an  
37 Ashland Police Sergeant in relation to the incidents described below.  
38

39 The incidents upon which the termination is based are as follows:  
40

- 41 1. While Sergeant in charge of the 3:00 p.m. to 11:00 p.m. shift on September 1,  
42 2017, you abandoned your duties shortly after 8:00 p.m. without making

1 arrangements to cover the remainder of the shift and in doing so you  
2 jeopardized the safety of your fellow officers and the public.

- 3  
4 2. On October 10, 2017, you were interviewed by Paul J. White, an investigator  
5 retained by the Town. During that interview, you were untruthful regarding your  
6 conduct on September 1, 2017, specifically as follows:

7  
8 a. You indicated that you left the station and abandoned your duties as  
9 sergeant in charge on September 1, 2017 due to illness. Based on your  
10 conduct following your departure, it is clear that you were not too ill to  
11 work.

12  
13 b. You were untruthful in your statements regarding how long you were at  
14 the Hanto restaurant on September 1, 2017[.]

15  
16 c. You were untruthful regarding your consumption of alcohol while at the  
17 Hanto restaurant on September 1, 2017.

- 18  
19 3. You falsified Ashland Police Department payroll records and committed fraud  
20 upon the Town by reporting that you worked a full 3:00 p.m. – 11:00 p.m. shift  
21 on September 1, 2017, when in fact you had left at least three (3) hours early.  
22 You made no attempt to correct the payroll records to reflect your absence in  
23 the weeks following September 1, 2017.

24  
25 All three (3) of the aforesaid incidents were found by the Hearing Officer to be  
26 intentional violations of the Department Rules and Regulations, each committed  
27 without justification. I find the Hearing Officer's findings to be troubling in general,  
28 but I am particularly disturbed that a sergeant in the Ashland Police Department  
29 would abandon his duties without any regard for the safety of his fellow officers or  
30 the citizens we are all charged to protect. Your willingness to be untruthful during  
31 the investigation only exacerbates the seriousness of your misconduct.

32  
33 (For the record, I note that the following charge was not sustained by the Hearing  
34 Officer: "While on duty on September 1, 2017, between approximately 8:00 p.m.  
35 and 9:00 p.m., consumed 2 alcoholic beverages at the Hanto" was found to be  
36 without merit by the Hearing Officer as you were not on duty when you consumed  
37 the two (2) alcoholic drinks. As this charge was not sustained by the Hearing  
38 Officer, it was not considered in my decision to terminate you.)

39  
40 After the Town discharged Fawkes, the Town and the Union reached a deal  
41 whereby Fawkes dropped the appeal of his discharge in exchange for the Town re-hiring  
42 him and supporting his application for accidental disability retirement related to a February  
43 2017 traumatic incident that Fawkes responded to in the line of duty. On September 20,

1 2018, Fawkes submitted his Application for Accidental Disability Retirement, and that  
2 application was subsequently approved.<sup>35</sup>

3 Notice of Contemplated Termination and July 27, 2018 Pre-Termination Hearing

4 By letter dated July 19, 2018, Chief Davis notified Fay that the Town was  
5 contemplating discharging Fay for his conduct related to the arrest and prosecution of his  
6 brother-in-law.<sup>36</sup> This letter informed Fay that his pre-termination hearing was scheduled  
7 for July 27, 2018, at 9:00 am. On July 27, 2018, Lampke conducted Fay's pre-termination  
8 hearing.<sup>37</sup> Chief Davis and Fay testified at this hearing.

9 By email that morning at 9:26 am, Piers, who was present at the hearing but not  
10 testifying, wrote to Herbert:

11 I am writing to inform you that because of your inaction in dealing with Chief Davis  
12 lying under oath, I have taken the steps necessary to file a criminal charge for

---

<sup>35</sup> At the hearing on August 23, 2019, the Union submitted Fawkes' September 20, 2018 Application for Accidental Disability Retirement into the evidentiary record. This document included supplemental materials related to Fawkes' claim after the initial application was submitted. Included in this exhibit is the report from a March 21, 2019 psychiatric evaluation performed as part of Fawkes' claim. This report states, in relevant part: "He described a situation with a back-and-forth between a superior including an email that he sent. Through the course of this conflict, Mr. Fawkes stated Mr. Fawkes was suspended for insubordination. He said he did not see the insubordination at first, but now he does." I note that this statement, obtained as part of a medical diagnosis and offered by the Union, contradicts Fawkes' subsequent July 23, 2019 sworn testimony in this matter that his August 28, 2017 discipline for this incident was "very obviously retaliatory."

<sup>36</sup> Chief Davis attributed some of the delay in issuing this Notice of Contemplated Termination to waiting to receive availability dates from the hearing officer. The record does not establish the length of this delay.

<sup>37</sup> Herbert testified that, as with Fawkes' case, he retained an outside hearing officer to get an "objective set of eyes" on the case.

1           perjury.<sup>38</sup> I am seeking your protection from retaliation from Chief Davis. Any  
2           adverse employment actions taken against me will be construed as witness  
3           intimidation and appropriate additional criminal charges will be filed.  
4

5           At 9:49 am that morning, Hebert forwarded this email to Chief Davis and the  
6           Town's labor counsel to discuss it.<sup>39</sup> At this point, Chief Davis learned the identity of the  
7           officers who had accused him of perjury.<sup>40</sup>

#### 8           Discipline of Piers

9           By letter dated July 30, 2018, Chief Davis notified Piers that Piers was under  
10          investigation for abandoning his duties. This letter ordered Piers to respond in writing to  
11          certain questions related to him going home while on duty. On August 16, 2018, Piers  
12          was interviewed as part of the investigation. On September 10, 2018, the Town placed  
13          Piers on administrative leave. On or around September 28, 2018, the Town, the Union,  
14          and Piers entered into a settlement agreement whereby, in lieu of more serious discipline,  
15          Piers received a ten-day unpaid suspension and ten eight-hour shifts of punishment duty,  
16          "predicated upon evidence of unauthorized absences during shifts worked by Sgt. Piers  
17          from February through July, 2018."<sup>41</sup>

#### 18          Notice of Termination

---

<sup>38</sup> Piers testified that in or around July 2018, the Middlesex County District Attorney's Office, the Essex or Suffolk County District Attorney's Office – he could not remember which one - and the Attorney General's Office all declined to act on his complaint.

<sup>39</sup> Herbert testified regarding his decision to forward this email: "So...just because you write an email saying you're seeking protection from retaliation does not give you a blank check to perform wrongdoing or continue in wrong behavior for anything else that you do."

<sup>40</sup> Chief Davis testified, "I did not know who the players were that had made the allegation against me until I think it was during Fay's termination hearing."

<sup>41</sup> The Union did not object to this settlement agreement entering into evidence.

1 On October 22, 2018, Lampke issued his report finding just cause to discipline Fay  
2 up to and including termination. On an unidentified date, Chief Davis recommended that  
3 Herbert discharge Fay.<sup>42</sup> By letter dated October 31, 2018, Herbert discharged Fay. This  
4 letter states, in relevant part:

5 On July 27, 2018, pursuant to G.L. c. 31, § 41, the Town of Ashland ("Town") held  
6 a contemplated termination hearing before Hearing Officer James B. Lampke, Esq.  
7 to determine whether just cause existed to terminate you from your position as a  
8 Police Officer with the Town. During the hearing, you were represented by counsel  
9 and you were afforded the opportunity to present evidence on your behalf.

10  
11 Based on the findings and recommendations set forth in the Hearing Officer's  
12 Report, a copy of which is enclosed herewith and the substance of which is  
13 incorporated herein by reference, as appointing authority for the Town, and  
14 pursuant to G.L. c. 31, § 41, I have made the decision to terminate you from your  
15 employment with the Ashland Police Department. As further detailed in the  
16 Hearing Officer's Report, Hearing Officer Lampke found that your behavior in  
17 connection with events surrounding the arrest and prosecution of a third-party by  
18 the Gardner Police Department and the Worcester County District Attorney's Office  
19 violated the following provisions of the Town of Ashland Police Department Rules  
20 and Regulations: Rule 4.02 – Conduct Unbecoming an Officer; Conflict of Interest;  
21 Rule 4.03 – Violating Conflict of Interest Law; Rule 4.06 – Undue Influence; Rule  
22 4.12 – Interfering with Course of Justice; Rule 4.20 – Use of Official Position; Rule  
23 7.10 – Recommendation for Disposition of Cases; Rule 9.4 – Wearing the Uniform;  
24 Rule 11.12 – Criminal Conduct; M.G.L. c. 268, § 13B: Intimidation of Persons  
25 Connected to Criminal Proceedings; Rule 12.3 – Authorized Equipment.

26  
27 Your termination is effective immediately.<sup>43</sup>

---

<sup>42</sup> Chief Davis testified that he considered Fay's conduct "tremendously egregious" and that Fay used his "badge to betray the public trust and confidence." Chief Davis also testified that Fay had told Herbert that he wore his uniform to the courthouse on March 2, 2018, because he was on his way to work. This allegation first appears in Chief Davis' investigatory notes for March 6, 2018, but it does not appear in the letter placing Fay on administrative leave or the Notice of Contemplated Termination. It is referenced but not relied upon in Lampke's report and is not part of the basis underpinning Fay's discharge. I therefore do not credit this aspect of Chief Davis' testimony.

<sup>43</sup> Herbert testified regarding his decision to discharge Fay: "Here, you have an instance of an officer who had orchestrated... a swap essentially so that he could be off-duty, so he could then put on his uniform and go to another district's court to try to influence an investigation, in essence commit a felony... there's certain levels of egregiousness I think in terms of offenses, and I think this rises to the maximum level." Herbert also testified



OPINION

The issue is whether the Town violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by placing Fay on administrative leave with pay and by discharging him. To establish a violation of Section 10(a)(3) of the Law, a charging party must first establish a prima facie case of retaliation or discrimination by demonstrating that: 1) the employee was engaged in activity protected under Section 2 of the Law; 2) the employer was aware of this activity; 3) the employer took adverse action against the employee; and 4) the employer's conduct was motivated by a desire to penalize or discourage the protected activity. Town of Carver, 35 MLC 29, 47, MUP-03-3894 (June 30, 2008); Lawrence School Committee, 33 MLC 90, 96-97, MUP-02-3631 (December 13, 2006). To support a claim of unlawful motivation, the last element of a prima facie case, a charging party may proffer direct or indirect evidence of discrimination or retaliation. Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002), *aff'd sub nom.*, Town of Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005).

Absent direct evidence, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. Lawrence School Committee, 33 MLC at 97. Several factors may suggest unlawful motivation, including the timing of the alleged discriminatory act in relation to the protected activity, triviality of reasons given by the employer, disparate treatment, an employer's deviation from past practices, or expressions of animus or hostility toward a union or the protected activity. Town of Carver, 35 MLC at 48 (citing Melrose School Committee, 33 MLC 61,

---

that he "absolutely" had concerns about Fay's conduct reflecting poorly upon and embarrassing the Department.

69, MUP-02-3549 (September 27, 2006)). In an indirect, or circumstantial, evidence case, the CERB applies the tri-partite analysis articulated in Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981). Under this analysis, once the charging party establishes a prima facie case, the employer may rebut it by producing evidence that a legitimate reason motivated the adverse action. If the employer produces one or more legitimate reasons, the charging party must establish that but for the protected activity, the employer would not have taken the adverse action. Id. at 565-566; Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001).

#### Prima Facie Case

The Union did not establish a prima facie case of retaliation because, assuming it has established the first three elements, the evidence does not establish that the Town's adverse actions against Fay were unlawfully motivated. Rather, the evidence convincingly establishes that the Town took adverse action against Fay in response to his serious misconduct. The Union argues that the Town's general hostility toward the Union and the timing of the adverse actions in relation to Fay's protected activity establish circumstantial evidence of unlawful motivation. I disagree.

As a preliminary matter, the Complaint alleges that the Town retaliated against Fay, not Piers or Fawkes. Accordingly, their discipline is not before me. Nevertheless, I find no credible evidence of widespread anti-Union animus. In the case of Fawkes, the Department ultimately allowed him to retire rather than discharge him after he walked off his shift as the OIC and went drinking because he was upset about being disciplined for his August 3, 2017 email. Additionally, Fawkes' Application for Accidental Disability Retirement contains a March 21, 2019 statement attributed to Fawkes that contradicts his

1 sworn testimony at the hearing that he believed the Town retaliated against him when it  
2 disciplined him for the August 3, 2017 email. In the case of Piers, who was regularly  
3 going home for hours at a time while the OIC of his shift, the Town and the Union  
4 negotiated a settlement in which Piers acknowledged that his discipline was supported  
5 by evidence of misconduct. In both cases of objectively verifiable misconduct by the  
6 Union's elected officials, the Town reached agreement with the Union to reduce the  
7 contemplated discipline. The record simply does not support the Union's allegations of  
8 widespread animus.<sup>44</sup>

9 The Union also argues that the Town suspiciously did not place Fay on  
10 administrative leave until after he complained to the Town Manager. Timing alone is  
11 insufficient to establish unlawful employer motivation. City of Holyoke, 35 MLC 153, 157,  
12 MUP-05-4503 (January 9, 2009). Moreover, this argument ignores the fact that Fay's  
13 misconduct, which he did not report to the Town, occurred on a Friday, and he joined  
14 Piers in accusing Chief Davis of perjury the next Monday. At the time that Fay made this  
15 complaint, Herbert and Chief Davis had just learned of his unreported misconduct that  
16 morning but had already agreed to investigate that misconduct. Herbert also informed  
17 Fay at the time that Fay made the complaint that the Town would investigate him.  
18 Accordingly, the record does not support the Union's position that the timing of this  
19 investigation and placement of Fay on administrative leave is suspicious or shows  
20 unlawful motivation.

---

<sup>44</sup> The Union argues that the Town also retaliated against dispatcher Joe McDonald and Dionne. Neither individual testified at the hearing, and neither individual's disciplinary history is in the record. I therefore do not address this argument except to again note that the limited information in the record related to Dionne's employment contradicts Piers' assertion that by March 5, 2018, Dionne had been chilled out of engaging in Union activity.

1       The Union also argues that Chief Davis' investigation reflects disparate treatment  
2 of Fay and that Chief Davis offered shifting reasons for discharging Fay.<sup>45</sup> As noted,  
3 Chief Davis was not aware that Fay had accused him of perjury until the pre-termination  
4 hearing, after the investigation was completed, after Chief Davis formed his conclusions  
5 regarding Fay's misconduct, and after the process to discharge Fay had commenced.  
6 Further, Chief Davis explained his decision to personally begin investigating Fay as  
7 resulting from a sense of urgency to ascertain what exactly had occurred. The fact that  
8 Chief Davis travelled to Worcester to begin the investigation within a day of learning of  
9 the incident supports his position. The investigation also quickly became clear cut, and,  
10 unlike in the situations where the Town retained an outside investigator, no outside  
11 investigator was necessary because the basic facts of Fay's misconduct were not  
12 genuinely in material dispute. The Union attempts to frame the investigation as  
13 incomplete because Chief Davis did not speak to Coates, Arsenault, and Fay. Yet, Chief  
14 Davis had the nearly contemporaneous statements of Coates and Arsenault, and,  
15 considering all of the evidence, including Fay's written admissions to his own misconduct,  
16 he had no reason to doubt them. Although some delay occurred between Chief Davis  
17 completing his investigation and the issuing of the Notice of Contemplated Termination in  
18 July, some of this delay resulted from Chief Davis' attempt to obtain video footage from  
19 the courthouse, and some of it resulted from waiting on Lampke's availability. The record  
20 does not contain any evidence that the delay was retaliatory or otherwise unlawfully

---

<sup>45</sup> The Union offers these arguments to support its position that a legitimate reason did not motivate the Town to take adverse action against Fay and but for Fay's protected activity he would not have been discharged. Because these are, however, factors in establishing unlawful motivation through circumstantial evidence, I address these arguments in the Prima Facie section of my analysis.

1 motivated. Accordingly, I find that under the totality of the circumstances, Chief Davis'  
2 decision to personally investigate Fay does not raise an inference of unlawful disparate  
3 treatment.

4 Similarly, the record does not support the Union's argument that the Town had  
5 shifting reasons for taking adverse action against Fay that raise an inference of unlawful  
6 motivation. The reference to Fay telling Herbert that he wore his uniform to court because  
7 he was going to work appears in Chief Davis' investigative notes, but it appears in no  
8 official notice or letter to Fay. Lampke did not base any of his conclusions upon it, and it  
9 was not a factor in the grounds for Fay's discharge. Additionally, Herbert, the appointing  
10 authority, offered testimony consistent with the documentary evidence explaining the  
11 reasons for Fay's discharge. Accordingly, although Chief Davis testified erroneously on  
12 this point at the hearing, the Town has consistently stated its reasons for discharging Fay,  
13 and the evidence convincingly supports those stated reasons. The Union's argument on  
14 this point therefore does not persuade me that the Town's actions were unlawfully  
15 motivated.

16 Legitimate Reason

17 Even if the Union had established a prima facie case of retaliation, which it has  
18 not, the Town has shown that a legitimate reason motivated the adverse actions against  
19 Fay. In addition to arguing that the adverse actions were unlawfully motivated, the Union  
20 argues that the adverse actions against Fay are illegitimate because they are premised  
21 "on falsehoods and wildly exaggerated claims about Fay's conduct." The record wholly  
22 contradicts this position. The Town reasonably concluded that Fay's misconduct, to  
23 which Fay admits, egregiously betrayed the public trust. The Town further reasonably

1 concluded that Fay's conduct reflected poorly upon the Department and had the capacity  
2 to embarrass the Town.

3 The Union attempts to minimize the seriousness of Fay's misconduct. Although  
4 Fay unconvincingly insists that he did not attempt to influence Coates and Arsenault, the  
5 conduct he admits to – wearing his full uniform to another jurisdiction to increase his  
6 credibility so that he could put in a good word for his brother-in-law while exploring the  
7 possibility of juvenile diversion – was an overt attempt to improperly influence his brother-  
8 in-law's criminal case. If he did not seek to influence the officers in some way, he would  
9 not have needed credibility, and there would have been no reason to approach them and  
10 engage them in the moments before they testified against his brother-in-law.

11 Moreover, the investigation into Fay commenced after the Chief of Police of  
12 another department in a different county complained to Chief Davis about Fay's conduct  
13 inside a courthouse beyond the Department's jurisdiction. Lending even further  
14 legitimacy to the Town's actions, Fay's conduct was so concerning to Judge Marrotta that  
15 the judge admonished Fay for it on the record. The Union's argument that Judge  
16 Marrotta's admonishment of Fay on the record "was reckless and entitled to little weight"  
17 ignores the fact that at the time that this admonishment occurred, Fay was standing in the  
18 judge's courtroom armed and in full uniform without any legitimate reason for appearing  
19 there in that capacity. Accordingly, I conclude that even if the Union had satisfied its initial  
20 burden of establishing a prima facie case of retaliation, the Town has demonstrated that  
21 legitimate reasons motivated its adverse actions against Fay.

22 But for Test

1 Finally, the Union cannot prove that but for the protected activity the Town would  
2 not have discharged Fay. The Town decided to investigate Fay before he accused Chief  
3 Davis of perjury, and it began the process to discharge Fay before Chief Davis knew that  
4 Fay had accused him of perjury. The record contains no factually supported evidence to  
5 prove the Union's position that Fay would not have been discharged but for bringing the  
6 complaint against Chief Davis.

7 CONCLUSION

8 The Town did not violate the Law by placing Fay on administrative leave and  
9 discharging him. I therefore dismiss the Complaint.

10 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

  
JAMES SUNKENBERG, 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.