

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

In the Matter of:
CITY OF NEWTON

and

NEWTON POLICE SUPERIOR OFFICERS
ASSOCIATION, MASSCOP LOCAL 401

Case Nos. MUP-18-6946,
MUP-19-7379

Date Issued:
February 22, 2023

CERB MEMBERS

Marjorie F. Wittner, Chair
Kelly B. Strong, Member
Victoria B. Caldwell, Member

Appearances:

Jaclyn R. Zawada, Esq. - Representing the City of Newton
Alan H. Shapiro, Esq. - Representing the Newton Police Superior
Officers Association, MassCop Local 401

CERB DECISION ON APPEAL OF HEARING OFFICER DECISION

1 The Newton Police Superior Officers Association, MassCop Local 401 (Union or
2 NPSOA) and the City of Newton (City) have filed cross-appeals from a Department of
3 Labor Relations (DLR) Hearing Officer decision in these consolidated matters. The
4 Hearing Officer concluded that the City did not violate Section 10(a)(3) and, derivatively,
5 Section 10(a)(1) of M.G.L. c. 150E (the Law) when it: 1) involuntarily transferred Union
6 President Sergeant John “Jay” Babcock (Babcock) from his day shift position as a
7 Sergeant Specialist in the Traffic Bureau to a night shift position in the Patrol Bureau
8 (MUP-18-6946); 2) denied Babcock’s request to attend a specialized Search Warrant

1 training course (MUP-19-7379); and 3) did not select Babcock for a Sergeant Specialist
2 (Special Operations Sergeant) position (MUP-19-7379).

3 The Commonwealth Employment Relations Board (CERB) affirms the dismissal of
4 MUP-19-7379 pertaining to the training course and to the City not selecting Babcock for
5 Special Operations Sergeant. We conclude, however, that the City violated the Law by
6 involuntarily transferring Babcock to the night shift as the complaint in MUP-18-6946
7 alleges. Although we find that the City stated a lawful reason for the transfer, we also find
8 that the City failed to meet its evidentiary burden of producing facts indicating that the
9 stated reason was actually a motive in the decision. In so holding, we reject the City's
10 cross-appeal that the transfer was not an adverse action for purposes of establishing a
11 prima facie case of retaliation under Section 10(a)(3) of the Law.

12 Background¹

13 The Newton Police Department (Department) has two police unions – the patrol
14 officers' union (NPA) and the NPSOA, a superior officers union, which is comprised of
15 sergeants, lieutenants and captains, with certain exceptions not relevant here.

16 MacDonald

17 David MacDonald (MacDonald) became the City's Chief of Police in 2015. Before
18 then, he was the Department's "Executive Officer," serving as the management liaison

¹ The parties agreed to certain stipulations and the Hearing Officer made additional findings of fact based on the record. Except as discussed below, we adopt those findings and summarize the relevant portions, supplemented as necessary with additional information from the record. Further reference may be made to the facts set out in the Hearing Officer's decision, reported at 48 MLC 125 (November 25, 2021).

1 between the Superior Officers and Chief of Police. As Executive Officer, MacDonald
2 attended bargaining sessions. MacDonald retired in July 2020.

3 Babcock

4 Babcock began working for the Newton Police Department in 1987 as a patrol
5 officer in the Patrol Bureau. In 2004, Babcock was assigned to the Traffic Bureau as a
6 traffic officer until he was promoted to Sergeant in 2009. At that point, he was assigned
7 to the Patrol Bureau, where he worked nights.² In 2012, Babcock applied for a Sergeant
8 Specialist position in the Traffic Bureau (Traffic Sergeant). The Traffic Sergeant is one of
9 several “specialty” assignments listed in the parties’ collective bargaining agreement
10 (CBA).³

² Newton police officers assigned to the night shift typically work a “four and two” or “last first, last first” schedule. The “first half” is either from 3:00 PM. to 11:00 PM or 3:30 PM to 11:30 PM. The “second half” is either from 11:00 PM to 7:00 a.m., or 11:30 p.m. to 7:30 a.m.. When Babcock was the sergeant in the Patrol Bureau from 2009-2012, he worked from 11:00 PM to 7:00 a.m. then 3:00 PM to 11:00 p.m. i.e., last half, first half, followed by twenty-four hours off. His next two shifts were a repeat of the first two, followed by two days off.

³ Captain Dennis Geary (Geary) was the Captain of the Special Operation Bureau during the relevant events in this matter. He served as Vice President of the Union from 2014-2016. Geary retired from the Department in early 2021 after serving for approximately 37 years. Geary testified that “pretty much” any superior officer assignment outside of the patrol bureau is considered a “specialty” position. Section XXXI of the collective bargaining agreement (CBA), Specialty Assignments, states:

Superior Officers assigned to the following classifications shall be deemed specialists. The Chief may add or delete classifications at his discretion . . .

Administrative Aide to the Chief, Computer System Manager,
Detective Sergeant/Lieutenant, Executive Officer, FTO
Supervisor/Trainer, Instructor, Internal Affairs, Prosecutor, Traffic
Sergeant.

1 Babcock was not initially selected for Traffic Sergeant but transferred into it in 2012
2 after the successful candidate transferred out. Between 2012 and 2016, he worked
3 Monday through Friday from 8:30 a.m. to 5:00 p.m. with weekends and holidays off. From
4 2016 until his transfer in 2018, he worked from 7:00 a.m. to 3:00 p.m. Monday to Friday,
5 with weekends and holidays off.

6 The Traffic Bureau handles traffic-related matters such as traffic crashes, ticketing
7 and special events, such as road races. From 2012 until 2017, Babcock was also in
8 charge of contacting the detail office to obtain officers to handle road race details. In
9 2017, after MacDonald became Chief of Police, he removed detail staffing from Babcock's
10 responsibilities and created a detail lieutenant position to handle all details. Lieutenant
11 Daniel J. Walsh (Walsh) initially filled this position.

12 On at least three occasions in 2017, Walsh sent emails to MacDonald and Babcock
13 regarding Babcock's continued involvement involved with details. On August 16, 2017,
14 MacDonald sent an email to Babcock regarding details, which stated in pertinent part:

15 You have been told numerous times by Lt Daly and Lt Walsh to forward
16 complaints and detail staffing directly to Lt Walsh, you are to consider this
17 an order. There is one point of contact for Police details, which is Lt Walsh.
18 If anyone calls you regarding detail complaints or detail staffing issues
19 other than in your capacity as a union official, you should forward the
20 complaint to Lt Walsh.

21
22 There is no evidence, and the City does not claim that MacDonald or Walsh disciplined
23 Babcock for any detail-related infractions.

24 Babcock's Union Activity

25 Before he became a sergeant, Babcock served as NPA president from 1996 to
26 2009. After being promoted to sergeant, Babcock was elected NPSOA Vice President in
27 January 2014 and NPSOA president in 2016.

1 Babcock was an active and vocal union official. The City does not dispute that from
2 at least 2014 until 2018, Babcock engaged in multiple union activities, including serving
3 as the Union's lead negotiator for successor contract negotiations that began in 2014.

4 MacDonald attended most successor bargaining sessions, first in his capacity as
5 Executive Officer, and then as Chief. During negotiations in 2016, MacDonald and
6 Babcock had a dispute over whether the City needed to discuss planned changes to travel
7 time during successor negotiations. At one point during the dispute, MacDonald swore
8 at Babcock and threw a document at him, causing Babcock to get a paper cut. Although
9 MacDonald denied hitting Babcock, MacDonald apologized to Babcock, stating that
10 sometimes he (MacDonald) gets "hot and wordy."

11 Also in 2016, MacDonald sent Babcock a letter regarding the use of special leave.
12 The Union's attorney responded with a letter threatening to file an unfair labor practice
13 charge if the changes were unilaterally implemented. Although the City refrained from
14 implementing the change, on one of MacDonald's weekly visits to the Traffic Bureau, he
15 informed Babcock that he was not happy with Babcock blocking his efforts to change
16 things in the Department.

17 JLMC

18 In 2017, the Union filed a petition for mediation with the Joint Labor Management
19 Committee (JLMC). The JLMC granted the petition. Subsequent mediations and
20 negotiations did not result in a contract. The matter proceeded to interest arbitration in
21 February 2019. In September 2019, a tripartite arbitration panel issued a contract award.

22 MUP-16-5532

1 Also in 2017, Babcock, in his capacity as a Union official, accompanied a
2 bargaining unit member to a meeting in which MacDonald placed the bargaining unit
3 member on paid administrative leave and ordered him to take a psychological test. During
4 the meeting, Babcock contested whether MacDonald had the right to order the
5 psychological exam. This led to the Union filing a prohibited practice charge with the DLR
6 in Case No. MUP-16-5532. In one of several conversations that MacDonald had with
7 Babcock over the charge, MacDonald told Babcock to stop fighting this issue and accused
8 him of being an “obstructionist.” Babcock also filed a grievance regarding the exam.

9 2018-2019

10 The three Section 10(a)(3) allegations at issue in this proceeding happened in
11 2018 and 2019. The following is a chronological summary of those events, along with
12 Babcock’s protected concerted activity during this timeframe.

13 February 2018

14 The DLR conducted its first day of hearing in MUP-16-5532 on February 20, 2018.
15 Babcock and MacDonald both attended the hearing.

16 March 2018

17 Crowley Incident

18 On March 9, 2018, Parking Control Officer (PCO) Dorothy Crowley (Crowley) had
19 an encounter with Babcock that led to MacDonald issuing Babcock a written reprimand
20 on March 30, 2018.⁴ MacDonald learned of the incident on March 12 from Captain
21 Anastasia (Anastasia), the captain assigned to the Traffic Bureau. MacDonald asked

⁴ The Union did not allege that the written reprimand was unlawfully motivated.

1 Lieutenant George McMains (McMains) to investigate the incident by soliciting “Dear
2 Chief” letters from witnesses to the incident.⁵ McMains obtained letters from seven Traffic
3 Bureau personnel, including Babcock and Crowley. Based on those letters, McMains
4 issued a report on March 23, 2018, finding in part that:

5 Parking Control Officer Crowley and several witnesses . . . state they heard
6 both Sgt Babcock and PCO Crowley raise their voices and yell at each
7 other. As a supervisor there are several places where contentious, heated
8 discussions or discussions involving discipline can be had in private out of
9 earshot of other employees. Sgt. Babcock allowed the disruptive behavior
10 to continue and even engaged in the disruptive behavior himself with no
11 regard for the other employees who could hear the interaction between him
12 and PCO Crowley.⁶

13
14 Based on these findings, McMains concluded that Babcock had violated the “Newton
15 Police Code of Conduct, Section V, Professional Conduct and Responsibilities, 14.
16 Courtesy.”

⁵ McMains started working at the Department in 1997.

⁶ Babcock and Crowley were discussing an incident that, according to Babcock’s “Dear Chief” letter, had occurred about four years earlier, when Crowley told Babcock that her bike had been vandalized at her house the day after some unknown person scratched the word “RAT” into her car while it was parked in the Traffic Bureau. Crowley’s “Dear Chief” letter reflects that on the morning of the incident with Babcock, she was in the Traffic Bureau and began discussing bike and car vandalism incidents with other Traffic Bureau employees. Crowley became upset and wondered why the Department had not filed a report over her bike. The employees suggested that Crowley speak with Babcock when he got to work. When Babcock arrived, Crowley, who, according to her report, was already crying, asked Babcock why no police report had been filed about her bike. Babcock answered that the decision not to file a report had been hers. Crowley stated that after she asked why Babcock had not recommended that she file a report, Babcock raised his voice and yelled, “Don’t put this on me, that was your decision not mine.” In Babcock’s “Dear Chief” letter, he denied raising his voice at Crowley. All of the “Dear Chief” letters reflected that Crowley had been upset and crying and there was yelling. Some, but not all, indicated that Babcock had raised his voice. Crowley’s statement indicated that she told both Babcock and Assistant Human Resources Director Teri Struth (Struth) that she did not feel safe at work. Struth placed Crowley on administrative leave for the day. Crowley never returned to work.

1 McMains shared the report with MacDonald. On March 30, 2018, MacDonald
2 issued a Letter of Reprimand to Babcock that adopted McMains' conclusions. MacDonald
3 further found that by failing to relocate his conversation with Crowley to a private setting
4 and engaging in a "contentious exchange," Babcock had engaged in "conduct
5 unbecoming a Newton Police superior officer [that] merits discipline." The final sentence
6 of the report stated that further misconduct could result in additional discipline by the
7 Department. The Letter of Reprimand contained no mention of transferring Babcock from
8 out of the Traffic Bureau as a result of the incident.

9 March 30 Grievances

10 Also on March 30, Babcock filed a grievance alleging that MacDonald violated
11 various CBA provisions when it "delayed the process of placing Sergeant Chisholm
12 (Chisholm) on injury on duty status by forty-two days;" did not pay Chisolm overtime in
13 February and March 2018; and forced Chisholm to work two and half additional days
14 beyond his scheduled tour of duty during three different weeks. The grievance also stated
15 that MacDonald had been "unreasonable" when he informed the Union that Chisholm
16 could not return to work without completing a certain Human Resources form that the
17 Union had never seen.⁷

18 MacDonald denied the grievance on April 9, 2018 in a letter that criticized the
19 advice that NPSOA had given to Chisolm and the manner in which the NPSOA and
20 Babcock had handled the incident. MacDonald wrote that the grievance contained "false"
21 statements about MacDonald's conduct and that Babcock had "unreasonably and

⁷ The record is not clear whether Babcock filed the grievance before or after he received the Letter of Reprimand pertaining to the Crowley incident.

1 unnecessarily delayed the return of the form to HR.” MacDonald stated that Chisolm had
2 been “AWOL from work at the direction of the NPSOA as a result of a misperceived
3 change in working conditions,” but that Chisolm “was informed that he would not be
4 disciplined as a result of the advice provided by this union to stay out after being cleared
5 to return to full duty without restriction by this physician....”

6 April 2018

7 Transfer

8 The CBA’s management rights clause grants the City the right to transfer
9 employees . . . “when it shall be in the best interests of the City or the Department.”

10 On April 23, 2018, MacDonald handed Babcock a letter stating that:

11 Effective on Monday, April 30, 2018 you will be transferred to the Patrol
12 Bureau. You will report to duty at 2330 hours [11:30 PM] and be assigned
13 to the 3rd Platoon, Group VI. Thank you for your service and dedication to
14 the Traffic Bureau.

15 Babcock testified without rebuttal that when he told MacDonald that he did not understand
16 why he was being transferred, MacDonald replied that “he was the Chief, therefore he
17 can do what he wanted, and Babcock was being transferred.”⁸ Babcock again asked why
18 he was being transferred. MacDonald responded, “This conversation is over.”

19 The Third Platoon is a night platoon, whose officers work a four and two schedule.
20 As a result of the transfer, Babcock had to transfer from the day shift to the night shift but
21 in doing so, he was entitled to receive an 8% night wage differential.

⁸ As discussed later, the City did not call MacDonald to testify at the hearing. The City called two witnesses, Daniel Valente (Valente) and McMains. Their testimony did not address MacDonald’s reasons for transferring Babcock.

1 There is no evidence that, prior to Babcock's transfer, the Department had ever
2 involuntarily transferred a sergeant or lieutenant from a specialty assignment.⁹ Around
3 2016,¹⁰ however, MacDonald transferred three captains, including Dowling, from their
4 original assignments to different bureaus. At the time, MacDonald told McMains that he
5 did so because he thought that several of the captains were "stagnant in their positions,
6 they could have some more ingenuity and change in different bureaus if they moved
7 captains around from one bureau to another bureau." To McMains' knowledge, the
8 Department does not post bureau commander positions held by captains and captains
9 do not interview for them.

10 On April 30, 2018, Babcock testified on behalf of the Union in MUP-16-5532.

11 May 2018

12 Babcock broke his ankle while off duty on May 3, 2018 and went on medical leave,
13 which ended on November 7, 2018.

14 December 2018

15 Babcock began working in the Patrol Bureau on the night shift.¹¹

16 January 2019

⁹ Geary, McMains, and Babcock, all of whom had over well over twenty years of Department experience, could not recall a sergeant being involuntarily transferred out of a specialty position.

¹⁰ The Hearing Officer found that the captain transfers occurred in 2019, after McMains became executive officer. However, both McMains' and Captain Dennis Dowling's (Dowling) testimony reflects that the transfers occurred in 2016.

¹¹ After Babcock's medical leave ended on November 6, he took vacation from November 6 to December 27, 2018. He testified that he took that time off because he had accumulated a lot of time, and did not want to lose all but five days of it pursuant to the Department's "use it or lose it" policy.

1 On January 30, 2019, a DLR hearing officer issued a decision in MUP-16-5532.
2 The decision concluded that the City had violated Section 10(a)(5) and, derivatively,
3 Section 10(a)(1) of the Law when it did not give the Union notice and an opportunity to
4 bargain over certain aspects of its decision to require the patrol officer to undergo
5 psychological testing as a condition of continued employment.

6 Around January 2019, Dowling , the Patrol Bureau's commanding officer, asked
7 Babcock if he was interested in attending a search warrant training class. Babcock said
8 "yes," and Dowling said that he would get back to him. On January 25, 2019, Geary and
9 Dowling approved Babcock's request to attend a search warrant training class and
10 informed MacDonald.¹² After consulting with the platoon's commanding officers,
11 Lieutenant Mead and Lieutenant Charles Leone (Leone), MacDonald sent an email to
12 Geary stating that the Officer-in-Charge (Leone),¹³ had recommended Sergeant McLean
13 (McLean) for the training, and that MacDonald had approved the selection. Geary
14 responded that he would not have approved McLean's selection.

15 Dowling disagreed that McClean should attend instead of Babcock. Dowling felt
16 "blindsided" by the fact that MacDonald had accepted Leone's and Mead's
17 recommendation and not his, especially since Dowling was Leone's and Mead's superior;

¹² Because the training cost over \$200, Dowling had to obtain MacDonald's approval for the training.

¹³ Leone is Babcock's supervisor.

1 he had never before had a training recommendation countermanded, and he had found
2 the search warrant training in the first place.¹⁴

3 On January 30, 2019, Leone sent an email to Geary, Dowling and MacDonald
4 stating that he felt that Babcock could use more basic training because a lengthy period
5 of time had lapsed since Babcock had last worked in Patrol. Dowling responded that it
6 was the first time he was hearing of any issues, and asked Leone to let him know what
7 the problems were so they could be addressed.

8 February 2019

9 On February 8, 2019, the Department posted an opening for Special Operations
10 Sergeant, a specialty position. The duties for this position included responsibility for
11 training police personnel, including firearms training, coordinating training exercises and
12 keeping training records.

13 There were two applicants for the position, Babcock and Sergeant Peter Wade
14 (Wade). A four-member hiring committee comprised of Geary, who is the Captain of the
15 Special Operations Bureau, McMains, Sergeant Frank Eldridge and Mary O'Neill from the
16 Human Resources Department interviewed Babcock and Wade on March 6, 2019.

17 Following the interviews, but before the hiring committee was disbanded, McMains
18 spoke to MacDonald to tell him that the committee was equally split between Babcock
19 and Wade. According to McMains, MacDonald was not happy about the result because
20 MacDonald always wanted there to be an odd number of people on the committee to
21 avoid a deadlock. MacDonald directed McMains to go back and speak to the committee

¹⁴ The Union challenged the omission of the findings contained in the last two sentences of this paragraph regarding Dowling. We have added the finding, as they are supported by Dowling's testimony.

1 to see if they could come to a consensus.¹⁵ McMains was not successful, resulting in
2 Geary writing a letter to MacDonald that stated in pertinent part:

3 The [hiring] committee members all expressed the opinion that it would have
4 been better if we had more applicants. After the interviews and discussion
5 among the members, the members gave their opinion about the candidates.
6 Sgt. Wade and Sgt. Babcock each received 2 opinions that each was the
7 best candidate of those who applied. My recommendation as bureau
8 commander is Sgt. Babcock.

9
10 Geary recommended Babcock because he knew Babcock was detail-oriented, which
11 Geary believed was a necessary qualification.

12 Geary and MacDonald had a discussion after Geary sent this letter. MacDonald
13 informed Geary that he could not accept the Geary's recommendation. MacDonald
14 further indicated that he believed that Sergeant Valente (Valente) would be a good fit.¹⁶

15 During their conversation about the Sergeant Specialist position, MacDonald
16 asked Geary if he thought anyone else would be a good fit. Geary recommended
17 Sergeant Tramontozzi, but MacDonald stated that Tramontozzi would not be available.
18 Valente later spoke with MacDonald and Geary about the Sergeant Specialist position
19 and a few days later, MacDonald selected Valente to fill it. At no point did Valente
20 interview with a hiring committee for the Sergeant Specialist position.¹⁷

¹⁵ These findings about McMains' interaction with MacDonald following the interviews comes from McMains' unrebutted testimony.

¹⁶ Valente did not apply for the Sergeant Specialist position because he applied for a detective position that the Department posted around the same time. Valente submitted a resume with that application, which stated that he had experience in training new officers and serving as a firearms and range instructor. Valente was interviewed by a hiring committee for the detective position, but he was not selected.

¹⁷ The hiring committees for the Detective and Sergeant Specialist positions were not the same, except that McMains served on both of them.

1 On March 26, 2019, MacDonald sent Geary the following letter:

2 I am in receipt of your interview committee memo dated March 6, 2019. In
3 your memo you articulate the committee was split on the two candidates
4 [who] applied for the position. The committee indicated it would have been
5 better if more candidates applied for the position. As you know the
6 Detective Sergeant posting ran concurrently with the Training Sergeant
7 posting.

8
9 With all due respect, your recommendation to select one of the candidates
10 over the other without a unanimous consensus from the group is
11 problematic for me.

12
13 Therefore, I will be invoking the language contained in the NPSOA collective
14 bargaining agreement under section 3.07 *If in the opinion of the Chief of*
15 *Police, an appropriate candidate is available to fill the vacancy as a result*
16 *of the posting, he reserves the right to fill the vacancy from among any*
17 *qualified Superior Officer of the Department.* (Emphasis added).¹⁸

18
19 As per our conversation and your input, I have interviewed and selected
20 Sergeant Dan Valente to fill the vacancy.

21
22 Sincerely,
23 Chief MacDonald

24
25 September 2019 and October 2019

¹⁸ The full text of Section 3.07 is as follows:

A notice of vacancy in a specialist position within the Department shall be posted in a conspicuous place in the Department for a period of seven (7) consecutive days. The posting shall contain a brief description of the position, duties and responsibilities. Any member of the Association desiring to be considered for the position shall submit in writing an application for a vacancy, detailing his/her qualification for the position prior to the close of the posting period. In filling the position, the Chief of Police will make his decision based upon the nature of the duties to be performed, the needs of the Department and the qualifications of the applicants. If, in the opinion of the Chief of Police, no appropriate candidate is available to fill the vacancy as a result of the posting, he reserves the right to fill the vacancy from among any qualified Superior Officers of the Department.

1 The City sent Babcock to two different trainings – Law Enforcement on the Stand
2 and Advanced Domestic Violence Seminar Commonwealth Police Legacy.

3 October 2019 – December 2020

4 As of the hearing, Babcock had worked on the night shift for nearly two years. He
5 preferred the day shift and found the past two years of working nights “difficult” – that it
6 had “added stress at home,” including on his children. Babcock explained that working on
7 the night shift “was a whole change of lifestyle,” while days at the Traffic Bureau had
8 allowed Babcock a more “normal life schedule and weekends off was more important,
9 family life, than getting an extra eight percent [night differential] every night.”¹⁹

10 Decision²⁰

11 The Hearing Officer dismissed the complaints in their entirety, finding that none of
12 the three allegedly adverse actions at issue here, the denied Search Warrant training,
13 rejection from a Sergeant Specialist Position, and involuntary transfer to a night shift on
14 the Patrol Bureau, were unlawfully motivated. The Union has appealed all aspects of the
15 dismissal. We affirm as to all but the transfer.

16 The CERB traditionally applies a three-step analysis to Section 10(a)(3) retaliation
17 allegations. Town of Clinton, 12 MLC 1361, 1364, MUP-5659 (November 8, 1985) (citing
18 Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 563 (1981)).
19 First, the CERB determines whether the charging party has established a prima facie
20 case of retaliation by producing evidence to support each of the following elements: 1)

¹⁹ Babcock also testified that he could make up the difference in pay by working details if he wanted.

²⁰ The CERB’s jurisdiction is not contested.

1 the employee engaged in concerted activity protected by Section 2 of the Law; 2) the
2 employer knew of the concerted, protected activity; 3) the employer took adverse action
3 against the employee; and 4) the employer's conduct was motivated by a desire to
4 penalize or discourage the protected activity. Town of Clinton, 12 MLC at 1364. If the
5 charging party demonstrates all four elements, the burden then shifts to the employer to
6 produce lawful reasons for its actions, and produce evidence that the reason actually
7 motivated the adverse action. If the employer meets this burden of production, the burden
8 shifts back to the charging party who must then prove that "but for" the protected activity,
9 the employer would not have taken the adverse action. Id. See also Town of Carver, 35
10 MLC 29, 48, MUP-03-3384 (June 30, 2008); Bristol County, 26 MLC 105, 109, MUP-2100
11 (January 28, 2000).

12 The Hearing Officer found that the Union had established a prima facie case of
13 retaliation as to all three allegations. Neither party disputes that the Union met the first
14 two elements, in that Babcock, as a Union officer, had engaged in protected concerted
15 activity that was known to the City. Based upon the incidents in which MacDonald called
16 Babcock an obstructionist and threw aa document at him, and another incident involving
17 Geary, the Hearing Officer also concluded that the Union had met the fourth prong of the
18 prima facie analysis, that the City's conduct was unlawfully motivated.²¹ However, as

²¹ In addition to contending that Babcock did not establish the "adverse action" element of his prima facie case with respect to the transfer, the City asserts that having a good work record is an element of a prima facie case under Section 10(a)(3) of the Law. That is not an accurate statement of the law as it has developed since the Trustees of Forbes Library decision. See e.g., Town of Clinton, *supra*. See also Town of Brookfield, 28 MLC 320, 327, MUP-2538 (May 1, 2002) *aff'd sub nom* Town of Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005); School Committee of the City of Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327, 329 (1996) (setting forth prima facie case of retaliation under Chapter 150E). The City does not otherwise contest the incidents that

1 described below, both parties contest other aspects of the Hearing Officer's Section
2 10(a)(3) analysis.

3 Search Warrant Training

4 The Hearing Officer concluded that the Department's rejection of Babcock for this
5 training was not discriminatorily motivated and dismissed this count. Her conclusion was
6 based on her finding that neither Mead nor Leone, who had recommended that
7 MacDonald approve McLean instead of Babcock for the training, harbored anti-union
8 animus. She also determined that Leone had provided legitimate reasons for denying
9 Babcock's request for search warrant training -- that Babcock had been away from patrol
10 for a while and would benefit from more basic training. Taken together, she found that
11 the Union had not established that, but for Babcock's union activity, the Department would
12 have been selected him for search warrant training.

13 On review, the Union argues that in accepting the City's reasons for not granting
14 the training to Babcock, the Hearing Officer ignored that the Department had not
15 previously rejected any of Dowling's training recommendations and that no one had
16 previously informed Dowling that Babcock needed more basic training. Even considering
17 these facts, however, the record shows that MacDonald consulted with Mead and Leone,
18 who was Babcock's direct supervisor, before denying the training request and they
19 recommended McLean instead of Babcock. As the Hearing Officer found, there is no
20 evidence that Mead and Leone harbored anti-union animus. Further, Leone's January
21 30 email explains the reason for the non-selection: it made more sense to send Babcock

the Hearing Officer relied upon to find that "MacDonald was frustrated and angered by Babcock's and the Union's engagement in protected, concerted activity."

1 to a refresher in-house course before sending him to a more advanced one. The Union
2 challenges this explanation by pointing out that no one in the Department had previously
3 notified Dowling or Babcock that Babcock's performance was deficient in any way.
4 However, it was Dowling who raised the issue of sending Babcock to training. Once
5 raised, Leone and Mead responded by stating that Babcock could benefit more from a
6 different type of training. Furthermore, the record shows that Babcock did attend
7 additional training in September and October 2019. This supports the Hearing Officer's
8 conclusion that the decision to deny Search Warrant training was based on the content
9 of the training, and not to retaliate against Babcock for his Union-related activities. We
10 uphold the dismissal of this count.

11 Sergeant Specialist

12 The Hearing Officer also dismissed the allegation that Babcock was not selected
13 for the Sergeant Specialist position due to his Union activity. In so doing, she rejected
14 the argument that the fact that MacDonald selected Valente without an interview was
15 evidence that Babcock's non-selection was discriminatorily motivated. Rather, she
16 concluded that the unusual situation of the deadlocked hiring committee justified
17 MacDonald's decision to look elsewhere for a candidate. She further found that although
18 Geary thought Babcock was qualified, the Union did not present evidence that Babcock
19 was more qualified for the position than Valente, who had directly relevant firearms
20 training experience.

21 On review, the Union challenges the sufficiency of the City's defense, arguing that
22 the City's only evidence for not selecting Babcock was MacDonald's March 26th letter to
23 Geary, which explained that he was troubled that the hiring committee had not made a

1 recommendation and he was therefore invoking his contractual right to select a different
2 candidate. The Union argues that in the absence of MacDonald's testimony, the letter did
3 not suffice to demonstrate that this was the actual reason that MacDonald did not select
4 Babcock for the position. We disagree for the following reasons.

5 Preliminarily, the Union is correct that at the second stage of the Trustees of
6 Forbes Library Analysis, an employer must do more than simply state a lawful reason for
7 its decision, it must also produce supporting facts indicating that this reason was actually
8 a motive in the decision. Trustees of Forbes Library, 384 Mass. at 566; School Committee
9 of Boston v. Labor Relations Commission, 40 Mass App. Ct. at 335 (citing Wheelock
10 College v. Massachusetts Commission Against Discrimination, 371 Mass. 130, 136
11 (1976)). In Trustees of Forbes Library, 384 Mass. at 566, the Court illustrated this point
12 as follows:

13 For example, an employer might assert that it had fired an employee
14 because it believed the employee had broken rules. The employer would
15 then have to identify the rules and perhaps the occasions of their violation,
16 and offer some indication that it had considered these violations in its
17 deliberations prior to the discharge.

18
19 Id.

20 Contrary to the Union, we find that MacDonald's letter meets this standard. In it,
21 MacDonald contemporaneously explains to Geary why he felt the need to search
22 elsewhere for viable candidates – that Geary's recommendation to select one candidate
23 over the other without a unanimous consensus from the group was "problematic." Further,
24 MacDonald's description of the circumstances was consistent with the facts found at
25 hearing, and with Section 3.07 of the CBA, which grants the Chief the right to fill a posted
26 position with a qualified Superior Officer in a situation where the posting did not result in

1 an appropriate candidate for the position. Thus, even without MacDonald's testimony, this
2 letter satisfies the City's burden of stating a lawful reason for its decision and
3 demonstrating that the reason was actually a motive in the decision.

4 Having met this burden, the City dispelled the presumption of discrimination arising
5 out of the prima facie case, leaving the Union with the burden of proving that, but for
6 Babcock's protected concerted activity, he would have gotten the job. We agree with the
7 Hearing Officer that the Union did not meet this burden. Like the Hearing Officer, we rely
8 on the unusual lack of consensus that justified the Chief's decision to look outside the
9 existing pool of candidates. We additionally rely on the fact that, after McMains told
10 MacDonald that the hiring committee was deadlocked, the Chief told McMains to return
11 to the interview room and try to achieve consensus. This fact leads us to conclude that if
12 a majority of the Hiring Committee had selected Babcock, MacDonald would have abided
13 by their decision. Under these circumstances, the Union has failed to establish that but
14 for Babcock's Union activities, MacDonald would have selected Babcock. We therefore
15 uphold the dismissal of this count.

16 Transfer

17 We reach a different conclusion with respect to the issue of whether Babcock's
18 involuntary transfer to a night shift in the Patrol Bureau was discriminatorily motivated.
19 The Hearing Officer dismissed this count on grounds that the City had articulated
20 legitimate reasons for the transfer – the recent incident with Crowley that resulted in
21 MacDonald issuing a reprimand to Babcock and Babcock's trouble in following the chain
22 of command at least with respect to details. Finding no other evidence that MacDonald's
23 hostility to Union activity was directed solely towards Babcock, and that Babcock was not

1 the only superior officer who MacDonald had ever transferred, the Hearing Officer
2 concluded that the Union had not shown that but for his Union activity, he would not have
3 been transferred.

4 On review, the Union makes the same argument that it made regarding the
5 Sergeant Specialist position, that although the City could have relied on the Crowley
6 incident or the detail incident, it failed to show that these reasons were actually a motive
7 in the decision. We agree.

8 Unlike the evidence presented with respect to the training or Sergeant Specialist,
9 counts, the record contains no testimony or documentary evidence that supports the
10 City's stated reasons for transferring MacDonald. The transfer letter contains no
11 explanation for the transfer; MacDonald flatly and repeatedly refused to give Babcock any
12 reason for the transfer; and MacDonald did not testify to explain the basis for his decision
13 at hearing, leaving Babcock's testimony regarding this interaction unrebutted.

14 Although the City relies on McMains' testimony regarding the Crowley incident to
15 support its reason for the transfer and to justify that reason, the City's questions to
16 McMains focused on the basis for the *reprimand*, not the transfer.²² The City elicited no
17 testimony from McMains regarding the transfer, e.g., whether McMains knew why
18 Babcock had been transferred or whether he had even discussed the issue with

²² Both parties spend considerable time in their briefs debating whether there was just cause for McMains' and MacDonald's conclusion that Babcock violated the Department's Code of Conduct. We need not reach this issue because: 1) there is no allegation that the reprimand was discriminatorily motivated; and 2) our determination that the City did not meet its burden of showing that this incident played a role in its decision to transfer Babcock obviates the need to decide whether the decision was valid in the first instance. In other words, even if we decided that the reprimand was justified, we would still find that the subsequent transfer was unlawfully motivated based on the City's failure to establish a nexus between that incident and the transfer decision.

1 MacDonald. The absence of testimony on this issue is notable given that McMains
2 testified that MacDonald had “specifically” explained to him that he (MacDonald) had
3 decided to transfer three captains in 2016 because they were becoming “stagnant” in their
4 positions. In short, while the City provided ostensibly valid reasons for its transfer of
5 Babcock in 2018, its explanation was unaccompanied by any evidence that these reasons
6 factored into the transfer decision. The Trustees of Forbes Library and City of Boston
7 School Committee decisions cited above make clear that merely asserting reasons that
8 *could have* been the legitimate basis for the action does not meet the accompanying
9 burden of demonstrating that those reasons actually played a part in the decision.

10 This is particularly true here in terms of timing. While the Crowley incident and
11 associated March 30 reprimand were close in time to the April 23 transfer letter, the same
12 can be said of the two grievances that Babcock filed on March 30, which resulted in
13 MacDonald’s April 9 reply that accused Babcock of making false statements about him in
14 the grievance and criticized the advice that NPSOA had given to Chisolm and the manner
15 in which Babcock had handled the incident. The transfer was also just a few weeks after
16 Babcock and MacDonald attended the first day of hearing in MUP-16-5532 - a charge
17 that MacDonald had asked Babcock to stop fighting - and to stop being an “obstructionist.”
18 Thus, the absence of any evidence supporting that the basis of the transfer was the
19 Crowley incident or the much earlier detail incidents clearly fails to dispel the presumption
20 created by the prima facie case that the transfer was motivated by Babcock’s protected
21 concerted activity.²³

²³ Indeed, because the City had relevant evidence within its control that it failed to produce, an adverse inference is warranted that the evidence was unfavorable to the City,

1 Ordinarily, an employer's failure to meet its burden at the second stage of the
2 burden shifting analysis leads to a conclusion that the Employer violated Section 10(a)(3)
3 and, derivatively, Section 10(a)(1) of the Law by its conduct. See Boston School
4 Committee, 40 Mass. App. Ct. at 335-336; Massachusetts Department of Transportation,
5 44 MLC 1, 4, SUP-14-3576, SUP-14-3460 (July 1, 2017). In this case, however, before
6 we can reach this conclusion, we must address the City's cross-appeal of the Hearing
7 Officer's conclusion that the Union established a prima facie case with respect to the
8 transfer. Specifically, the City argues that the Hearing Officer erred when she found that
9 the transfer was an adverse action. We disagree.

10 To establish an adverse action for purposes of establishing a prima facie case
11 under Section 10(a)(3) of the Law, a charging party must establish that the conduct was
12 an employment action of some sort that objectively and materially disadvantaged them in
13 some way. Warren Yee v. Massachusetts State Police, 481 Mass. 290, 295-296 (2019)
14 (quoting Psy-Ed Corp. v. Klein, 459 Mass. 697, 707-708 (2011)) (action taken by an
15 employer is an "adverse employment action" where it is "substantial enough to have
16 materially disadvantaged an employee"); City of Boston, 35 MLC 289, 291, MUP-04-4077
17 (May 20, 2009) (citing MacCormack v. Boston Edison Co., 423 Mass. 652, 662 (1996))
18 (plaintiff failed to establish adverse action element of prima facie case of unlawful
19 retaliation when there was no evidence that he had been materially disadvantaged in
20 some way)). The CERB has defined adverse actions to include such adverse personnel
21 actions, such as a suspension, discharge, or, pertinent here, an involuntary transfer.

i.e., that the basis for the transfer was Babcock's protected, concerted activity. See
Bellingham Teachers Association, 9 MLC 1536, 1548, MUPL-2336 (December 30, 1982).

1 Compare City of Boston, 35 MLC at 291 (minor change in job duties that did not materially
2 affect employee's objective terms and conditions of employment not an adverse action)
3 to Boston City Hospital, 11 MLC 1065, 1072, MUP-4893 (July 25, 1984) (involuntary
4 transfer to "less desirable position" is an adverse action).

5 Here, the Hearing Officer found that Babcock's involuntary transfer from a daytime
6 Sergeant Specialty position to a nighttime Patrol Bureau shift resulted in an actual and
7 material disadvantage to Babcock because, as evidenced by the fact that the City created
8 a differential pay for officers to work the night shift, it is less desirable to work a rotating
9 night shift than to have the ability to work a daytime shift and with weekends off. With
10 respect to the City's argument that the transfer could not have been adverse because
11 Babcock earned an 8% night differential, the Hearing Officer further found that,
12 notwithstanding the night differential, Babcock lost the opportunity to earn overtime for
13 attending the various evening meetings that he attended as the Traffic Bureau Sergeant,
14 like the monthly meetings of the Disability Commission or City Council.²⁴ Citing Suffolk
15 County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001), the Hearing
16 Officer further found that even if Babcock did make more money, the transfer could still
17 materially disadvantage his terms and conditions of employment. Finally, finding that the
18 Traffic Bureau position was a specialty position, and therefore a more desirable
19 assignment, the Hearing Officer found that transferring Babcock out of the position was
20 an adverse action.

²⁴ In this regard, the Hearing Officer found that the City did not present evidence showing that Babcock actually made more on the night shift than he did on the day shift with its additional overtime opportunities. The City disputes this finding and claims that it was not its burden to do so. Because our determination of the adverse action issue does not turn on Babcock's earnings, we do not address these arguments.

1 The City contests these findings, pointing out that many officers consider a transfer
2 to the night shift to be preferable to the day shift, especially in light of the additional
3 compensation offered. It also contests that the Sergeant Specialist position is necessarily
4 a favorable or prestigious assignment. Citing Board of Higher Education, 43 MLC 148,
5 SUP-14-3771 (November 30, 2016), the City argues that, at best, the change in schedule
6 was a mere inconvenience that does not rise to the level of an adverse action.

7 We disagree. Preliminarily, while, as the SJC acknowledged, a lateral transfer
8 from an evening to a day shift may “be an adverse employment action to one employee,
9 but be welcomed by another,” that is not the end of the adverse action analysis. Yee v.
10 Massachusetts State Police, 481 Mass. at 297. Rather, to decide this matter we must
11 focus on whether the disadvantage is objectively apparent to a reasonable person in the
12 employee’s position, while bearing in mind that subjective feelings of disappointment and
13 disillusionment will not suffice. Id. (citing King v. Boston, 71 Mass App. Ct. 460, 469;
14 MacCormack, 423 Mass. at 663). To satisfy this element of an adverse employment
15 action in the prima facie case, an employee who is denied a lateral transfer must put
16 forward evidence of any “objective indicator of desirability” that would “permit a
17 reasonable factfinder to conclude that the sought for position is materially more
18 advantageous.” Id. at 299 (citing Beyer v. County of Nassau, 524 F. 3d 160, 165 (2d Cir.
19 2008)).

20 Here, we find that a reasonable person in Babcock’s shoes would view a sudden
21 involuntarily transfer from six years of working on a day shift with weekends and holidays
22 off, to a night shift with a schedule that could routinely include working weekends and
23 holidays to be a material and objective change in terms and conditions of employment.

1 See Ginger v. D.C., 477 F. Supp. 2d 41, 50 (D.D.C. 2007), aff'd, 427 F. 2d 1340 (D.C.
2 Cir. 2008) cert. den'd, 555 U.S. 1101 (January 12, 2009) (“it is hard to say that a change
3 from a permanent midnight shift to a rotating shift where one’s schedule changes every
4 month is not a change in the conditions or privileges of employment sufficient to constitute
5 an adverse employment action”). Freedman v MCI Telecomms Corp., 255 F. 3d 840, 844
6 (D.C. Cir 2001) (transfer from day shift to night shift adverse where among other things,
7 employee testified that transfer interfered with his education).

8 In so holding, we distinguish this matter from the Board of Higher Education
9 decision that the City cites. There, the charging party was a professor who alleged that
10 his employer discriminatorily refused to approve his requested teaching schedule, which
11 reflected his desire to limit his time on campus and work consecutive days. 43 MLC at
12 150-153. The Hearing Officer dismissed this allegation on several grounds, including that
13 the charging party was not materially disadvantaged by his failure to receive his desired
14 schedule because his compensation was not affected and he taught the same classes,
15 just at different times. Id. at 155. On appeal to the CERB, the charging party argued that
16 he had been more than “merely inconvenienced,” rather, the employer’s action “separated
17 him from the stature of his colleagues” and was “intended to diminish his status in
18 juxtaposition with his colleagues and to demoralize him.” Id. The CERB rejected these
19 arguments, concluding that the charging party had failed to show that he had been
20 actually and materially disadvantaged in terms and conditions of employment. Id. (citing
21 City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (January 9, 2009)(employment action
22 not deemed adverse merely because alleged discriminatee had been “made sport” of by
23 other officers as a result of the transfer).

1 Unlike in Board of Higher Education, the Union does not contend that the change
2 was intended to demoralize or diminish Babcock's stature. Instead, it provided objective
3 evidence showing that a reasonable person in Babcock's situation would find a position
4 that removed the ability to work weekdays with weekends and holidays off to be less
5 desirable than one that did. Further, even though the position provided extra money, we
6 agree with the Hearing Officer that money may not compensate for the benefits that a
7 regular weekday schedule provides, especially in this case where Babcock believed he
8 could have earned the additional compensation that the night schedule offered by working
9 details. For all these reasons, we agree that this transfer constituted an adverse
10 employment action sufficient to meet the Union's burden to establish a prima facie case.
11 Because the City failed to meet its burden of demonstrating that its legitimate reason for
12 the transfer was actually a motive in the decision, it has failed to dispel the presumption
13 of discrimination established by the prima facie case. We therefore conclude that the City
14 violated Section 10(a)(3) and, derivatively, Section 10(a)(1) when it transferred Babcock
15 out of the Traffic Bureau in April 2018.

16 Conclusion

17 For the foregoing reasons, we affirm the Hearing Officer's dismissal of MUP-19-
18 7379, but reverse the dismissal of MUP-18-6946. We therefore issue the following Order
19 to put Babcock in the same position he would have been in had the transfer not
20 occurred.²⁵

21 ORDER

²⁵ We do not order a make-whole remedy as the record does not reflect that Babcock sustained a monetary loss as a result of his transfer.

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WHEREFORE, based upon the foregoing, it is hereby ordered that the City shall:

1. Cease and desist from:

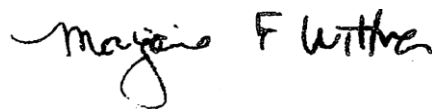
- a. Transferring unit members in retaliation for their protected, concerted activity;
- b. In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

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

- a. Immediately offer to reinstate Babcock to his day shift position as a Sergeant Specialist in the Patrol Bureau, and if accepted by Babcock, immediately rescind Babcock’s transfer to the night shift in the Patrol Bureau.
- b. Post immediately in all conspicuous places where members of the Union’s bargaining unit usually congregate, or where notices are usually posted, including electronically, if the City customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees;
- c. Notify the DLR in writing of the steps taken to comply with this decision within thirty (30) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



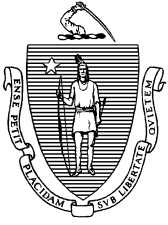
KELLY STRONG, CERB MEMBER



VICTORIA B. CALDWELL, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To obtain such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.



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

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (CERB) has concluded that the City of Newton (Newton) violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by transferring John "Jay" Babcock (Babcock) in retaliation for engaging in concerted, protected activity.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

- WE WILL NOT retaliate against Babcock for engaging in concerted, protected activities.
- WE WILL NOT in any like manner, interfere with, restrain and coerce any employees in the exercise of their rights guaranteed under the Law;
- WE WILL immediately offer to reinstate Babcock to his day shift position as a Traffic Sergeant Specialist in the Traffic Bureau and, if accepted we will rescind Babcock's transfer to the night shift in the Patrol Bureau.

City of Newton

Date

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

This notice must remain posted for thirty consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, 2 Avenue de Lafayette, Boston MA 02111 (Telephone: (617- 626-7132)).