

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
	*	
	*	
BROCKTON HOUSING AUTHORITY	*	Case Nos. MUP-19-7544
	*	MUP-19-7545
and	*	
	*	Date Issued: May 11, 2021
WALTER L. BARRIS	*	
	*	

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Kier Wachterhauser, Esq. Representing the Brockton Housing Authority

Mitchell J. Notis, Esq. Representing Walter L. Barris

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the Brockton Housing Authority (Housing
2 Authority or Employer) violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of
3 Massachusetts General Laws, Chapter 150E (the Law) by discriminating against Walter
4 L. Barris (Barris or Charging Party) for engaging in concerted, protected activities. I find
5 that the Housing Authority did not violate the Law in the manner alleged.

6 Statement of the Case

7 On August 30, 2019, Barris filed two charges of prohibited practice with the
8 Department of Labor Relations (DLR) in Case Nos. MUP-19-7544 and MUP-19-7545,
9 alleging that the Housing Authority violated Sections 10(a)(3) and (1) of the Law. The

1 DLR consolidated the cases for investigation, and a DLR investigator investigated the
2 charges on December 2, 2019. On February 27, 2020, the investigator issued a two-
3 count complaint, alleging that the Housing Authority discriminated against Barris for
4 engaging in concerted, protected activities when it bypassed him for promotion to the
5 position of maintenance assistant working foreman in February and May 2019 in violation
6 of Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law.¹ The Housing Authority
7 filed its answer to the complaint on March 9, 2020.

8 I conducted a hearing on September 30, 2020.² Both parties had an opportunity
9 to be heard, to call witnesses and to introduce evidence. The parties submitted their post-
10 hearing briefs on December 10, 2020. Upon review of the entire record, including my
11 observation of the demeanor of the witnesses, I make the following findings of fact and
12 render the following opinion.

13 Findings of Fact³

14 The Housing Authority oversees a total of two thousand apartments, which are in
15 nineteen housing complexes.⁴ All of the complexes were constructed in the 1970's or
16 earlier. The Maintenance Employees Union affiliated with the Service Employees

¹ The investigator dismissed the remaining allegations in the case alleging that the Housing Authority violated Section 10(a)(3) of the Law by: assigning Barris to collect trash and to strip and wax floors and by not assigning him to respond to work orders as part of its twenty-four-hour call service. Barris did not file a request for review pursuant to 456 CMR 15.05(9) of the portions of the charge that the investigator dismissed.

² I conducted the hearing remotely pursuant to Governor Baker's teleworking directive to executive branch employees.

³ The DLR's jurisdiction in this matter is uncontested.

⁴ The Housing Authority also oversees two thousand Section 8 vouchers that provide rental assistance to tenants living in private housing.

1 International Union, Local 888 (SEIU) represents a bargaining unit of twenty to twenty-
2 five maintenance employees⁵ who work at the Housing Authority, including Barris.

3 Relevant Contractual Provisions

4 The Housing Authority and SEIU are parties to a collective bargaining agreement,
5 that by its terms, is in effect from January 1, 2017 through December 31, 2019 (2017-
6 2019 CBA).⁶ The 2017-2019 CBA contains the following relevant provisions:

7 Article 3-Recognition

8 The Authority recognizes the Union as the exclusive bargaining representative for the
9 purposes of bargaining wages, hours, and other conditions of employment for the
10 following employee job classifications:

- 11
12 Maintenance Mechanic (including Lead Mechanic*)⁷
13 Mechanic Aide
14 Maintenance Aide/Laborer
15 Maintenance Groundskeeper/Custodian⁸
16 Housekeeper
17 Working Foreman⁹
18 Assistant Working Foreman
19 Warehouse Assistant

20
21 *The Lead Mechanic job description is that of Mechanic with the additional responsibility
22 of being a team leader. The Lead Mechanic is senior to a Mechanic and is expected to
23 direct work at the assigned worksites. The Lead Mechanic reports to an assigned
24 Assistant Foreman. The Lead Mechanic will fill in for an Assistant Foreman in the
25 Assistant Foreman's absence. The purpose of this position is to allow employees and

⁵ SEIU also represents a bargaining unit of twenty-five to fifty administrative employees of the Housing Authority.

⁶ As of the date of the hearing, the parties had negotiated a successor collective bargaining agreement, whose terms are not in the record.

⁷ The Housing Authority employs eight or nine maintenance mechanics and three lead mechanics.

⁸ The Housing Authority currently does not employ any incumbents in the position of maintenance groundskeeper.

⁹ The Housing Authority employs three working foremen.

1 the Brockton Housing Authority the opportunity to train for future Foreman positions. The
2 Lead Mechanic position, if the Authority chooses to have such positions, are assignments
3 rather than promotional positions, and individuals, therefore, may be assigned out of this
4 position without this being viewed as a demotion. The Lead Mechanic will be paid per
5 hour more than the rate paid for Mechanic.

6
7 Article 15-Seniority, Promotions and Vacancies

8
9 **Section 1. Definitions** [Emphasis in Original]

10
11 Seniority shall be defined as the length of continuous service by an employee with the
12 Authority from the date of his/her initial hire. Seniority shall commence to be acquired by
13 a full-time employee after completion of his/her probationary period, at which time such
14 seniority shall be retroactive to the first date of employment.

15
16 For Civil Service purposes, the provisions of Section 41 to 45, inclusive, of Chapter 31 of
17 the General Laws, Civil Service Laws and regulations shall be applicable to the extent
18 they apply under Chapter 121B, section 29. ...

19
20 **Section 4. Posting Seniority**

21
22 A Seniority [L]list of all employees covered by this Agreement, showing names, position[s]
23 and date[s] of entering service, will be posted promptly on appropriate bulletin boards
24 accessible to all employees affected. The roster will be revised and posted in January of
25 each year. It will be open to protest and correction for a period of thirty (30) days, and
26 upon proof of error presented by an employee or his representative, such error will be
27 corrected.

28
29 **Section 5. Vacancies**

30
31 It shall be the policy of the Authority during the life of this Agreement to give members in
32 good standing in the bargaining unit the opportunity to apply for job vacancies, provided
33 such persons are available and willing to perform the jobs in which the vacancies exist.

34
35 A. A notice of such vacancy shall be posted on appropriate bulletin boards for a period
36 of ten (10) days prior to the closing of applications for the position. Upon request,
37 management will provide the Union with a list of Union members absent due to
38 illness, vacation, or any authorized leave of absence. Applications for any
39 maintenance position will remain active for a period of twelve (12) months from the
40 closing date of application for the position and the Executive Director may
41 recommend qualified applicants from said list of active applicants without further
42 advertisement.

43
44 B. In the event that applicants for any position appear to be equally well qualified, first
45 preference shall be given to the Authority employee over the applicant who is not
46 an Authority employee. When two (2) Authority employees appear equally well

- 1 qualified for any position, preference shall be given to the employee with greater
2 seniority.
3
- 4 C. When applicants who are not employed by the Authority for any position appear to
5 be equally well qualified, preference shall be given in accordance with the
6 Authority's Section 3 policy.
7
- 8 D. The Executive Director or his designee shall review all applications for employment
9 and recommend qualified applicants for further consideration.
10
- 11 E. In the filing of all positions covered by this Agreement, an Interviewing Committee
12 consisting of the following shall be established:
13
 - 14 1. The Executive Director or his designee.
 - 15
 - 16 2. The Director of the Department.
 - 17
 - 18 3. Any other person determined advantageous by the Executive Director.
19
- 20 F. For any position for which a test is determined to be advantageous by the
21 Executive Director, the test shall be administered to all apparently qualified
22 applicants.
23
- 24 G. The Interviewing Committee shall interview all employees of the Authority who are
25 applicants passing the test and/or meeting the minimum qualifications, in the
26 judgment of the Executive Director or his designee, as set forth in the job
27 description.
28
- 29 H. The Union shall the right to select a representative to observe during the selection
30 process. Said representative may observe the testing and interviewing process as
31 well as have access to a listing of all applicants and test results in order to assure
32 the selection process is in accordance with this Agreement.
33
- 34 I. The Interviewing Committee shall submit a ranking of applicants interviewed to the
35 Executive Director.
36
- 37 J. The Executive Director, in making his/her recommendations to the Board of
38 Commissioners, shall make available to the Board the ranking of applicants by the
39 Interviewing Committee.
40
- 41 K. The Board of Commissioners or a subcommittee of the Board reserves the right to
42 interview one or more applicants for any position prior to appointment.
43
- 44 L. The appointing authority for all positions shall rest with the Board of
45 Commissioners.
46

1 M. The above is subject to the grievance procedure.

2 Barris' Background Information

3 Barris began to work for the Housing Authority in April 1989. He has held the
4 following positions at the Housing Authority: groundskeeper, custodian, laborer for four or
5 five years, mechanic aide for eight years and then maintenance mechanic.¹⁰ In 2008, the
6 Housing Authority assigned him the duties of lead mechanic. As a lead mechanic, Barris
7 continued to perform maintenance mechanic's duties but also was responsible for being
8 a team leader and directing work at jobsites. He also worked on the twenty-four-hour
9 night call service responding to emergency calls from the Housing Authority's tenants on
10 nights, weekends and holidays until 2017.¹¹ Since 2016, Barris has overseen the floor
11 care crew that maintains the tile floors in the Housing Authority's seven high rise
12 apartment buildings.¹²

13 Barris also intermittently held the position of SEIU steward for thirteen or fourteen
14 years. He began as steward in the mid-1990's for a period of six years, then left the
15 position and subsequently returned to the position upon the death of the then steward.

¹⁰ The job description for the maintenance mechanic described, in part, the qualifications for the position as: a) the ability to direct and supervise skilled and unskilled crews of maintenance workers, b) skill in the use and care of the tools, machines and equipment of the building trades, c) considerable knowledge of the standard methods, practices, tools, materials, occupational hazards, and safety precautions of the building trades, d) considerable knowledge of local/national codes and ordinances, and e) ability to read blueprints, compute cost estimates, keep records, perform skilled and technical tasks without supervision and follow oral and written instructions.

¹¹ The Housing Authority represented at hearing that Barris was still eligible to work on the twenty-four-hour night call service if he chose to do so.

¹² The seven high-rise buildings each have between eight and ten floors.

1 His most recent term as steward was from 2013 through 2017.¹³ As steward, Barris
2 helped unit members write up approximately fifteen grievances, met with the Housing
3 Authority about grievances along with various staff representatives from SEIU, and was
4 a member of SEIU's bargaining teams for various rounds of successor contract
5 negotiations.

6 2015

7 Reimbursement for Licenses and Certifications

8 On or about July 2015, Thomas Thibeault (Thibeault), the Housing Authority's
9 Executive Director, became aware that the Housing Authority was reimbursing certain
10 maintenance employees for the costs of holding licenses and certifications, while other
11 maintenance employees were unaware that they could request reimbursement. On July
12 20, 2015, Thibeault sent out a memo (July 20, 2015 memo) to all maintenance employees
13 with an attached Standard Operating Procedure (SOP) regarding the process for
14 maintenance employees to seek reimbursement for the cost of holding certifications and
15 licenses. The July 20, 2015 memo stated:

16 As the administration and operations of our programs become ever more
17 complex our staff is now, more than ever, required to acquire and maintain
18 special certifications and licenses to ensure compliance with program
19 regulations and expectations.

20
21 At this year's annual meeting I made the statement that "The current staff
22 of the Brockton Housing Authority is the most credentialed, educated and
23 capable group of employees in the history of our organization." I am proud
24 of the professionalism of our staff and the hard work that has been and
25 continues to be done to obtain these credentials. It is important to know

¹³ In 2016, Barris unsuccessfully attempted to replace SEIU as the bargaining representative. However, the Investigator concluded that the Housing Authority had no knowledge of Barris' attempt to replace SEIU. The Charging Party did not appeal the investigator's finding on this point.

1 that the Board and the Directors realize and appreciate the time and
2 expense required for each of you to obtain and maintain these designations.
3

4 With this in mind the attached SOP was developed and is meant to clarify
5 the process for employees to be reimbursed for such certification and
6 licenses.
7

8 Your dedication and professionalism is recognized and appreciated.
9 Please see your Director if you have any questions regarding this
10 procedure.

11 The SOP described the following reimbursement procedure:

12 **Conditions: [Emphasis in original]**
13

- 14 • The certification or license must be related to job duties and be beneficial
15 to meeting the BHA's mission.
16
- 17 • The certification or license must be issued by an institution or agency that
18 the Executive Director deems to be credible.
19
- 20 • A new certification or license must be pre-approved by the employee's
21 direct supervisor and the Executive Director prior to the employee
22 committing to training or incurring any expenses.
23
- 24 • Whether new certifications or licenses, or scheduled renewals or dues,
25 these will be paid by the BHA under the Employee Tuition Reimbursement
26 Program.
27

28 **Procedures:**
29

30 **New**
31

- 32 • For new certifications or licenses, the employee shall submit to his direct
33 supervisor a written request with back-up documentation as follows:
34
 - 35 1. Type of Certification or License being sought with a written
36 explanation on how it will relate to job duties;
37
 - 38 2. Information on the school or training institution providing the training
39 or testing;
40
 - 41 3. Curriculum or skill requirement information for the course or license;
42
 - 43 4. Dates and location of training or testing;
44

- 1 5. Cost information, along with cost and frequency of renewal and/or
- 2 job duties.
- 3
- 4 6. Once the Executive Director has approved such a request the
- 5 employee shall undertake registration for the course or testing: the
- 6 Finance Department will issue either a Purchase Order, or check
- 7 payable to the institution to be submitted by the employee with the
- 8 registration forms.

Existing

- 9
- 10
- 11 • For employees wishing to receive reimbursement for renewal costs/dues for
- 12 existing certifications or licenses that have been approved, the following
- 13 steps must be followed:
- 14
- 15 1. The employee shall pay the renewal fee(s) or dues;
- 16
- 17 2. Submit a written request for reimbursement to the employee’s direct
- 18 supervisor accompanied by a copy of the paid invoice from the
- 19 professional institution or licensing board;
- 20
- 21 3. Following the Executive Director’s approval the Finance Department
- 22 will process a check payable to the employee reimbursement.

Certificate as an Apartment Maintenance Technician

24 In the summer of 2015,¹⁴ the Housing Authority notified Barris that it was going to

25 require him and certain other unit members to attend four days of classes and to take a

26 test in order to earn certificates as apartment maintenance technicians (CAMTs).¹⁵ Other

27 unit members, including a unit member with dyslexia, approached Barris, as SEIU

28 steward, with concerns about the CAMT test. The unit members were concerned that

29 they would be embarrassed by their CAMT test results or that the test would affect their

¹⁴ The record does not indicate whether Thibeault sent out his July 20, 2015 memo before or after the Housing Authority notified Barris and other unit members that it wanted them to earn certificates as apartment maintenance technicians.

¹⁵ Barris took the CAMT classes, started the test, encountered computer problems, and did not complete the test. He subsequently did not re-take the test. Barris also does not hold any other professional licenses.

1 employment. Barris then contacted SEIU senior representative Bill Storella (Storella)
2 with those concerns.¹⁶ On August 20, 2015, Storella sent a letter to Thomas Plouffe,
3 Esq. (Plouffe), the Housing Authority's senior counsel and division director of housing
4 administration,¹⁷ stating:

5 It has come to the Union's attention that the Brockton Housing Authority is
6 unilaterally requiring employees to take examinations for the purpose of
7 obtaining certifications without negotiating with the Union. According to
8 Article 12 of the collective bargaining agreement between the Brockton
9 Housing Authority Maintenance Employees and the Brockton Housing
10 Authority, "No agreement, understanding, alteration or variation of the terms
11 or provisions of the Agreement herein contained, shall bind the parties
12 hereto, unless made and executed in writing, by the parties hereto."
13

14 Please cease and desist from issuing any such test until the Housing
15 Authority has met its obligations under the collective bargaining agreement
16 and MGL Chapter 150E. Furthermore, the Union refuses to acknowledge
17 or accept any impact in which these examinations may have on these
18 employees.
19

20 Please feel free to contact me on this matter. If this letter does not rectify
21 this issue, the Union will be forced to file a grievance. Thank you in advance
22 for your consideration.

23 Thereafter, the Housing Authority and SEIU met for approximately one hour regarding
24 Storella's August 20, 2015 letter. Barris, the assistant shop steward,¹⁸ Storella and legal
25 counsel John Magner (Magner) attended on behalf of SEIU, while Plouffe and Frank

¹⁶ Although paragraph 6 of the Complaint alleged that in July and August of 2015, Barris circulated a letter to other unit members protesting the Housing Authority's imposition of the CAMT test, Barris clarified at hearing that he had not circulated a letter to other unit members, but rather, he had spoken with some of them.

¹⁷ Plouffe began with the Housing Authority 2005 and stated that since that time, SEIU had pursued three to five grievances to Step 3 of the contractual grievance procedure, which is the Housing Authority's Board of Commissioners. Since 2005, SEIU has not submitted any grievances to arbitration.

¹⁸ The record does not identify the assistant shop steward.

1 Hinds (Hinds), Division Director of Asset Management,¹⁹ attended on behalf of the
2 Housing Authority. SEIU sought confirmation that the Housing Authority would not
3 terminate or demote unit members because they failed or did not take the CAMT exam.
4 During the meeting, Barris explained the unit members' concerns about the CAMT test to
5 Plouffe and Hinds.²⁰ At the meeting, Plouffe or Hinds indicated that in making promotions,
6 the Housing Authority wanted to be allowed to credit applicants who held licenses or
7 certifications.²¹

8 On September 21, 2015, Plouffe sent a letter (September 21, 2015 letter) to
9 Magner²² stating:

10 In response to SEIU's, so called, "Cease and Desist" letter of August 20,
11 2015, the parties have met and have agreed as follows:

- 12
- 13 1. That the training and testing which the Brockton Housing Authority
14 has undertaken consistently for a number of years regarding OSHA,
15 lead paint and asbestos certifications will continue as will any other
16 State or Federal mandated trainings.
 - 17
 - 18 2. That the Brockton Housing Authority can train its employees as per
19 their job descriptions.
 - 20
 - 21 3. That any certifications other than those listed in paragraph one will
22 be voluntary.

¹⁹ One of the departments that Hinds oversaw was the maintenance department.

²⁰ Barris credibly testified at the hearing that he explained unit members' concerns to Plouffe and Hinds. Although Plouffe testified that he and Magner did most of the talking at the meeting, he also stated that he did not specifically remember Barris speaking. Thus, I credit Barris on this point.

²¹ Plouffe acknowledged at hearing that the Housing Authority and SEIU did not discuss whether the Housing Authority could penalize an applicant for promotion who did not hold licenses or certifications.

²² Thibeault was copied on the letter.

1 4. That there will be no implications or ramifications for any employee,
2 on his current position, who does not take or who fails the certified
3 apartment maintenance technician testing.²³
4

5 5. That any candidate who has failed the certified apartment
6 maintenance technician test and voluntarily wishes to retake the test
7 may do so and the cost of retaking the test will be borne by the
8 Brockton Housing Authority.
9

10 As stated at our meeting, Brockton Housing Authority will use all the
11 information at its disposal to evaluate candidates for promotion²⁴ including
12 but not limited to any and all certifications, licenses, degrees, attendance
13 records, disciplinary records, promotional testing and interview process.²⁵

14 2018

15 In August 2018, the Housing Authority posted a vacancy for the position of working
16 foreman, while Barris was out on sick leave. On August 27, 2018, Steven Chetwynd
17 (Chetwynd), SEIU's steward,²⁶ sent a letter to Plouffe stating:

18 Recently the Brockton Housing Authority posted the vacant position of
19 Working For[e]man. Based on the details of the posting it states that all
20 interested parties need to have their cover letter and resumes in by the
21 deadline of August 24, 2018 at 4:30 PM.
22

23 I was contacted today by Walter Barris a 30+ employee of the Maintenance
24 Department who has been absent due to personal illness. Mr. Barris states

²³ The Housing Authority subsequently has not disciplined any unit member for not taking the CAMT test.

²⁴ In response to a question at hearing from Barris' counsel, Barris indicated that his understanding was that the Housing Authority would not consider whether or not unit members held CAMTs when making future promotions. However, I decline to credit Barris' understanding as to what the Housing Authority would do when evaluating promotional candidates held CAMTs because it is subjective and contrary to the plain language of the final paragraph of the letter.

²⁵ The record contains no facts showing that SEIU subsequently challenged the terms of the September 21, 2015 letter.

²⁶ On May 17, 2017, Chetwynd succeeded Barris as the steward for the maintenance unit.

1 that he was unaware of the details of the posting and would've liked to have
2 been able to apply for this position.

3
4 On behalf of Mr. Barris and SEIU-888 I would like to request an extension
5 of the deadline for the vacant position of Working Foreman until Friday,
6 August 27, 2018 at 4:30 pm to allow Mr. Barris the opportunity to prepare
7 and submit his cover letter and resume for the position.

8
9 Upon speaking with Steve D'Amico, Field Representative for SEIU-888 we
10 would be greatly appreciative and be willing to sign an agreement stating
11 this is a specific situation and under no circumstances would this set any
12 future precedence for any future job postings. Thank you very much for
13 your anticipated understanding.²⁷

14 In an August 28, 2018 letter, Plouffe replied that:

15 This letter is in response to the letter you sent to me by email yesterday
16 regarding an extension of the deadline for the position of Maintenance
17 Working Foreman. Unfortunately, the Brockton Housing Authority is unable
18 to extend the date for the submission of cover letter and resume for the
19 position of Working Foreman.²⁸

20
21 This type of situation is covered in the Collective Bargaining Agreement,
22 Article 15, Section 5, paragraph A.

23
24 If you should have any questions, please feel free to contact me.²⁹

25 Two Promotional Bypasses

26 February 2019 Bypass

²⁷ At hearing, Barris opined that because he was on sick leave, SEIU or its steward should have notified him about the posting for the working foreman vacancy.

²⁸ Plouffe explained at the hearing that he had denied the request because he believed that it was unfair to the other applicants.

²⁹ I notified the parties at hearing that I would not treat the Housing Authority's August 28, 2018 refusal to extend the time for Barris to submit an application for the maintenance working foreman vacancy as a separate actionable claim of retaliation for concerted, protected activity because it was untimely and not previously raised at the investigation.

1 In November 2018, the Housing Authority posted a vacancy for an assistant
2 maintenance working foreman (assistant working foreman) that stated in pertinent part:

3 **Internal Posting Only**³⁰
4

5 The Brockton Housing Authority is accepting applications for the position of
6 **MAINTENANCE ASSISTANT WORKING FOREMAN** [emphasis in the
7 original]. A cover letter and resume are required and should be mailed or
8 delivered to the Director of Human Resources, Brockton Housing Authority,
9 45 Goddard Road, P.O. Box 7070, Brockton, MA 02303. Any resumes
10 received after **3:00 PM on Friday, November 30, 2018** will not be
11 considered. No electronic submittals will be accepted.
12

13 This position is included in the Agreement between the Brockton Housing
14 Authority and the Maintenance Union Affiliated with The Service Employees
15 International Union Local 888. This notice is being posted in accordance
16 with Article 15, Seniority, Promotions, Vacancies, Section 5. Vacancies.
17 The salary level has been established in accordance with Article 21. Wages,
18 salary level for 2018. Interviews will be granted only to candidates who
19 meet the minimum qualifications as described in the attached job
20 description.

21 The Housing Authority attached the job description for the assistant working foreman to
22 the posting. The job description described the assistant working foreman as performing
23 skilled supervisory work in the maintenance and repair of buildings, grounds, building
24 equipment, fixtures, and facilities. The incumbent in the position was responsible for
25 assisting in the planning, assigning, and supervising of maintenance employees engaged
26 in performing a wide variety of maintenance and repair tasks. The assistant working
27 foreman would: a) assign work orders at the start of each work shift, b) take up and review
28 work orders at the end of the shift, which included taking immediate action to correct any
29 problems, and c) conduct daily inspections of assigned employees' work orders in
30 progress and upon completion. The assistant working foreman was responsible for

³⁰ External candidates were not given the opportunity to apply for the position.

1 developing standards, procedures, schedules, and methods for the utilization of
2 personnel, materials, and equipment.

3 The qualifications for the position included: a) graduation from an accredited high
4 school plus at least five years progressively responsible experience in building and
5 grounds maintenance or building contracting with at least one year of supervisory
6 experience but an equivalent combination of education, training and experience may be
7 substituted; b) general knowledge of effective supervisory practices and procedures, work
8 planning, scheduling, inspection and control; c) thorough knowledge of maintenance
9 support systems including work orders, preventive maintenance, inventory control,
10 vacancy tracking and resident charges, and indicators related to maintenance and
11 occupational hazards and safety precautions; d) considerable knowledge of the practices,
12 methods, materials and tools used in building and grounds maintenance, and the basic
13 principles of electricity, plumbing, gas fitting, plastering, masonry, carpentry, refrigeration,
14 heating, air conditioning, welding and their applicability to maintenance and repair
15 activities; e) ability to plan and direct the work of subordinates, including skilled, semi-
16 skilled and unskilled maintenance workers, to estimate costs, labor time and materials, to
17 keep records and prepare reports, to read and interpret building plans, prints, drawings
18 and diagrams; and f) basic knowledge of computers and the ability to use the Housing
19 Authority's computer system.

20 Barris³¹ and five other unit members applied for the assistant working foreman
21 vacancy. In late January 2019, the Housing Authority held individual interviews with the

³¹ Barris indicated that he would earn more money and have more responsibility as an assistant working foreman.

1 applicants. Plouffe, Hinds, and Thibeault³² comprised the interview panel. Chetwynd
2 also was present as the observer from the Union, although he could not ask questions
3 and did not participate in the Employer's deliberations. Each applicant's interview lasted
4 thirty minutes, with Plouffe, Hinds and Thibeault all asking questions.³³ The panelists
5 asked the same questions to all the candidates, except for follow-up questions that were
6 made in response to applicants' answers to the initial questions. Barris was nervous and
7 described himself as having not done too well in the interview. Similarly, Plouffe and
8 Thibeault both described Barris as having struggled during the interview and having been
9 unable to answer certain questions, which included being unable to provide an example
10 of how he demonstrated leadership while working for the Housing Authority. The Housing
11 Authority then had all the applicants take a test (promotional test) with Hinds'
12 administrative assistant as the proctor. Hinds first developed the promotional test in 2004
13 to fill a vacancy for a mechanic's aide, and the Housing Authority subsequently used it to
14 fill a vacancy for working foreman.³⁴ The promotional test consisted of twenty questions.
15 Barris' score of sixty on the test was the lowest of the six candidates.

³² Typically, the director of maintenance would have attended the interview rather than Thibeault. However, the director of maintenance position was vacant, and Plouffe, who organized the interviews and was the executive director's designee on the panel, believed that the interview panel should have three members.

³³ Plouffe reviewed the panelists' questions in advance to ensure that there were no duplicate questions.

³⁴ Plouffe opined at hearing that Hinds developed the promotional test based on his general basic construction knowledge and the internet. Barris opined that certain questions were based on the CAMT examination, while DeChristopher opined that the questions were different from the CAMT exam. Because Hinds, who had retired the previous summer and moved out of state, did not testify, and the CAMT exam is not in evidence, I make no findings as to the origins of the promotional test.

1 Plouffe, Hinds and Thibeault then met to discuss the applicants and reach a
2 consensus on whom to recommend for promotion.³⁵ They compiled their interview notes,
3 reviewed the results of the promotional test, and contacted the three working foremen,
4 Vincent DeChristopher (DeChristopher), Mike Leary and Eddie McDonald, to get their
5 opinions about the applicants. While deliberating, the panelists did not discuss Barris'
6 activities as a Union steward. Ultimately, the Housing Authority selected Kevin Gately
7 (Gately) for the promotion. Gately received a 95, the highest score on the exam, and held
8 a CAMT. Plouffe cited Gately's test score, his interview as well as his qualifications, which
9 included possession of a CAMT, as the reason for his selection. Gately, who started with
10 the Housing Authority in September of 1999, had approximately ten and one-half years
11 less seniority than Barris.³⁶ The Employer also acknowledged that Gately had engaged
12 in less Union activity than Barris, although Gately had been a steward a number of years
13 ago and had been a member of the Union's bargaining team for a successor contract(s).³⁷

14 In February 2019, Thibeault and Hinds met with the applicants individually. They
15 informed Gately of his selection and spoke individually with the other applicants, except
16 Barris, about how they might want to improve their interview skills or their resumes. Barris
17 was not at work on the day when Thibeault and Hinds spoke with the other applicants.

³⁵ If Thibeault had not been a member of the interview panel, the interview panel also would have recommended an applicant to Thibeault. Thibeault then would interview the applicant and submit his own recommendation to the appointing authority the Board of Commissioners.

³⁶ Barris maintained at hearing that although he and Gately had the same qualifications, the Housing Authority should have promoted him because he had more seniority.

³⁷ The record is unclear as to the number of Union bargaining teams for which Gately was a member and for what time period(s).

1 When Thibeault and Hinds subsequently met with Barris, Barris was upset and
2 questioned whether he had wasted his thirty-year career at the Housing Authority. The
3 meeting, which Thibeault described as “uncomfortable,” ended without Thibeault and
4 Hinds informing Barris how he might improve his responses to interview questions.

5 May 2019 Bypass

6 In May 2019, another vacancy (May 2019 vacancy) for an assistant working
7 foreman position occurred when the Housing Authority promoted DeChristopher to
8 director of maintenance³⁸ and promoted Chetwynd, formerly an assistant working
9 foreman, to the working foreman position that DeChristopher had vacated. Because this
10 second assistant working foreman vacancy had occurred within one year of the
11 November 30, 2018 posting for the assistant working foreman vacancy, the Housing
12 Authority used the five remaining applicants for the November 2018 posting as the pool
13 to fill the position. On May 2019, Plouffe sent a letter to Barris stating:

14 Please be advised that pursuant to the Collective Bargaining Agreement
15 between the Brockton Housing Authority and the Maintenance Employees
16 Union, we will be using the existing pool of candidates for the Vacant
17 Assistant Working Foreman Position.

18
19 Your interview is scheduled for Friday, May 17, 2019 at 2:00 in the new
20 board room at 45 Goddard Road. If you would like to update or supplement
21 your resume, I will accept those updates/supplements until Wednesday
22 May 15, 2019 at 4:30pm.

23
24 If you have any questions, please contact me.

25 On May 17, 2019, Plouffe, Hinds and DeChristopher conducted separate thirty-
26 minute interviews with the remaining five applicants, including Barris. Either Chetwynd

³⁸ DeChristopher had worked for the Housing Authority for forty-eight years and previously served on SEIU bargaining teams for successor contract negotiations, including the SEIU bargaining team for the 2017-2019 CBA.

1 or Walter Yurkins (Yurkins), the assistant steward, was present as the SEIU observer, but
2 did not ask questions or participate in the Housing Authority's deliberations about which
3 applicant to select.³⁹ The panel members asked the same questions to all the candidates,
4 except for follow-up questions that were made in response to the applicants' answers to
5 the initial questions. Plouffe described Barris' performance in the May 17, 2019 interview
6 as even worse than the January 2019 interview with long, awkward pauses.
7 DeChristopher, who sometimes had been Barris' supervisor on the twenty-four-hour night
8 call service, described Barris as unable to answer basic repair questions during the
9 interview, which DeChristopher opined that Barris should have been able to answer.⁴⁰

10 The interview panel also used the results of the promotional test that the Housing
11 Authority previously administered in January 2019 when evaluating the applicants. The
12 panelists did not discuss Barris' duties as Union steward. The interview panel ultimately
13 recommended that Thibeault select Robert DeMulis (DeMulis)⁴¹ for the position.
14 DeMulis had worked for the Housing Authority since March of 2002 but had nearly
15 thirteen years less seniority than Barris.⁴² DeMulis scored an 80 on the promotional test.

³⁹ The record is unclear as to whether it was Chetwynd or Yurkins who attended the interview.

⁴⁰ The three working foremen rotated supervising the twenty-four hour on call staff as so-called "mentors," who would advise/help if the twenty-four hour on call staff had trouble with a repair. DeChristopher stated that Barris especially had difficulty with calls regarding heating problems and that DeChristopher would either need to tell him what to do or would need to report to the work site to do the repair himself.

⁴¹ Based on the evidentiary record, I correct the phonetic spelling of DeMulis' name that appeared in the transcript.

⁴² DeMulis had no involvement with SEIU other than being a unit member.

1 Plouffe explained that the Housing Authority selected DeMulis because he was able to
2 satisfactorily answer questions during the interview, held a CAMT and a hoisting license,
3 and also was in charge of the vacancy crew.⁴³ The vacancy crew, which consisted of
4 three to five maintenance personnel, needed to quickly prepare vacant apartments to
5 make them ready for new tenants, which included making all necessary repairs. DeMulis
6 would need to order the materials, prepare the work, and assign the work.

7 On June 4, 2019, Barris filed a grievance at Step 1 of the contractual grievance
8 procedure challenging the Housing Authority's failure to promote him in February and
9 May 2019. Barris' grievance noted in part:

10 BHA's conduct is [in] violation of, *inter alia*, my Union Agreement,
11 specifically Article 15, Section 5(B) provides:

12
13 *"In the event that applicants for any position appear to be equally well*
14 *qualified, first preference shall be given to the Authority employee over the*
15 *applicant who is not an Authority employee. When two (2) Authority*
16 *employees appear equally well qualified for any position preference will be*
17 *given to the employee with greater seniority."* [Italics in original].
18

19 BHA filled positions that I was qualified for with employees that possess
20 less experience and less seniority. I am more senior, have greater
21 experience and am overall more qualified than the employees that BHA
22 selected to fill positions for which I applied. BHA's conduct is in violation of
23 our Union Agreement.

24 Also, on June 4, 2019, DeChristopher issued his Step 1 answer stating:

25 This letter is in [...] response to the grievance I received dated June 4, 2019
26 for the position of Assistant Working Foreman. You were not selected for
27 the reasons stated below[:]

- 28
29 • During the interview there were many simple questions that you had no
30 answers for.

⁴³ Barris maintained at hearing that he was more qualified than DeMulis because DeMulis have never been a lead mechanic or worked on the twenty-four-hour night call service.

1 • There was a 20[-] question test in which you scored much lower than the
2 candidate that was selected.

3

4 • You are not a Certified Apartment Maintenance Technician.

5

6 So at this time I am denying your grievance request.

7 Ultimately, Barris withdrew the grievance at Step 2 of the contractual grievance procedure
8 and filed Case Nos. MUP-19-7544 and MUP-19-7545.

9

Opinion

10 A public employer that retaliates or discriminates against an employee for
11 engaging in activity protected by Section 2 of the Law violates Section 10(a)(3) of the
12 Law. Southern Reg. Voc. School District v. Labor Relations Commission, 388 Mass. 414
13 (1982); School Committee of Boston v. Labor Relations Commission, 40 Mass. App. Ct.
14 327 (1996). To establish a prima facie case of discrimination, a charging party must show
15 that: 1) an employee was engaged in activity protected by Section 2 of the Law; 2) the
16 employer knew of that conduct; 3) the employer took adverse action against the
17 employee; and 4) the employer took the adverse action to discourage the protected
18 activity. Quincy School Committee, 27 MLC 83, 92, MUP-1986 (December 29, 2000);
19 Town of Clinton, 12 MLC 1361, 1365, MUP-5859 (November 9, 1985).

Prima Facie Case

21 Turning to the first three elements of the prima facie case, it is undisputed that
22 Barris engaged in concerted activity protected by Section 2 of the Law, and that the
23 Housing Authority had knowledge of those activities. Barris acted as a Union steward at
24 various times from the mid-1990's to 2017 for a total of thirteen or fourteen years. Barris'
25 most recent term as steward was from 2013 through 2017. As a steward, Barris filed
26 approximately fifteen grievances on behalf of unit members and was a member of SEIU's

1 bargaining team for several successor collective bargaining agreements. Further, on
2 August 20, 2015, Barris and certain other SEIU representatives, including business agent
3 Storella and legal counsel Magner, attended a meeting with the Housing Authority's
4 representatives Plouffe and Hinds regarding the CAMT issue. As previously noted, Barris
5 expressed concerns about the CAMT testing at that meeting. Additionally, the Housing
6 Authority's failure to promote Barris to the assistant maintenance foreman vacancies in
7 February and May 2019 constitutes adverse action. See Town of Mashpee, 36 MLC 163,
8 171, MUP-02-3653 (April 15, 2010) (failing to promote a patrol officer to the rank of
9 sergeant was an adverse action).

10 Animus

11 Next, I must consider whether there is evidence of employer animus towards
12 Barris' protected activity. A charging party may proffer direct or indirect evidence of
13 discrimination in support of its claim. See Town of Brookfield, 28 MLC 320, 327-328,
14 MUP-2538 (May 1, 2002), aff'd sub nom., Town of Brookfield v. Labor Relations
15 Commission, 443 Mass. 315 (2005).

16 Direct Evidence

17 In discrimination cases where the charging party has proffered direct evidence of
18 discrimination, the Commonwealth Employment Relations Board (CERB) applies the two-
19 step analysis articulated in Wynn v. Wynn, P.C. v. Massachusetts Commission Against
20 Discrimination, 431 Mass. 685 (2000) (Wynn & Wynn). According to the first step in the
21 Wynn & Wynn analysis, a charging party meets its initial burden by proffering direct
22 evidence that proscribed criteria, here, engaging in concerted, protected activity, played
23 a motivating part in a respondent's adverse action. Id. at 667. Direct evidence is evidence

1 that, “if believed, results in an inescapable, or at least highly probable inference that
2 forbidden bias was present in the workplace.” Id. (citing Johansen v. NCR Comten, Inc.,
3 30 Mass. App. Ct. 294, 300 (1991)). Stray remarks in the workplace, statements by
4 people without the power to make employment decisions, and statements made by
5 decision makers unrelated to the decisional process itself do not suffice to satisfy a
6 charging party’s threshold burden. Id. at 667 (citing Price Waterhouse v. Hopkins, 490
7 U.S. 228, 277 (1989)). Upon review of the facts before me, I find no direct evidence of
8 animus towards Barris’ concerted, protected activity. Thus, I have treated his allegations
9 as an indirect evidence case. The burden of proof in indirect evidence cases is set forth
10 in Trustees of Forbes Library v. Labor Relations Commission (Trustees of Forbes
11 Library), 384 Mass. 559 (1981).

12 Absent direct evidence of unlawful motivation, unlawful motivation may be
13 established through circumstantial evidence and reasonable inferences drawn from that
14 evidence. Suffolk County Sheriff’s Department, 27 MLC 155, 159, MUP-1498 (June 4,
15 2001). Circumstantial factors may include: shifting and inconsistent reasons for an
16 employer’s action, Everett Housing Authority, 13 MLC 1001, 1006, MUP-5656 (June 4,
17 1986); the insubstantiality of the reasons given for the adverse action, Commonwealth of
18 Massachusetts, 14 MLC 1743, 1749, SUP-3081 (May 19, 1988); the timing of the adverse
19 action in relation to the protected activity; Town of Somerset, 15 MLC 1523, 1529, MUP-
20 6404 (March 9, 1989); and the employer’s divergence from longstanding practices, Town
21 of Mashpee, 36 MLC at 171.

22 Insubstantiality of Reasons

1 One of the reasons that the Housing Authority cited for the promotion of both
2 Gately and DeMulis was that they held CAMTs. Barris contends that the Housing
3 Authority's cited reason is pretextual because it violated the terms of the September 21,
4 2015 letter and was not referenced in the job description for the assistant working
5 foremen. Turning to the terms of the September 21, 2015 letter, numbered paragraph 4
6 states:

7 That there will be no implications or ramifications for any employee on his
8 current position, who does not take or who fails the certified apartment
9 maintenance technician testing.

10 Barris argues that his lack of a CAMT had an implication or ramification on his current
11 role as a lead mechanic because he could not be promoted from that position. However,
12 the final paragraph in the September 21, 2015 letter undercuts Barris' argument by noting:

13 As stated at our meeting, Brockton Housing Authority will use all the
14 information at its disposal to evaluate candidates for promotion, including
15 but not limited to any and all certifications, licenses, degrees, attendance
16 records, disciplinary records, promotional testing and interview process.

17 A plain reading of this provision shows that when evaluating applicants for promotion, the
18 Housing Authority could consider any and all certifications that the applicants possessed,
19 including the CAMT.

20 Also, Barris argues that because the job description for the assistant working
21 foremen does not list the holding of a CAMT as a qualification for the position, the Housing
22 Authority impermissibly considered whether or not Barris' held that certification when
23 evaluating the applicants for promotion. However, as the November 2018 posting for the
24 assistant working foreman indicated, the qualifications that are listed in the job description
25 are the minimum qualifications for the position, which Barris and the other five internal
26 applicants satisfied and thus, were granted interviews. As discussed above, the

1 September 21, 2015 letter, which was the result of discussions with the bargaining
2 representative SEIU and which SEIU subsequently did not challenge, permitted the
3 Housing Authority to use the CAMT as well as other factors to distinguish between the
4 applicants once they met the minimum qualifications.

5 Furthermore, Barris posits that the Housing Authority attempted to conceal its
6 animus towards Barris' concerted, protected activities because the interview panelists
7 inexplicably failed to discuss Barris' activities as Union steward when evaluating the
8 applicants in January 2019 and May 2019. Barris contends that the interview panelists
9 should have considered and favorably discussed Barris' experiences as a Union steward
10 because those experiences would have helped him perform any labor relations duties or
11 deal with any labor relations issues while working as an assistant working foreman. The
12 flaw in Barris' argument is that the record contains no evidence showing that the assistant
13 working foreman had any labor relations duties or was even expected to routinely deal
14 with labor relations issues. Further, the record contains no evidence showing that during
15 the two interviews, Barris cited his experiences as a Union steward as a reason why he
16 should be promoted. In the absence of that evidence, I decline to find the panelists' failure
17 to discuss Barris' experiences as Union steward while evaluating the applicants supports
18 Barris' concealment claim.

19 Timing

20 Here, Barris acted as a Union steward until 2017, which included being a member
21 of the Union's bargaining team for negotiations for the 2017-2019 CBA. Further, as
22 steward, he met with management about unit members' concerns about the CAMT in
23 2015. The Employer posted the first vacancy for the assistant maintenance foreman in

1 November 2018, approximately eighteen months after Barris ceased being a steward. In
2 August 2018, Barris did not apply for the working foreman vacancy because he was out
3 sick and unaware of the posting. Therefore, the November 2018 posting was the first
4 time that Barris had applied for a promotion since expressing concerns about the CAMT
5 in 2015 as well as continuing to perform his other activities as steward, and was the first
6 time that the Housing Authority had the opportunity to retaliate against Barris by denying
7 him a promotion.

8 However, timing alone is insufficient to find unlawful employer motivation. See City
9 of Holyoke, 35 MLC 153, 157, MUP-05-4503 (January 9, 2009). As was discussed above,
10 I have discounted Barris' claims that the Housing Authority had insubstantial reasons for
11 bypassing him for promotion in February and May 2019. Further, there is no evidence
12 showing that the Housing Authority deviated from longstanding past practice in the
13 promotional procedures that it used to select Gately and DeMulis. Rather, the Housing
14 Authority adhered to the negotiated promotional procedure as described in Article 15 of
15 the 2017-2019 CBA. Finally, the record contains no evidence that the Housing Authority
16 provided shifting or inconsistent reasons as to why it had bypassed Barris for promotion.
17 Therefore, Barris has failed to establish any circumstantial evidence coupled with timing
18 that would allow me to reasonably conclude that the Housing Authority's decision not to
19 promote Barris in February and May 2019 was motivated by animus. Compare Town of
20 Carver, 35 MLC 29, 48-49, MUP-03-3894 (June 30, 2008) (drawing reasonable inference
21 of animus based on timing and deviation from past practice as well as certain other
22 factors). Thus, Barris has failed to establish the fourth element of his prima facie case.

1 Moreover, even assuming that I were to infer animus, as discussed below, Barris
2 has failed to establish that “but for” his protected activity the Housing Authority would have
3 promoted him to assistant working foreman in February and May 2019.

4 Employer’s Burden of Production

5 Under the three-part Trustees of Forbes Library analysis, once a charging party
6 establishes a prima facie case of retaliation, it is the employer’s burden to produce a
7 legitimate, non-discriminatory motive for taking the adverse action. The employer’s
8 burden to produce legitimate, non-discriminatory reasons for taking the adverse action is
9 more than simply stating an unsubstantiated allegation. Commonwealth of
10 Massachusetts, 25 MLC 44, 46, SUP-4128 (August 24, 1998). The employer must state
11 a lawful reason for its decision and produce supporting facts indicating that the lawful
12 reason was actually a motive in the decision. Trustees of Forbes Library, 384 Mass. at
13 566; Quincy School Committee, 27 MLC at 92; Commonwealth of Massachusetts, 25
14 MLC at 46. I turn now to consider whether the Housing Authority satisfied its burden of
15 production even assuming that Barris had established his prima facie case.

16 February 2019 Bypass

17 The Housing Authority selected Gately for the first assistant working foreman
18 vacancy in February 2019. The Housing Authority cited test results, his interview, and
19 his qualifications as the reason for the selection. Gately had worked for the Housing
20 Authority for nearly 20 years, held a CAMT, and had obtained a 95, the highest score on
21 the promotional exam. However, the issue before me is not just why the Housing
22 Authority had selected Gately, but also why it bypassed Barris and did it do so for
23 legitimate reasons. Although Barris had ten and one-half years more seniority than

1 Gately, Barris was the lowest scorer on the promotional exam with a 60. Further, Barris
2 admittedly described himself as not having done too well in the interview, which Plouffe
3 and Thibeault confirmed at hearing. Barris was unable to answer certain questions during
4 the interview, including being unable to provide an example of how he demonstrated
5 leadership while working for the Housing Authority.

6 May 2019 Bypass

7 The Housing Authority selected DeMulis for the second assistant working foreman
8 vacancy in May 2019. As the reasons for DeMulis' selection, the Housing Authority cited
9 DeMulis' possession of a hoisting license and a CAMT and his work in charge of the
10 vacancy crew, which needed to quickly turn over vacant apartments for new tenants, as
11 the reasons for his selection. Also, DeMulis had worked for the Housing Authority for
12 seventeen years, although he had thirteen years less seniority than Barris. However,
13 DeMulis had obtained a score of 80 on the promotional examination and was able to
14 satisfactorily answer the questions during the interview. When DeChristopher denied
15 Barris' grievance protesting the bypass at Step 1 of the grievance procedure,
16 DeChristopher noted, in part, that during the interview that there were simple questions
17 that Barris could not answer, a statement that DeChristopher reiterated at hearing.
18 Furthermore, DeChristopher, who previously had been one of Barris' supervisors on the
19 twenty-four on call service, noted that Barris had difficulty with heating repairs. Plouffe
20 also contended that Barris' performance in the May 27, 2019 interview was even worse
21 than the January 2019 interview with long awkward pauses.

22 Adverse Inference

1 However, Barris seeks to have me draw an adverse inference from the Housing
2 Authority's failure to call Gately or DeMulis as witnesses. Specifically, Barris asserts that
3 I should draw an adverse inference that the Housing Authority's stated reasons for Barris'
4 two promotional bypasses were pretextual and thus, not legitimate reasons.

5 In Bellingham Teachers Association, 9 MLC 1536, MUPL-2336 (December 30,
6 1982), the CERB considered the so-called "adverse inference rule," which Bellingham
7 described as:

8 When a party has relevant evidence within his control which he fails to
9 produce that failure gives rise to an inference that the evidence is
10 unfavorable to him. 9 MLC at 1548.

11 However, the application of the adverse inference rule is a matter of discretion for the
12 factfinder. See Quincy School Committee, 27 MLC at 91. As Barris correctly noted,
13 Gately and DeMulis are within the control of the Housing Authority as its employees.
14 However, in Massachusetts Board of Higher Education, University of Massachusetts
15 Medical Center, 14 MLC 1397, SUP-2901 (December 21, 1987), the CERB distinguished
16 between cases, such as Bellingham, where a party failed to produce a witness with
17 evidence crucial to establishing a vital element of its case, and those cases where a party
18 does not produce a corroborating witness. 14 MLC at 1399. The CERB stated that the
19 failure to produce a corroborating witness was a matter of litigation strategy and that the
20 adverse inference rule was less applicable. Id. at 1399, 1400. Here, the testimony of
21 Gately and DeMulis would only be corroborative to the testimony of Thibeault, Plouffe
22 and DeChristopher. Gately and DeMulis could testify about their own qualifications and
23 their own interviews. However, they would have no first-hand knowledge about the other
24 candidates' interviews, including Barris' interviews, or the interview panelists'

1 deliberations or reasons for their selections. Also, contrary to Barris' claims, they might
2 not even have first-hand knowledge of his qualifications, or their knowledge might be
3 subjective. Thus, I decline to draw an adverse inference from the Housing Authority's
4 failure to call Gately or DeMulis as witnesses.

5 Here, the Housing Authority has met its burden of production because it presented
6 reasons why it bypassed Barris for the two assistant maintenance foreman vacancies and
7 selected Gately and DeMulis for the promotions and the facts to support those reasons.

8 "But For" Analysis

9 Once an employer produces evidence of a legitimate, non-discriminatory reason
10 for taking the adverse action, the case becomes one of "mixed motives." Under the
11 Trustees of Forbes Library analysis, the CERB considers whether the employer would
12 have taken the adverse action but for the employee's protected activities. Suffolk County
13 Sheriff's Department, 27 MLC at 160; Quincy School Committee, 27 MLC at 92. The
14 charging party bears the burden of providing that, but for the protected activity, the
15 employer would not have taken the adverse action. Athol-Royalston Regional School
16 Committee, 28 M:LC 204, 214, MUP-2279 (January 14, 2002); Town of Athol, 25 MLC
17 208, 211, MUP-1448 (June 11, 1999). Although Barris made the broad assertion that he
18 was just as qualified as Gately but had more seniority and that he was more qualified and
19 more senior than DeMulis, Barris has not provided sufficient facts to show that the
20 Housing Authority would not have bypassed him for promotion in February and May 2019i
21 if he had not engaged in concerted, protected activity. Upon review of the facts before
22 me, Barris has failed to establish by a preponderance of the evidence that the Housing
23 Authority would have selected him for promotion to the assistant maintenance foreman

1 position in February or May 2019 but for his concerted, protected activity. See
2 Southbridge School Committee, 41 MLC 119, 201, MUP-06-4762, MUP-07-5010
3 (January 30, 2015); Bristol County Sheriff's Dep't, 26 MLC 105, 109, MUP-2100 (January
4 28, 2000).

5 CONCLUSION

6 Based on the record and for the reasons stated above, I conclude that the Housing
7 Authority did not retaliate against Barris for engaging in concerted, protected activity in
8 violation of Section 10(a)(3) of the Law when it bypassed him for promotion in February
9 and May 2019.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MARGARET M. SULLIVAN
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 be final and binding on the parties.