

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of:

CITY OF NEWTON

and

NEWTON POLICE SUPERIOR OFFICERS
ASSOCIATION, MASSCOP LOCAL 401

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Case Numbers: MUP-18-6946 &
MUP-19-7379

Date Issued: November 2, 2021

Hearing Officer:

Meghan Ventrella, Esq.

Appearances:

Jaclyn R. Zawada, Esq. - Representing the City of Newton

Alan H. Shapiro, Esq. - Representing the Newton Police Superior
Officers Association, MassCop Local 401

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of Newton (City) violated Section 10
2 (a)(3), and derivatively, Section 10(a)(1) of Massachusetts General Law Chapter 150E
3 (the Law) by: 1) transferring Sergeant John Babcock (Babcock) from the Traffic Bureau
4 to the Patrol Division; 2) denying Babcock's request to attend a specialized Search
5 Warrant training course; and 3) not selecting Babcock for the Sergeant Specialist position
6 and awarding the position to Sergeant Dan Valente (Valente).

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

8 STATEMENT OF CASE

1 On October 21, 2018, the Union filed a charge of prohibited practice (Charge) with
2 the Department of Labor Relations (DLR) alleging that the City of Newton (City) had
3 violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law. On January 18,
4 2019, a DLR Investigator investigated the Charge docketed as MUP-18-6946. On April
5 4, 2019, the Investigator issued a Complaint of Prohibited Practice and Partial Dismissal
6 (Complaint) alleging that the City violated Section 10(a)(3) and, derivatively, Section
7 10(a)(1) of the Law. On April 14, 2019, the City filed its Answer to the Complaint docketed
8 as MUP-18-6946.

9 On June 5, 2019, the Union filed a charge of prohibited practice with the DLR
10 alleging that the City had violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of
11 the Law. On February 27, 2020, a DLR Investigator investigated the Charge docketed as
12 MUP-19-7379. On April 21, 2020, the Investigator issued a Complaint of Prohibited
13 Practice and Partial Dismissal (Complaint) alleging that the City violated Section 10(a)(3)
14 and, derivatively, Section 10(a)(1) of the Law. On May 8, 2020, the City filed its Answer
15 for the Complaint docketed as MUP-19-7379. On May 26, 2020, the Union filed a request
16 for review of the partial dismissal with the Commonwealth Employment Relations Board
17 (CERB) for MUP-19-7379. On August 31, 2020, the CERB reversed the partial dismissal
18 in MUP-19-7379 and remanded the complaint to the Investigator. On August 31, 2020,
19 the Investigator issued a two-count Complaint alleging that the City violated Section
20 10(a)(3) and, derivatively, Section 10(a)(1) of the Law. On September 10, 2020, the City
21 filed its answer to the Amended Complaint in case MUP-19-7379. On October 8, 2020,
22 the Union requested that the DLR consolidate cases MUP-18-6946 and MUP-19-7379,
23 and the DLR approved the request.

1 On November 23, 2020, December 1, 2020, and February 4, 2021, I conducted a
2 hearing by video conference during which the parties received a full opportunity to be
3 heard, to examine and cross-examine witnesses, and to introduce evidence. On April 2,
4 2021, the parties filed post-hearing briefs. Based on my review of the record, including
5 my observation of the demeanor of the witnesses, I make the following findings of fact
6 and render the following opinion.

7 STIPULATIONS OF FACT

- 8
- 9 1. The City of Newton (“City”) is a public employer within the meaning of Section
10 1 of G.L.C. 150E (“the Law”).
 - 11
 - 12 2. The Newton Police Superior Officers Association, Masscop Local 401 (“Union”
13 or “NPSOA”) is an employee organization within the meaning of Section 1 of
14 the Law.
 - 15
 - 16 3. The Union represents Superior Officers of the Newton Police Department
17 (“NDP”), including all Sergeants, Lieutenants, and Captains, with the exception
18 of superior officers serving as Executive Officer and Internal Affairs Officer, who
19 are exempt from the Union’s bargaining unit.
 - 20
 - 21 4. For the period relative to the matters at issue, the NPD was composed of the
22 following sworn personnel: one chief, six captains, eleven lieutenants, 20
23 sergeants, and 111 patrol officers.
 - 24
 - 25 5. The patrol officers are in a separate bargaining unit represented by the Newton
26 Police Association (“NPA”).
 - 27
 - 28 6. The City and the Union are parties to a collective bargaining agreement
29 (“Agreement”) for the period July 1, 2006 through June 30, 2009 as modified
30 and extended in a September 2009 memorandum of agreement and a July
31 2011 memorandum of agreement. On October 29, 2019, the Joint Labor-
32 Management Committee for Police and Fire issued its Interest Arbitration
33 Award for JLMC 17-6002 In the Matter of Interest Arbitration between the City
34 of Newton and Newton Superior Officers Association, Masscop, Local 401.
 - 35
 - 36 7. On November 30, 2015, David MacDonald was promoted to Chief of Police in
37 the NPD. Chief MacDonald retired on or about July 17, 2020.
- 38

- 1 8. From on or about January 2, 2016 until his retirement on or about August 10,
2 2019, Lieutenant John Daly was the Executive Officer of the NPD and was
3 assigned to the office of the Chief of Police.
4
- 5 9. Sgt. John "Jay" Babcock was promoted to the rank of NPD sergeant on October
6 6, 2009. Prior to his promotion, as patrol officer, [he] had served as president
7 of the NPA from 1996 until his promotion in 2009.
8
- 9 10. In February 2012, Sgt. Babcock was assigned to the Traffic Division.
10
- 11 11. Effective January 1, 2014, Babcock was elected vice-president of the NPSOA.
12
- 13 12. Effective January 1, 2016, Babcock was elected president of the NPSOA and
14 holds that position to date.
15

16 FINDINGS OF FACT

17 Background

18 The Union is the exclusive bargaining agent of the Superior Officers of the Newton
19 Police Department (Department) for the City of Newton (City), including all Sergeants,
20 Lieutenants, and Captains. In 1987, John Babcock (Babcock) was hired as a patrol officer
21 for the City's Police Department.¹ In October of 2009, Babcock was promoted to
22 Sergeant. After his promotion to Sergeant, Babcock was assigned to supervise the Patrol
23 Bureau.² In 2012, Babcock was transferred to a Sergeant position in the Department's
24 Traffic Bureau, which is considered a specialty assignment.³ From 2016 to 2018, Babcock

¹ During his time as a patrol officer, Babcock was the Union president of the patrol officer bargaining unit in the City.

² Prior to his promotion to Sergeant, Babcock was assigned to the Traffic Bureau.

³ In 2012, Chief Cummings (Cummings) was the Chief of Police for the Department. Babcock had applied for the Sergeant position in the Traffic Bureau, but Cummings selected Sergeant Chisholm (Chisholm). Approximately a week after being selected for

1 worked in the Traffic Bureau on a 7:00am to 3:00pm shift, Monday through Friday with
2 weekends off.⁴ When Babcock first started as a Sergeant in the Traffic Bureau, Captain
3 Mintz (Mintz) was his supervisor. Approximately six months later, the Mayor of the City
4 appointed Mintz as interim Chief of Police. Eventually, Captain Gromada (Gromada) was
5 transferred to the Traffic Bureau and replaced Mintz as Babcock's supervisor.

6 In addition to Gromada and Babcock, the Traffic Bureau also consisted of several
7 sworn officer positions such as a Safety Officer.⁵ In addition to the sworn officers, the
8 Traffic Bureau consisted of two civilian clerks, ten civilian parking control employees, and
9 approximately 50 civilian crossing guards. Within the Traffic Bureau, the safety officer
10 was the first level of supervision for all the civilian clerks, parking control, and crossing
11 guards. After the safety officer, Babcock was the next level of supervision in the Traffic
12 Bureau. Babcock supervised the safety officers, traffic officers, and civilian employees.
13 Gromada, the Captain in charge of the Traffic Bureau, supervised Babcock.

14 The Traffic Bureau handled traffic crashes, investigations, pedestrian areas of
15 concern, ticketing, and community enforcement of traffic issues such as speeding. As the
16 Sergeant of the Traffic Bureau, Babcock was charged with making his supervisees'
17 schedules and daily assignments. Babcock was a liaison between the Traffic Bureau and
18 the City's Disability Commission to work out issues relative to sidewalks and handicap

the Traffic Bureau position, Chisholm requested to be transferred to Patrol. Cummings transferred Babcock to the Sergeant position in the Traffic Bureau.

⁴ Over the course of his time as a Sergeant in the Traffic Bureau, Babcock had several different shift schedules.

⁵ Typically, the Traffic Bureau consisted of five or six traffic officers.

1 concerns. Babcock would attend the Disability Commission's monthly meeting.⁶ Also,
2 Babcock would attend the monthly meetings of the City Council, including the monthly
3 public safety meeting. At the City Council's monthly public safety meeting, citizens would
4 bring forth complaints and requests regarding stop signs, speed bumps, and other traffic
5 issues. Babcock would attend meetings relative to bike safety issues, construction issues,
6 and transportation issues in the City. Babcock was the Traffic Bureau's court prosecutor
7 for traffic moving violations and would attend court every Tuesday to represent the Bureau
8 at traffic hearings. Also, during the six years that Babcock was the sergeant, the traffic
9 officers became certified to reconstruct traffic accidents, instead of calling the State Police
10 for assistance.

11 The Traffic Bureau handles special events such as road races.⁷ From 2012 to
12 2017, Babcock was in charge of contacting the detail office to staff officers for details
13 relating to special events such as road races.⁸ However, in 2017, after MacDonald
14 became the Chief of Police, he informed Babcock that he wanted to create a detail
15 lieutenant position to oversee all details. Also, in 2017, Gromada became involved with
16 handling special events for the Traffic Bureau, and Walsh became the Lieutenant in
17 charge of details.

⁶ Per the parties' collective bargaining agreement, Babcock would receive a minimum of four hours overtime when he attended a meeting in the evening on behalf of the Traffic Bureau.

⁷ In 2013, Mintz requested Babcock handle paid details for construction issues.

⁸ By email dated August 16, 2016, Lieutenant John Daly, the Executive Officer at the time, informed Captain Anastasia that over the years Babcock had involved himself in all areas of details, which had proven problematic. As such, the Department organized details in the Traffic Bureau in such a way that Walsh would handle all issues involving construction details, and Babcock would handle special events issues such as the marathon.

1 On or about March 28, 2017, Babcock attended a meeting with Nicole Freidman
2 (Friedman), Transportation Director for the City, regarding a project on Washington and
3 Harvard Street. After the meeting, Lieutenant Walsh asked Babcock why he attended the
4 meeting as Walsh was the Lieutenant in charge of details, not Babcock. Babcock
5 explained that he had received an email from Freidman requesting his presence.⁹

6 While at the Traffic Bureau, MacDonald directed Babcock to direct any staffing
7 questions to a sworn officer other than himself. MacDonald also instructed Babcock not
8 to offer opinions on detail staffing. After these conversations, Babcock worked a paid
9 detail for Charles Construction. The contractor approached Babcock about an upcoming
10 project regarding line painting. Babcock opined that the street should be shut down for
11 officer safety but referred the contractor to Lieutenant Walsh to determinate the
12 operations plan. By email dated July 24, 2017, Walsh informed Babcock that:

13 “Last Thursday [I spoke] with Bruno Tempesta from Charles Construction. He
14 said that you recommended the line stripping detail for this Tuesday be staffed
15 as a 2 sgts and 8 patrolmen detail. This counteracts our original plan of 1 sgt
16 and 4 patrolmen, I was out of the office on Friday and when I came in today I
17 found that he had ordered the 2 + 8 as you suggested. I checked with
18 engineering and Kevin McCabe informed me that line stripping was not that
19 big of an operation and 4 officers would be enough. In fact, last time they did
20 it they had 3 officers. Detail staffing issues are discussed between myself and
21 the contractors at the pre-construction meetings. To unnecessarily expand a
22 detail on the last half would adversely [a]ffect the details on the day shift. In
23 the future any recommendations for detail staffing should come through my

⁹ At the hearing, after the City rested its case, the Union attempted to call Babcock on rebuttal to submit an email relating to the March 28 meeting. However, the Union admitted that the email and accompanying witness testimony would not actually rebut any of the City's case, but that it forgot to submit this exhibit during its case in chief. As the information was not actually rebuttal, I rejected the exhibit and have not taken into account the contents of the email. However, Babcock did testify that Friedman had invited him via email to the meeting, and the City did not provide any contradicting evidence or an alternative explanation for how Babcock would have known the date and time of the meeting if he had not been invited.

1 office. If you have a suggestion you can reduce it to writing and send it to me
2 and I will give it consideration.”

3
4 Later that day, Babcock responded to Walsh by email stating that:

5
6 “First he asked for my opinion. I informed him that he should discuss the ops
7 plan with you. My only opinion was to recommend shutting down a street as
8 they did the line painting. There was never a recommendation from me to him
9 to create more details or alter your ops plan. So, I would be glad to sit in the
10 same room as the Charles Superintendent as well as the city engineer and
11 discuss the misinformation that you are directing at me. Th[is] is the second
12 time I am being blamed for something I had nothing to do with.”

13
14 By letter dated November 16, 2017, Daly informed Babcock that he was not
15 authorized to order a police detail for any vendor; the vendor themselves must call
16 in the detail. Daly reminded Babcock that on July 12, 2017, Daly had informed him
17 that “anyone who goes through you for events such as road races or other events
18 like the 4th of July that they [must] call details themselves to provide the billing
19 information. We are having a repeat problem with billing issues and tracking down
20 who will pay for details ordered through persons other than the person responsible
21 for the detail. In addition, we need to provide rates and cancellation policies for
22 people ordering details on the recorded detail line. Captain Anastasia had been
23 instructed by the Chief to implement new policies and procedures for processing
24 these events. Any questions on the new policies and procedures regarding the
25 processing of these events should be addressed through your chain of command.”¹⁰

26 Contract Negotiations

¹⁰ The City did not explain what events prompted Daly to send Babcock this email.

1 From 2014 to 2016, Babcock was the Vice President of the Union.¹¹ In 2014,
2 Babcock was part of a contract bargaining team for the Union which consisted of Berube,
3 Captain Dennis Gerry (Gerry)¹², Sergeant John O'Connell (O'Connell), Sergeant John
4 Claflin (Claflin), and Lieutenant John Bartinelli (Bartinelli).¹³ In 2014, the City's bargaining
5 team consisted of City Attorney Jeffrey Honig (Honig), Chief Financial Officer Maureen
6 Lemieux (Lemieux), the City's Human Resource Director, Chief Mintz, and Executive
7 Officer David MacDonald (MacDonald).¹⁴ As the Executive Officer, MacDonald attended
8 most bargaining sessions and labor management meetings with the Union and Mintz.
9 From 2014 to 2015, the Union and the City held approximately three or four bargaining
10 sessions for a successor contract.

11 During the September of 2015 bargaining session, the parties were discussing the
12 bargaining topic of travel time, and the discussion became heated. Additionally, Geary
13 mentioned that the patrol officer Union had a certain benefit, and the Superior Officers
14 should also have this benefit.¹⁵ MacDonald responded that "if you don't like what you are
15 receiving now as a supervisor, then go back to the patrolman union" or words to that

¹¹ During the 2014 to 2016 timeframe, Captain Dennis Berube (Berube) was the President of the Union.

¹² The City hired Geary as a patrol officer on or about 1984. In 2004, Geary was promoted to Sergeant, and in 2016 he was promoted again to Captain. At the time of the hearing, Geary was the Captain in charge of the Special Operations Bureau. In 2014, Geary became a member on the Union's executive board. In 2016, Geary became the Vice President of the Union.

¹³ Babcock had a professional and friendly relationship with Mintz.

¹⁴ The Executive Officer of the Department is the management liaison between the Superior Officers and the Chief of Police for any day-to-day issues.

¹⁵ The parties were discussing certain benefits regarding travel time.

1 effect. Mintz commented that everyone should calm down. In November of 2015,
2 MacDonald replaced Mintz as the Chief of Police for the City. After MacDonald became
3 the Chief of Police, the parties continued to meet to bargain over the successor contract
4 but were not successful in reaching an agreement.

5 On July 14, 2016, the parties met to continue contract negotiations, and one of the
6 topics discussed was again the issue of travel time.¹⁶ Babcock, Geary, MacDonald and
7 Lieutenant Daly (Daly), the new Executive Officer, attended the meeting. Babcock and
8 Geary informed MacDonald that the Union believed that he was trying to implement a
9 new policy regarding travel time, and he must bargain with the Union over such
10 implementation, or his actions would be illegal. MacDonald responded that the City did
11 not need to bargain with the Union over this issue. Babcock informed MacDonald that he
12 could not bargain about this issue outside of contract negotiations and handed
13 MacDonald a copy of the City's issues for negotiations of the successor contract which
14 included travel time. MacDonald was upset but took the document outside of the room to
15 make a copy. Upon returning to the room, MacDonald said that he rejected the document
16 and threw it back at Babcock. In response, Babcock held up his hand to grab the
17 document but received a papercut in the process. MacDonald started to yell and swear
18 at Babcock about travel time.

19 Afterwards, MacDonald stated that they were done and proceeded to walk out of
20 the room. Babcock and Geary retreated to Geary's office down the hall. Daly came to
21 Geary's office and apologized for MacDonald's behavior in the meeting. Babcock
22 requested that MacDonald apologize to him in person. Several minutes later, MacDonald

¹⁶ Travel time is the time it takes an officer to travel to specialized trainings.

1 entered Geary's office and informed Babcock that he "gets hot, I get wordy, and I'm sure
2 I didn't mean what I did" or words to that effect. However, MacDonald denied hitting
3 Babcock with a piece of paper.

4 By letter dated July 20, 2016, Babcock demanded that MacDonald rescind
5 changes the Department had made regarding travel time for superior officers. By letter
6 dated July 25, 2016, MacDonald responded to Babcock stating that the Department had
7 not made any recent changes to the travel time policy. MacDonald asserted that the
8 Department had notified the Union in 2013 of any changes to the travel time policy, and
9 the Union failed to request to bargain.

10 On May 16, 2017, the Union petitioned the Joint Labor Management Committee
11 (JLMC) to resolve the outstanding contract issues. On October 13, 2017, the JLMC voted
12 to exercise jurisdiction over the parties' dispute. Thereafter, the parties participated in
13 negotiations and mediation with the JLMC, but they did not reach a settlement. In January
14 of 2019, a JLMC 3A hearing was conducted, and the parties proceeded to interest
15 arbitration in February of 2019. The parties met with a tripartite interest arbitration panel
16 on July 13 and July 23, 2019. On or about November of 2019, the tripartite arbitration
17 panel issued an award.

18 Other Union Activity

19 As the Vice President and then the President of the Union, Babcock participated
20 in grievance hearings, grievance arbitrations, DLR proceedings, and general
21 labor/management meetings.

22 *Communications*

1 Babcock was involved in many communications between the Union and
2 MacDonald regarding labor/ management issues. For example, on August 15, 2016,
3 MacDonald sent Babcock a letter regarding the use of special leave. MacDonald informed
4 Babcock that the City would no longer allow employees to report off duty using special
5 leave without accrued special leave unless they have prior approval of some other type
6 of leave such as Family Medical Leave Act (FMLA). By letter dated August 30, 2016,
7 John Becker (Becker), the Union's attorney responded to MacDonald's letter stating that
8 it referred to proposed changes in working conditions that needed to be bargained with
9 the Union prior to implementation. Becker asserted that the Union considered
10 MacDonald's proposed changes as a proposal for successor contract negotiations and
11 would file an unfair labor practice charge if the changes were implemented prior to
12 bargaining with the Union. After Becker sent the August 30 letter, the City refrained from
13 implementing any of the changes on special leave. On one of MacDonald's weekly visits
14 to the Traffic Bureau, he informed Babcock that he was not happy with Babcock blocking
15 his efforts to change things in the Department.

16 *Prohibited Practice Charges and Grievances*

17 In late September of 2016, MacDonald had called Captain Doe into a conference
18 room to speak about Union related issues regarding Doe.¹⁷ Captain Doe requested that
19 Babcock be present at the meeting, and MacDonald agreed. MacDonald ordered Captain
20 Doe submit to a psychological test. At the meeting, Babcock and MacDonald argued over
21 the City's authority to demand a psych test. As a result of the meeting, Babcock contacted

¹⁷ In order to maintain anonymity of the officer the parties had agreed to refer to the officer as Captain Doe in all proceedings.

1 Alan Shapiro (Shapiro), the Union' attorney, and asked Shapiro to file an unfair labor
2 practice charge. On October 3, 2016, the Union filed a prohibited practice charge against
3 the City for allegedly violating the Law when it refused to provide the Union with requested
4 information and repudiated the parties' contract pertaining to the Drug and Alcohol
5 policy.¹⁸

6 After the Union filed the charge, Babcock and MacDonald had several
7 conversations about the underlying matter. During one of those conversations,
8 MacDonald informed Babcock that the Union should stop fighting the Captain Doe issue,
9 and Babcock should stop being "an obstructionist."¹⁹ Additionally, Babcock filed a
10 grievance which alleged that the City violated the contract when Captain Doe was given
11 a sobriety test at a physical examination.

12 On October 19, 2017, Babcock filed two grievances on behalf of the bargaining
13 unit alleging that MacDonald violated the contract when he failed to hire a Sergeant for a
14 detail.²⁰ On March 30, 2018, Babcock filed a grievance on behalf of all Superior Officers

¹⁸ The DLR docketed the Union's charge as MUP-16-5532. On January 26, 2017, a DLR investigated the allegations and subsequently issued a Complaint of Prohibited Practice. On February 20, 2018, and April 30, 2018, the DLR conducted a hearing, and on January 30, 2019, the Hearing Officer issued a decision that found the City violated the Law. The City appealed the Hearing Officer's Decision and the CERB upheld the decision in its entirety. The City appealed the CERB's Decision, and the case was pending in the Appeals Court at the time of this hearing in these cases. Babcock attended all proceedings at the DLR and testified for the Union at the hearing. Chief MacDonald was present for the investigation and subsequent hearing as well.

¹⁹ Babcock did not provide an exact date for this meeting.

²⁰ The Union brought the grievance to arbitration, and the Union lost. The Union did not provide evidence regarding a date of the arbitration or whether Babcock testified.

1 alleging that MacDonald violated the contract, specifically the Overtime Article, the
2 Special Leave Article and the Hours of Work Article.²¹

3 March 9, 2018 Incident

4 On or about March 12, 2018, Parking Control Officer Dorothy Crowley (Crowley)
5 requested to speak with Babcock about a bike incident.²² During the interaction, both
6 Babcock and Crowley raised their voices and became upset. After the conversation,
7 Crowley informed the City's Human Resources Assistant Director Teri Struth (Struth) that
8 Babcock had yelled at her and that she left the interaction in tears. At the direction of
9 MacDonald, Lieutenant George McMains (McMains) requested statements from all
10 officers in the Traffic Bureau who were present on March 12, 2018.²³ On or about March
11 23, 2018, McMains issued an investigation report on the March 12 incident. McMains
12 found that Babcock violated the Newton Police Code of Conduct. McMains concluded
13 that Babcock and Crowley both raised their voices in an unprofessional and discourteous
14 manner. However, Babcock, as the supervisor, should not have allowed a potentially
15 contentious discussion with an employee happen out in the open for other employees to
16 overhear.

²¹ Both MacDonald and Babcock were present at the arbitration. The Union did not provide an exact date of the arbitration.

²² The "bike incident" involved Crowley's bike being vandalized. Additionally, Crowley alleged that her co-workers had vandalized her car by carving a rat into the side panel.

²³ Officer Fleming was at the Traffic Bureau on March 12, 2018 when she heard an argument between Babcock and Crowley. After the incident, Fleming sent Crowley to see HR Assistant Director Teri Struth. Thereafter, Struth, Anastasis and Daly met to discuss the incident between Babcock and Crowley. Shortly after, Anastasia informed MacDonald about Babcock's interaction with Crowley.

1 By letter dated March 30, 2018, MacDonald issued Babcock a written letter of
2 reprimand for violating the Newton Police Code of Conduct. MacDonald informed
3 Babcock that as a supervisor he was required to have difficult conversations with
4 subordinates and to conduct himself with professionalism and decorum. MacDonald
5 informed Babcock that he failed to conduct himself in such a professional and courteous
6 matter on March 12, 2018. As such, the MacDonald found his actions to merit discipline
7 for conduct unbecoming a police officer.

8 Transfer²⁴

9 On April 23, 2018, the City transferred Babcock to the Patrol Unit and placed him
10 on the night shift.²⁵ MacDonald asked Babcock to meet him in the lunchroom to speak
11 privately. MacDonald handed Babcock a letter dated April 23 which stated that Babcock
12 would be transferred to the Patrol Bureau and assigned to the 3rd Platoon, Group VI
13 effective April 30, 2018.²⁶ Babcock informed MacDonald that he didn't understand why
14 he was being transferred. MacDonald responded that "he was the Chief, therefore he can

²⁴ The parties' CBA permits the City to transfer superior officers when it shall be in the best interests of the City or the Department.

²⁵ After McMains was assigned to the Executive Officer position, MacDonald informed him that he thought several Captains were stagnant in their positions and that the Department would benefit from transferring Captains to different bureaus. Thereafter MacDonald transferred three Captains from their original assignments to different bureaus in the Department.

²⁶ The 3rd Platoon is a night Platoon.

1 do what he wanted, and Babcock was being transferred.”²⁷ Babcock inquired why he was
2 being transferred, and MacDonald responded that “this conversation was over.”²⁸

3 Search Warrant Class

4 Captain Dennis Dowling (Dowling),²⁹ the commanding officer for the Patrol Bureau,
5 wanted the Bureau officers to start writing search warrants. Dowling wanted a sergeant
6 from each platoon in the Bureau to receive certification for search warrants. After being
7 transferred to the Patrol Bureau, Captain Dowling called Babcock to inquire if Babcock
8 would want to attend a Search Warrant training class. Babcock informed Dowling that he
9 was interested in attending the Search Warrant training.³⁰ Dowling informed Babcock he
10 would get back to him with confirmation of his ability to attend the training. MacDonald
11 has final approval of all training requests over \$200 in value, and the Search Warrant
12 Training cost more than \$200.

13 By email dated January 25, 2019, Geary informed MacDonald that Babcock had
14 requested to attend the search warrant class and that he and Dowling had approved the
15 request. MacDonald responded that the Officer in Charge recommended Sergeant
16 McLean for the training, and he approved the selection. Geary informed MacDonald that

²⁷ Per the contract, Babcock received an eight (8) percent night shift differential when he was transferred to the Patrol Bureau.

²⁸ On or about May 3, 2018, Babcock broke his ankle while off duty and went out on medical leave.

²⁹ Dowling has been an officer with the City’s Police Department for approximately 34 years. The City promoted Dowling to commander of the Patrol Bureau in 2016.

³⁰ Babcock testified that he did not think there was any professional gain to attending the training class.

1 McLean had been registered for the training class, but that he would not have
2 recommended McLean to attend the training class.

3 By email dated January 30, 2019, Lieutenant Charles Leone (Leone), Babcock's
4 supervisor and Officer in Charge of the Patrol Bureau, informed MacDonald, Geary, and
5 Dowling that it would be a good idea for Babcock to receive a refresher in more basic
6 skills as he had been out of Patrol for an extended period of time. Leone informed the
7 officers that he believed Babcock could benefit from some trainings in the basics, such
8 as bookings, restraining orders, Section 12's, etc. Leone suggested that Babcock receive
9 such refresher courses before being scheduled to receive more in-depth trainings such
10 as Search Warrants. Dowling responded to Leone's email and stated that this was the
11 first time he had heard about issues regarding Babcock since Babcock was reassigned
12 to the Patrol Bureau.³¹ Dowling stated he would make sure that Babcock was up to date
13 on all necessary information.

14 Dowling called Babcock a second time to inform him that MacDonald had denied
15 his request to attend the Search Warrant training class. Dowling informed Babcock that
16 MacDonald had asked Lieutenant Leone and Lieutenant Mead, the commanding officers
17 in his platoon, of their opinion of who should go to the training, and the conversation
18 resulted in a denial of Babcock's request. MacDonald approved Sergeant Rooney to
19 attend the Search Warrant training.³² Additionally, MacDonald approved Sergeant
20 McLean to attend the Search Warrant training instead of Babcock.

³¹ Babcock went out on medical leave for several months after being transferred to the Patrol Bureau.

³² Babcock never received any additional trainings on the basics such as books, Section 12s, and restraining orders. However, on September 23, 2019, the City sent Babcock to

1 Sergeant Specialist position

2 On or about February 8, 2019, the Department posted a job posting for a Sergeant
3 Specialist position.³³ The job posting stated that all interested candidates should fill out a
4 transfer card detailing their qualifications for the position. Within the job posting, the
5 Department outlined several of the Sergeant Specialist's job duties, including but not
6 limited to: training police personnel in the use of firearms, providing "less lethal training,"
7 maintaining the inventory of firearms, coordinating tactical training exercises, and
8 maintain training records of the Department.³⁴ Shortly thereafter, Babcock submitted an
9 application for the position. On or about March 6, 2019, the Hiring Committee interviewed
10 Babcock and Sergeant Peter Wade (Wade), the two applicants who applied for the
11 Sergeant Specialist position.³⁵ The Hiring Committee consisted of Geary, Lieutenant
12 McMains, Sergeant Frank Eldridge (Eldridge) and Mary O'Neil from the City's Human
13 Resources Department.

14 By letter dated March 6, 2019, Geary informed MacDonald that: "The interview
15 committee for the special Operations Sergeant position met on Wed[nesday], 3/6/19. The
16 committee consisted of Captain Dennis Geary, Lieutenant George McMains,³⁶ Sergeant

the "Law Enforcement on the Stand" training. On October 4, 2019, the City sent Babcock to the "Advanced Domestic Violence Seminar Commonwealth Police Legacy" training.

³³ On February 11, 2019, the Department reposted the Sergeant Specialist job posting with an extended deadline to submit an application.

³⁴ The Special Operations position had a nighttime differential.

³⁵ Dowling wrote a letter of recommendation for Wade.

³⁶ In 1997, the City hired McMains as a patrol officer and promoted him to Sergeant approximately four years later. In 2016, the City assigned McMains as a sergeant in the

1 Frank Eldridge, and Mary O'Neil from H[uman] R[esources]. We interviewed Sgt. Jay
2 Babcock at 2:00pm and Sgt. Peter Wade at 2:30pm. The committee members all
3 expressed the opinion that it would have been better if we had more applicants. After the
4 interviews and discussion among the members, the members gave their opinions about
5 the candidates. Sgt. Wade and Sgt. Babcock each received 2 opinions that each was the
6 best candidate of those who applied. My recommendation as bureau commander is Sgt.
7 Babcock."³⁷

8 A few days after the interviews, MacDonald informed Geary that he could not
9 accept his recommendation and mentioned that Sergeant Valente might be a good fit for
10 the position. Geary informed MacDonald that he did not have experience dealing with
11 Valente, and therefore could not comment. MacDonald asked if Geary could think of
12 anyone else who would make a good fit for the position. Geary mentioned Sergeant
13 Tramontozzi (Tramontozzi), but MacDonald stated that Tramontozzi would not be
14 available.³⁸ MacDonald stated that he would speak with Valente and see if he was
15 interested in the position. Afterwards, Valente stopped by Geary's office to discuss the
16 job duties and responsibilities of the position.³⁹

Police Department's Internal Affairs Bureau. In 2018, the City promoted McMains to Lieutenant, and in 2019, assigned him to the Executive Officer position.

³⁷ McMains recommended Wade for the Special Operations position because of his extensive experience in firearm training in the Armed Forces.

³⁸ Tramontozzi applied and was awarded the position of Detective.

³⁹ Around the same time as the Special Operations position was posted, the City had posted and interviewed for a Detective position. Valente was not selected for the Detective position. However, because Valente had submitted his resume to the City to apply for the Detective position, the Chief had a copy of his current resume which included his full work history.

1 MacDonalld selected Sergeant Dan Valente to fill the Sergeant Specialist position.
2 Valente did not interview with the committee.⁴⁰ The Department did not provide Babcock
3 with an explanation as to why he was not selected for the position.

4 Opinion

5 Prima Facie Case

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

16 Protected Activity and Employer Knowledge

17 The Commonwealth Employment Relations Board (CERB) has decided that an
18 employee's activity is protected if it focuses on generally applicable terms and conditions
19 of employment that impact the collective bargaining unit as a whole. City of Boston, 8
20 MLC 1872, 1875, MUP-3994 (February 25, 1982); Town of Shrewsbury, 5 MLC 1519,
21 1523, MUP-2999 (December 22, 1978). To be concerted, the evidence must demonstrate

⁴⁰ Prior to being selected to fill the Special Operations position, Valente was the firearms instructor.

1 that the employee is acting with other employees, or on the authority of other employees,
2 rather than acting out of self-interest. Town of Southborough, 21 MLC 1242, 1249, MUP-
3 8521 (August 29, 1994)(citing Meyers Industries, 268 NLRB 493, 115 LRRM 1025
4 (1984)). Compare Commonwealth of Massachusetts, 14 MLC 1743, 1747, SUP-3081
5 (May 19, 1988)(probationary employee's complaints with other employees about
6 unhealthy working conditions constituted concerted activity) with Town of Athol, 25 MLC
7 208, 211, MUP-1448 (June 11, 1999)(employee's safety and work break complaints did
8 not constitute concerted activity, because the employee was acting alone and without the
9 authority of other employees); Higher Education Coordinating Council, 24 MLC 97,102,
10 SUP-4095, 4096, 4098, 4099 (April 27, 1998)(without evidence that the employee was
11 acting with other employees or acting on their authority, the filing of a sexual harassment
12 complaint is not concerted activity).

13 The Union demonstrated that Babcock engaged in numerous acts protected by
14 Section 2 of the Law, e.g.: 1) participating in successor contract negotiations as a Union
15 officer; 2) filing a petition with the JLMC; 3) filing grievances on behalf of bargaining unit
16 members and participating in the subsequent arbitrations; 4) filing prohibited practice
17 charges and testifying in the subsequent proceedings; and 4) participating in
18 labor/management communications and meetings as a Union officer. As the City was a
19 named party in the grievances, prohibited practice charges and JLMC petition, and
20 MacDonald was a participant in labor management meetings as well as contract
21 negotiations, the City was aware of Babcock's protected, concerted activity.

22 Adverse Actions

1 The Union contends that the City took the following adverse actions against
2 Babcock: 1) transferring him from the Traffic Bureau to the Patrol Division; 2) denying his
3 request to attend a specialized Search Warrant training course; and 3) not selecting him
4 for the Sergeant Specialist position and awarding the position to Sergeant Valente.

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

20 Transfer

21 The Union contends that the City took adverse action against Babcock when it
22 transferred him from the Traffic Bureau to the Patrol Bureau. As a Sergeant in the Traffic
23 Bureau, Babcock worked the day shift from Monday through Friday. The Union asserts

1 that the City took adverse action against Babcock when it transferred him to the Patrol
2 Bureau because he was placed on the night shift and lost the benefit of working during
3 the day and having time off for his family at night and on the weekends. Given the loss of
4 the daytime shift, the Union contends that the City's decision to involuntarily transfer
5 Babcock from the Traffic Bureau to the Patrol Bureau was an adverse action under the
6 Law.

7 The City contends that its decision to transfer Babcock from the Traffic Bureau to
8 the Patrol Bureau was not an adverse action under the Law. The City asserts that its
9 decision to transfer Babcock did not result in an actual and material disadvantage in his
10 terms and conditions of employment because he received an eight percent differential
11 pay rate for working the night shift. Additionally, the City argues that the Union did not
12 demonstrate any other change or disadvantage to Babcock's terms and conditions of
13 employment other than working the night shift. The City asserts that its decision to transfer
14 Babcock to the Patrol Bureau was merely an inconvenience and not adverse action under
15 the Law.

16 In order to be an adverse action, Babcock must have been materially
17 disadvantaged in some way. See City of Boston, 35 MLC at 291. The CERB has held
18 that an involuntary transfer to a less desirable position constitutes adverse action. Boston
19 City Hospital, 11 MLC 1065, 1072, MUP-4893, (July 25, 1984). In this case, the City's
20 decision to involuntarily transfer Babcock from a daytime shift in the Traffic Bureau to a
21 nighttime shift in the Patrol Bureau did result in an actual and material disadvantage in
22 his terms and conditions of employment. An officer's ability to work the daytime shift and
23 have weekends off undoubtably is an advantage, so much so that the City has created a

1 differential pay for the officers who have to work night shift. The City's argument that any
2 disadvantage over the loss of the daytime shift for Babcock was rectified by the differential
3 pay ignores the fact that Babcock received overtime at a four-hour minimum each time
4 he attended an evening meeting. The City failed to demonstrate that Babcock earned
5 more money on the evening shift with the differential pay, than on the day shift with the
6 overtime opportunities. Even if the City had proven that Babcock made more money
7 working the night shift in Patrol, it would not mean that the City's decision to transfer him
8 to the night shift was not a material disadvantage to his terms and conditions of
9 employment.

10 Moreover, the Union established that a sergeant position in the Traffic Bureau was
11 a specialty assignment and thus was a desirable and distinguished position within the
12 Department. As such, Babcock was materially disadvantaged when he was transferred
13 from a specialty assignment to the Patrol Bureau. See Suffolk County Sheriff's
14 Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001) (employer's failure to consider
15 employee for favorable and prestigious assignment constituted adverse action); see also
16 Town of Holbrook, 15 MLC 1221, 1225, MUP-6344 (November 3, 1988) (sergeant's
17 permanent assignment to desk duty was punitive and constituted adverse action); see
18 also Boston City Hospital, 11 MLC at 1072 (an involuntary transfer to a less desirable
19 position constituted adverse action). Therefore, I find that the City's decision to transfer
20 Babcock from the Traffic Bureau to the Patrol Bureau constituted an adverse action under
21 the Law.

22 *Search Warrant Training*

1 The Union contends that the City took adverse action against Babcock when it
2 denied his request to attend the Search Warrant training. According to the Union, the
3 City's decision deprived Babcock of an opportunity to secure additional training, and
4 Babcock perceived the denial as punitive in nature. The City argues that its decision to
5 deny Babcock's request to attend the Search Warrant training did not amount to any
6 actual or material disadvantage to Babcock's terms and conditions of employment, and
7 therefore it is not an adverse action. The City contends that Babcock is still able to write
8 search warrants in his role as an officer, and because the City sent him to other trainings,
9 no harm resulted from the denial. Additionally, the City highlighted the fact that Babcock
10 believed that attending the Search Warrant training would not benefit him personally or
11 professionally.

12 Despite Babcock's opinion that the Search Warrant training would not have
13 benefited him personally or professionally, the training still would have given him extra
14 knowledge about the topic at hand. Babcock's participation in the Search Warrant training
15 would have been an opportunity to learn and strengthen his skill sets and as such, it would
16 be beneficial in advancing his career prospects. Further, the fact that Babcock
17 occasionally filled out a Search Warrant does not mean that he would not have benefited
18 from additional education on the topic. Additionally, Babcock viewed the Chief's denial of
19 his request to attend the Search Warrant training as punitive in nature. See Town of
20 Holbrook, 15 MLC 1221, 1225. MUP-6344 (November 3, 1988). As such, the City's
21 decision to deny Babcock's request to attend the Search Warrant training was an adverse
22 action under the Law. Board of Higher Education and Massachusetts Community College
23 Council, MTA/NEA, 32 MLC 181, SUP-02-4892 (June 21, 2006).

1 Sergeant Specialist Position

2 The Union contends that the City took adverse action against Babcock when it did
3 not select him for the Sergeant Specialist position and awarded the position to Valente.
4 The Sergeant Specialist position is specialty assignment, and thus was a desirable and
5 distinguished position within the Department.⁴¹ As such, Babcock was materially
6 disadvantaged when the City denied his request to fill the position, and awarded it to
7 Valente. See Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4,
8 2001) (employer's failure to consider employee for favorable and prestigious assignment
9 constituted adverse action); see also Town of Holbrook, 15 MLC at 1221 (sergeant's
10 permanent assignment to desk duty was punitive and constituted adverse action); see
11 also Boston City Hospital, 11 MLC at 1072 (an involuntary transfer to a less desirable
12 position constituted adverse action).

13 Unlawful Motivation

14 To support a claim of unlawful motivation, the last element of the Union's prima
15 facie case, a charging party may proffer direct or indirect evidence of
16 discrimination. Lawrence School Committee, 33 MLC 90, 97, MUP-02-3631 (December
17 13, 2006) (citing Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002),
18 aff'd sub nom. Town of Brookfield v. Labor Relations Commission, 443 Mass. 315
19 (2005)). Direct evidence is evidence that, "if believed, results in an inescapable, or at
20 least a highly probable inference that a forbidden bias was present in the workplace."
21 Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass.

⁴¹ The City did not argue that its decision to deny Babcock's request to fill the Sergeant Specialist position was not an adverse action under the Law.

1 655, 667 (2000) (quoting Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300
2 (1991)).

3 Unlawful motivation also may be established through circumstantial, or indirect,
4 evidence and reasonable inferences drawn from that evidence. Town of Carver, 35 MLC
5 29, 48, MUP-03-3894 (June 30, 2008) (citing Town of Brookfield, 28 MLC at 327-
6 328). Several factors may suggest unlawful motivation, including: the timing of the
7 alleged discriminatory act in relation to the protected activity; triviality of reasons, or
8 shifting and inconsistent reasons given by the employer; disparate treatment; an
9 employer's deviation from past practices; or expressions of animus or hostility towards a
10 union or the protected activity. Town of Carver, 35 MLC at 48 (citing Melrose School
11 Committee, 33 MLC 61, 69, MUP-02-3549 (September 27, 2006)); Lawrence School
12 Committee, 33 MLC 90, MUP-02-3631 (December 13, 2006); Cape Cod Regional
13 Technical High School District Committee, 28 MLC 332, 335, MUP-2541 (May 15, 2002).
14 Indirect Evidence of Unlawful Motivation⁴²

15 Timing

16 The Union maintains that the timing of the decision to transfer Babcock from the
17 Traffic Bureau to the Patrol Bureau demonstrates that the City was unlawfully motivated
18 in its actions. The Union contends that the City's decision to transfer Babcock on April 28,
19 2018 was suspiciously close in time to the hearing dates for MUP-16-5532 on February
20 20 and April 30, 2018. Similarly, the Union argues that Babcock filed a grievance on
21 March 30, 2018, which was less than a month from the date of the transfer. The Union

⁴² Although the Union alleged that MacDonald had expressed anti-union animus and made hostile comments towards Babcock, it did not expressly argue that it demonstrated direct evidence of unlawful motivation in this case.

1 argued that the close proximity between the hearing dates for the unfair labor practice
2 charge and Appeals court case and the City's adverse action is suspicious and
3 demonstrates unlawful motivation. Also, the Union argues that the timing of City's
4 decision to deny Babcock's request to attend the Search Warrant Training is suspect
5 because of MacDonald's antipathy towards Babcock in 2019.

6 Similarly, the Union argued that the timing of the City's decision not to award the
7 Sergeant Specialist position to Babcock in March of 2019 was suspiciously close in time
8 to the second day of hearing for case MUP-16-5532 on April 30, 2018, as well as the
9 arbitration date for a grievance filed on June 19, 2018 and October 19, 2018, the date
10 that MUP-18-6946 was filed. However, timing alone is insufficient to support a finding of
11 illegal employer motivation. City of Holyoke, 38 MLC at 156, MUP-05-4503 (January 9,
12 2009).

13 Anti-Union Animus

14 The Union asserts that MacDonald's expressions of antipathy for Babcock and the
15 Union's protected, concerted activities on multiple occasions were evidence of anti-union
16 animus. Specifically, the Union argues that MacDonald's aggressive behavior at a
17 bargaining session when he was the Executive Officer, his outburst – including throwing
18 papers at Babcock - at another bargaining session when he was Chief, his protestations
19 to Babcock and Geary over the Union's persistence in the Captain Doe case, and his
20 comments about Babcock holding up the contract were expressions of anti-union animus.
21 These actions and statements constitute evidence of unlawful motivation in the City's
22 decision to transfer Babcock, to deny his request to attend the Search Warrant Training,
23 and to deny Babcock's request to fill the Sergeant Specialist position.

1 As explained above, I found that while acting as the Chief, MacDonald swore and
2 yelled at Babcock in response to asserting that the City needed to bargain over any
3 changes to travel time and threw a document at Babcock. Additionally, MacDonald
4 approached Babcock about the Union pursuing the Captain Doe charge and called
5 Babcock an “obstructionist”. Finally, in 2016, MacDonald informed Babcock that he was
6 not happy with Babcock blocking his efforts to change things in the Department. Also, I
7 found that before MacDonald was the Chief of Police, he yelled at Geary during
8 bargaining stating that “if you don’t like what you are receiving now as a supervisor, then
9 go back to the patrolman union.”

10 Given the circumstances and context surrounding these comments and actions, it
11 is clear that MacDonald was frustrated and angered by Babcock’s and the Union’s
12 engagement in protected, concerted activity. As the majority of comments were made
13 during his tenure as the Chief, the Union has established that the City’s actions were
14 motivated by anti-union animus. Town of Carver, 35 MLC at 48 (citing Melrose School
15 Committee, 33 MLC 61, 69, MUP-02-3549 (September 27, 2006)); Cape Cod Regional
16 Technical High School District Committee, 28 MLC 332, 335, MUP-2541 (May 15, 2002);
17 Bristol County, 26 MLC 105, 109, MUP-2100 (January 28, 2000).

18 Departure from Past Practice or Procedures

19 The Union argues that the City has never involuntarily transferred a Sergeant from
20 a specialty position such as a Sergeant in the Traffic Bureau. The Union asserts that the
21 City’s decision to transfer Babcock from the Traffic Bureau to the Patrol Bureau was a
22 departure from the City’s standard procedures and practice, thus evidence of unlawful
23 motivation. The parties’ CBA permits the City to transfer superior officers when it shall be

1 in the best interests of the City or the Department. Prior to Babcock's transfer, MacDonald
2 decided it was in the Department's best interest to transfer several Captains from their
3 assignments in various Bureaus. As such, MacDonald's decision to involuntarily transfer
4 Babcock from the Traffic Bureau to the Patrol Bureau was not the first time the City
5 involuntarily transferred a superior officer from a specialty position. Therefore, the Union
6 failed to demonstrate that the City's decision to involuntarily transfer Babcock departed
7 from the Department's normal practice. Thus, the transfer does not show unlawful
8 motivation.

9 Next, the Union acknowledges that although Geary was in charge of training
10 requests for the Department, all training requests over \$200 must be approved by
11 MacDonald. The Union also contends that it was common practice for MacDonald to
12 approve Geary's recommendations regarding training requests even if the training was
13 over \$200. In this case, the Search Warrant Training cost more than \$200, thus
14 MacDonald's approval was required. Although Geary's requests were routinely approved,
15 MacDonald's decision to deny Babcock's request to attend the Search Warrant training
16 is not necessarily evidence of unlawful motivation by itself. However, considered along
17 with MacDonald's anti-union comments and the fact that MacDonald usually approved
18 Geary's recommendations for training requests, the departure from the City's common
19 practice is evidence of unlawful motivation.⁴³

⁴³ The Union argues that MacDonald's decision to deny Babcock's request to attend the Search Warrant training "incurred the wrath" of Geary and Dowling, which shows the extent of MacDonald's hostility towards Babcock. However, the Union failed to demonstrate that MacDonald "incurred the wrath" of Geary or Dowling. Although Geary and Dowling may have been confused, frustrated or disappointed in MacDonald's decision, their reactions cannot be characterized as "wrath". Furthermore, Geary and Dowling's feelings of disappointment are not evidence of the City's unlawful motivation.

1 Finally, the Union asserts that the Department's normal process for filling a vacant
2 position consists of forming an interview committee (Committee), accepting applications,
3 and interviewing the candidates. Afterwards, the Committee makes a recommendation to
4 the Chief of Police, and the Chief appoints the recommended candidate to the position.
5 In this case, the Union argues that MacDonald instructed Geary to assemble a Committee
6 for the Sergeant Specialist position, and informed Geary that he would appoint whomever
7 the Committee recommended unless he had some reason not to do so. The Union argues
8 that MacDonald's decision to unilaterally appoint Valente, a candidate who did not apply
9 for the position and was not interviewed by the Committee, was a break from the
10 Department's normal practice and thus evidence of unlawful motivation.

11 However, the Union failed to demonstrate that the City strayed from its normal
12 practice when MacDonald appointed Valente to the position. The Union's argument is
13 without merit as the circumstances surrounding the interview and appointment process
14 were not the norm. First, the Committee was not able to reach a majority recommendation
15 on a candidate as the vote was split between the two candidates. Additionally, the
16 Committee expressed concern that it did not have more candidates to choose from other
17 than Babcock and Wade. Given the unusual circumstances of the Committee's split vote
18 and expressed concerns about the lack of candidates, it is not suspicious that MacDonald
19 did not appoint Babcock or Wade and chose to select an officer who did not originally
20 apply. As such, the Union did not establish that the City's decision to select Valente for
21 the Sergeant Specialist position was a departure from the norm and constituted evidence
22 of unlawful motivation.

23 **Legitimate, Non-Discriminatory Motive**

1 For all the above-mentioned reasons, the Union has established the four elements
2 of its prima facie case. Under the three-part Trustees of Forbes Library analysis, once a
3 charging party establishes a prima facie case of retaliation, it is the employer's burden to
4 produce a legitimate, non-discriminatory reason for taking the adverse action. The
5 employer's burden to produce a legitimate, non-discriminatory reason for taking the
6 adverse action is more than simply stating an unsubstantiated allegation. Commonwealth
7 of Massachusetts, 25 MLC 44, 46, SUP-4128 (August 24, 1998). The employer must
8 state a lawful reason for its decision and produce supporting facts indicating that the lawful
9 reason was actually a motive in the decision. Trustees of Forbes Library, 384 Mass. at
10 566; Quincy School Committee, 27 MLC at 92; Commonwealth of Massachusetts, 25
11 MLC at 46. Here, the Employer satisfied its burden to produce credible evidence that it
12 transferred Babcock from the Traffic Bureau to the Patrol Bureau, denied Babcock's
13 request to attend the Search Warrant Training, and decided not to select Babcock for the
14 Sergeants Specialist position and awarded it to Valente for legitimate, non-discriminatory
15 reasons.

16 Transfer

17 First, the City established that it transferred Babcock from the Traffic Bureau to the
18 Patrol Bureau because he exhibited unprofessional conduct when he had a verbal
19 altercation with a subordinate in the Traffic Bureau. Additionally, the City established that
20 when MacDonald considered his unprofessional conduct in the March 12 incident along
21 with other examples of his failures to follow orders, that he found it was in the best interest
22 of the Department to transfer Babcock to the Patrol Bureau.

1 The Union asserts that the City did not provide sufficient evidence for its reasons
2 to transfer Babcock, therefore did not meet its shifted burden to establish legitimate, non-
3 discriminatory reasons. Specifically, the Union argues that McMains failed to interview
4 any of the involved participants in the March 12 incident and wrote an investigation report
5 that reached a conclusion desired by MacDonald. The Union is correct that McMains
6 relied upon written statements from witnesses of the March 12 incident and did not
7 interview anyone. However, the written statements that McMains relied upon in his
8 investigation provided a clear and consistent description of Babcock's behavior during the
9 altercation. McMains' reliance on the written statements when concluding the
10 investigation is not suspect, nor does it invalidate the City's proffered legitimate and non-
11 discriminatory reasons for transferring Babcock.

12 Additionally, it was McMains, not MacDonald, who concluded based on the
13 witnesses' written statements that Babcock had conducted himself in an unprofessional
14 manner. The Union did not provide any evidence to establish that McMains exhibited any
15 anti-union animus or held a negative opinion of Babcock. Furthermore, the Union failed
16 to establish that McMains was influenced by MacDonald or his anti-union comments when
17 he wrote the investigation report. The City's decision to remove Babcock from the Traffic
18 Bureau, where he had exhibited unprofessional conduct towards his subordinates, to the
19 Patrol Bureau, where he could have a fresh start as a supervisor with the warning that his
20 past behavior was not appropriate for a sergeant in charge of other officers, was a
21 reasonable decision. Because the City had found that Babcock acted unprofessionally
22 and failed to appropriately handle a tense situation as a supervisor, the City's reason for
23 transferring Babcock out of the Traffic Bureau was legitimate.

1 In addition to the March 12 incident, the City cited Babcock's trouble following the
2 chain of command while performing his duties in the Traffic Bureau as one of the reasons
3 he was transferred. The City argues that it was forced to remind Babcock several times
4 that the structure in the Department for how details were handled had changed, and that
5 Walsh would be handling all details. Specifically, the City argued that it had to speak with
6 Babcock about meddling in details in March of 2017 when he attended a meeting that he
7 was not invited to, when he interfered with a construction detail by offering advice to a
8 representative from Charles Construction, and in a second email reminder about various
9 changes in detail requests in November of 2017. The Union argues that the City did not
10 provide enough evidence to establish that Babcock had acted outside the scope of his
11 job duties on any of the above referenced incidents.

12 I agree with the Union that in March of 2017, Babcock was invited to the project
13 meeting, and therefore his attendance was appropriate. Also, the City did not explain
14 satisfactorily why it needed to send Babcock an email reminder about the changes to the
15 detail request protocols in November of 2017. As such, I do not find the City adequately
16 established that the March 2017 meeting or the November 2017 email reminder were
17 legitimate reasons for its decision to transfer Babcock in 2018. However, I do find that
18 Babcock's decision to provide his opinion to Charles Construction about road closures for
19 a particular project to be inappropriate given that the City had reminded him several times
20 that Walsh was in charge of details. Accordingly, I conclude that the City demonstrated
21 that legitimate reasons motivated its decision to transfer Babcock from the Traffic Bureau
22 to the Patrol Bureau.

23 *Search Warrant Training*

1 The City established that it denied Babcock's request to attend the Search Warrant
2 training because it wanted Babcock to take refresher courses on some of the basics
3 necessary to perform his duties in the Patrol Bureau. The Union argued that the City did
4 not provide a reason for its denial of Babcock's request to attend the training. However,
5 the record is clear that the City had a legitimate reason for its denial of Babcock's request,
6 and that it shared the reason with Babcock. Prior to Babcock's transfer to the Patrol
7 Bureau, he had worked in the Traffic Bureau for many years. Consequently, it is
8 reasonable for the City to want him to brush up on more foundational skills before
9 attending a Search Warrant training. Additionally, Babcock was out on medical leave for
10 approximately ten months prior to the training request. Therefore, I conclude that the City
11 demonstrated that legitimate reasons motivated its decision to deny Babcock's request
12 to attend the Search Warrant training.

13 *Sergeant Specialist Position*

14 The City established that it denied Babcock's request to fill the Sergeant Specialist
15 position and awarded the position to Valente because the Committee did not reach a
16 majority decision. Additionally, MacDonald thought Valente was a more qualified
17 candidate for the position than Babcock and Wade. The Union argues that the City did
18 not provide a legitimate reason for it to award Valente the position over Babcock or Wade.
19 However, the evidence shows that MacDonald was concerned that the Committee could
20 not reach a majority vote on which of the two candidates would be best for the position.
21 In fact, the Committee, including Geary, expressly stated that it wished they had more
22 candidates to choose from. The Committee's concerns sent the message to MacDonald

1 that they only voted for either Wade or Babcock due to a lack of candidates, not because
2 they thought Wade or Babcock was the best fit for the position.

3 Given the Committee's concerns, MacDonald's decision to look outside the two
4 candidates to fill the vacant Sergeant Specialist position was legitimate, and his decision
5 to award Valente the position was legitimate as well. The City had recently interviewed
6 Valente for the detective position and had a recent copy of his resume. Although Geary
7 thought Babcock was detail oriented, Valente had extensive job experience with firearm
8 training which is a relevant job duty for the Sergeant Specialist position.

9 The Union argues that the City did not provide a witness to explain why a sergeant
10 who did not apply for and was not interviewed for the position was selected. However, the
11 record contains the Committee's letter stating that it did not reach a majority vote on an
12 interviewed candidate, and that it wished that more candidates applied. Additionally,
13 McMains and Geary testified about the Committee's concerns regarding the lack of
14 candidates. Moreover, McMains testified about his interactions with MacDonald about the
15 City's decision to award Valente the position instead of Babcock or Wade. For all the
16 aforementioned reasons, I conclude that the City demonstrated that legitimate reasons
17 motivated its decision to deny Babcock's request to fill the Sergeant Specialist position
18 and award it to Valente.

19 **But for Test**

20 Finally, the Union has not proved that but for Babcock's protected activity, the City
21 would not have: 1) transferred Babcock to the Patrol Bureau, 2) denied his request to
22 attend the Search Warrant training, or 3) denied his request to fill the Sergeant Specialist
23 position and selected Valente.

1 Transfer

2 The Union argues that MacDonald's open hostility towards Babcock's protected
3 activity makes it clear that if not for his union activity, Babcock would not have been
4 transferred to the Patrol Bureau. However, the evidence established that the City's
5 primary reason for transferring Babcock was his unprofessional conduct in the March 12
6 incident. Although MacDonald, as the Chief, decided to issue Babcock discipline and
7 transfer him to the Patrol Bureau, McMains was the officer who investigated the incident
8 and determined that Babcock's conduct was inappropriate and unprofessional for a
9 supervisor. The Union may have established the MacDonald had expressed anti-union
10 animus over the years, it did not provide any evidence to establish that McMains harbored
11 any anti-union animus or was influenced by MacDonald when issuing the investigation
12 report. Once McMains investigated the incident and determined that Babcock acted in an
13 unprofessional manner, it was reasonable for MacDonald to transfer Babcock away from
14 the Traffic Bureau where he had behaved unprofessionally, to the Patrol Bureau.

15 Additionally, Babcock was not the only superior officer who was transferred from
16 their position while MacDonald was Chief of Police. Prior to Babcock's transfer,
17 MacDonald decided to transfer captains from different bureaus, so no officer became
18 complacent. MacDonald's decision to transfer Babcock because he had engaged in
19 unprofessional behavior as a supervisor fits with his overall plan for the Department.

20 Also, the Union did not just establish that MacDonald had expressed anti-union
21 animus towards Babcock, but with other officers as well. In fact, the Union established
22 that MacDonald had yelled at Geary and told him to go back to the Patrolman Unit during
23 a bargaining session. Although MacDonald expressed frustration and anger towards

1 Geary for engaging in union activity, MacDonald had not retaliated against him for it. The
2 Union has established that MacDonald has a temper and a tendency to behave in an
3 inappropriate fashion when frustrated, but the Union has not proven that Babcock was
4 transferred in retaliation for his Union activity.

5 Next, the Union argues that the City did not provide any evidence that MacDonald
6 put Babcock on notice that his conduct may result in his transfer to another bureau.
7 However, as a sergeant for several years, Babcock was aware that it was essential for
8 an officer to act in a professional manner at all times, especially when interacting with
9 subordinates. As far as the City's other reasons for transferring Babcock, it did warn
10 Babcock several times over the years that his conduct was not in line with the new
11 protocols for details. In fact, Walsh expressed his concerns about Babcock overstepping
12 his boundaries on more than one occasion. Even if MacDonald did not expressly notify
13 Babcock that he would be transferred if he acted unprofessionally or continued to
14 overstep his boundaries, it doesn't mean that the City would not have transferred Babcock
15 from the Traffic Bureau to the Patrol Bureau but for Babcock's concerted, protected
16 activity.

17 Search Warrant Training

18 The Union argues that MacDonald's open hostility towards Babcock's engagement
19 in protected activity makes it clear that if not for his union activity, the City would not have
20 denied his request to attend the Search Warrant training. The Union advances the
21 argument that the City did not provide a reason for denying Babcock's request to attend
22 the training, therefore the evidence warrants a finding that Babcock, but for his
23 engagement in protected, concerted activity would have been permitted to attend the

1 Search Warrant training. However, the City did provide a legitimate reason for its decision
2 to deny Babcock's request to attend the Search Warrant training. MacDonald talked to
3 Babcock's supervisors in the Patrol Bureau, Leone and Mead, about whether having
4 Babcock attend the Search Warrant training was in the Department's best interests.
5 Leone and Mead expressed the opinion that Babcock would benefit from other training
6 before attending the Search Warrant session because he had been out on medical leave
7 for several months and had not worked in the Patrol Bureau for many years. MacDonald
8 decided to deny Babcock's request based on Leone and Mead's opinion of Babcock's
9 training needs. The Union did not produce any evidence that Leone or Mean harbored
10 any negativity towards Babcock, or any anti-union animus, or that they were swayed by
11 MacDonald's sentiments. In short, the record contains no evidence establishing that the
12 City would have approved Babcock's request to attend the Search Warrant training but
13 for his concerted, protected activity.

14 *Sergeant Specialist Position*

15 Again, the Union argues that the City did not establish a reason for its decision to
16 deny Babcock's request to fill the Sergeant Specialist position and to award it to Valente,
17 a candidate who was not interviewed by the Committee. The Union asserts that the City's
18 failure to provide any evidence to establish legitimate reason for its decisions proves that
19 the City would not have chosen a candidate who did not apply or interview for the position
20 over Babcock but for Babcock's protect activity. The Union contends that the City's failure
21 to produce evidence proves that any explanation offered was not credible and was a
22 pretext for discrimination.

1 As explained above, I found that the City established that it had legitimate, non-
2 discriminatory reasons for its decision not to award the position to Babcock. Moreover, I
3 disagree with the Union's contention that the City's reasons were merely a pretext for
4 discrimination. First, MacDonald was not on the Committee that interviewed Wade and
5 Babcock. The Union did not provide any evidence that any of the members of the
6 Committee harbored anti-union animus or negative opinions of Babcock. The Committee,
7 not MacDonald, could not decide on a candidate as it was a split vote. Similarly, the
8 Committee, not MacDonald, stated that they all wished there were more candidates to
9 choose from for the position. Given that the Committee did not actually recommend a
10 candidate due to the split vote and its concerns about lack of candidates, MacDonald
11 reasonably looked outside of Wade and Babcock to fill the position. Essentially, the Union
12 argued that the Chief always takes the recommendation of the Committee, however, in
13 this case, the Committee never gave a recommendation. Geary may have voiced his
14 personal recommendation for Babcock, but he was only one member of the Committee.
15 Even more telling, Geary also shared the Committee's sentiments that they wished more
16 candidates had applied for the position.

17 The Union argued that it was inappropriate for MacDonald to choose Valente to fill
18 the position because he was never interviewed by the Committee. However, the Union
19 may have asserted that it was customary for an interview committee to vet potential
20 candidates for a position, it did not establish that it was required. MacDonald and McMains
21 were already familiar with Valente and his job credentials because he had recently applied
22 and interviewed for a Detective position. The Union did not establish that Valente was not
23 qualified for the Sergeant Specialist position, or that Wade or Babcock were somehow

1 more qualified for the position. For all the reasons explained above, the record contains
2 no evidence establishing that the City would have chosen Babcock to fill the Sergeant
3 Specialist position but for Babcock's concerted, protected activity.

4 **CONCLUSION**

5 The City did not violate the Law by: 1) transferring Babcock from the Traffic Bureau
6 to the Patrol Bureau; 2) denying Babcock's request to attend the Search Warrant training;
7 and 3) not choosing Babcock to fill the Sergeant Specialist position, and awarding it to
8 Valente. I therefore dismiss the Complaint.

9 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MEGHAN VENTRELLA, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11 and 456
CMR 13.19, to request a review of this decision by the Commonwealth Employment
Relations Board by filing a Notice of Appeal with the Department of Labor Relations not
later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed
within ten days, this decision shall become final and binding on the parties.