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

In the Matter of: ANDOVER SCHOOL COMMITTEE and ANDOVER EDUCATION ASSOCIATION	Case Number: MUP-19-7730 MUP-19-7736 Date Issued: August 16, 2022

CERB Members Participating:

Marjorie F. Wittner, Chair
Kelly Strong, CERB Member

Appearances:

Robert D. Hillman, Esq. - Representing the Andover School Committee
Jennifer F. King, Esq.

Jocelyn B. Jones, Esq. - Representing the Andover Education Association
Jasper Groner, Esq.

CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISION

SUMMARY

The Andover Education Association (Union) appeals from one aspect of a Department of Labor Relations (DLR) Hearing Officer's decision. The Hearing Officer held that the Andover School Committee (School Committee or Employer) did not violate Section 10(a)(1) of M.G. L. c. 150E (the Law) when, during the School Committee's investigation into an anonymous hostile work environment complaint, the investigator

instructed employees not to discuss what they had talked about during the investigation with anyone in the Andover School District (District) other than their Union representative.

For the following reasons, we hold that this was an overly-broad directive that could chill reasonable employees from engaging in protected, concerted, activity. We reverse.

Background

The Union represents a bargaining unit of teachers employed by the School Committee. The confidentiality directives at issue in this appeal were given at the beginning of interviews that Wendy Chu (Chu), an attorney with the law firm that represents the School Committee in labor-related matters, including in this proceeding, conducted from December 2019 – February 2020 with over forty employees who worked at the South Elementary School (South School).

Before addressing the legal issues arising out of these instructions, we provide some contextual background. As described in detail in the Hearing Officer's decision, in November 2019,[1] the month immediately preceding the onset of the investigation, several events occurred that formed the basis of the prohibited practices at issue in these consolidated matters.[2] On November 4, 2019, South School Principal Tracy Crowley (Crowley) held a staff meeting that included a quiz game called "Kahoot." During the game, participating bargaining unit members answered multiple choice questions about

[1] All dates are in 2019, unless otherwise indicated.

[2] On December 6, 2019, the Union filed a prohibited practice charge, which the DLR docketed as Case No. MUP-19-7730. This charge alleged that the School Committee violated Sections 10(a)(2) (subsequently changed to 10(a)(3)) and 10(a)(1) of the Law by events that occurred on November 13, 14 and 15, as described below. On December 10, 2019, the Union filed the prohibited practice charge docketed as Case No. MUP-19-7736, which alleged that the investigation and interview questions at issue here violated Section 10(a)(1) of the Law.

their co-workers' personal lives, such as their spending habits, hobbies, etc. Two days later, on November 6, 2019, the Union held a meeting at the South School to discuss Union business and their reaction to the quiz game. Several members expressed displeasure with the game at the meeting, indicating that it made them feel uncomfortable and embarrassed. At around 8:50 a.m., five minutes after the contractual school starting time of 8:45 a.m., Assistant Superintendent Sandra Trach opened the door to the meeting and told bargaining unit members that it was time to start the day.

On November 12, two bargaining unit members gave Crowley a "heads up" that some bargaining unit members had been offended by the game. One of the bargaining unit members who had assisted Crowley in creating the game, told Crowley that she had tried to explain to staff that the game was in good fun. Afterwards, Crowley approached two Union building representatives, Lydia Wise (Wise) and Rene Theodorou (Theodorou),[3] to say that she was sorry if she had offended anyone by playing Kahoot and that she felt terrible about it. Both Wise and Theodorou said in response, "Don't worry about it, we all make mistakes."

On November 13, Crowley held a staff meeting during which she stated that she knew that people were talking about her, and that this upset and hurt her.[4] In response

[3] Theodorou also serves as Grievance Chair and second Vice President of the Association.

[4] Count I of the Complaint alleged that during this meeting, Crowley stated that: "things that are said at the Union's meetings do not stay in the Union meetings;" that she hears "everything;" and she knew that Special Education Teacher Ellen Zrike (Zrike) had said negative things about her at the November union meeting. Although the Hearing Officer found that Crowley stated she knew that people were talking about her and that this hurt and upset her, the Hearing Officer did not find that the cumulative evidence supported the remainder of the statements attributed to Crowley in this part of the Complaint.

to this statement, Wise responded, "we weren't talking about you for very long." Crowley also stated that she knew that there was a "divide" in the staff. Crowley stated that she did not want to take sides but wanted to build a culture of collaboration.

The following day, November 14, Crowley held a meeting between Building Representative Lise Singer (Singer) and Theodorou during which Crowley repeated that she believed the building was divided.[5] Theodorou disagreed, but Singer stated that she that she felt uncomfortable and threatened at times and believed staff were talking about her.[6] Singer had, at other times, told Crowley that she felt that there was a "division within our Union that was spilling into the school" and that there were times when she felt uncomfortable if she did not agree with the "direction" the Union wanted to take.[7]

On the next day, November 15, Crowley held a meeting with Zrike. Crowley told Zrike that she knew that Zrike had said "unkind" things about her at the November 6th Union meeting. Zrike denied making any negative statements. Two weeks earlier, Crowley had issued Zrike a written letter of reprimand for her conduct at a Special Education team meeting. At a meeting on November 21, however, Zrike received compliments regarding her work. Afterwards, Crowley told Zrike that she would remove the letter of reprimand from Zrike's personnel file and rip it up.

[5] Crowley held monthly meetings with the Building representatives in which they would discuss concerns that teachers and staff had brought to them via an anonymous drop box.

[6] Singer was one of the School Committee's witnesses.

[7] Singer did not clarify what she meant by the word "direction."

On Friday, November 22, Union president Matthew Bach (Bach) sent Crowley a letter requesting, among other things, that she cease and desist from "engaging in unlawful actions that have the effect of intimidating" bargaining unit members," or "any similar unlawful conduct that could have the effect of interfering with and coercing members from exercising their lawfully protected union rights."[8]

After receiving Bach's letter, Crowley contacted School Superintendent Sheldon Berman (Berman). According to Crowley,[9] Berman told her that she could not rip up Zrike's letter of reprimand or remove it from Zrike's personnel file. The following Monday, which was November 25,[10] Crowley approached Zrike in the hallway and told Zrike that she "had to go by the contract" and that she would be "sending the letter," i.e., that Crowley would be placing the letter of reprimand in Zrike's personnel file. Crowley had previously removed letters of reprimand from employees' files at the end of the school year.

Also on November 25, Crowley responded to Bach with a one-page letter in which she denied inquiring about or monitoring Union meetings. In the letter, Crowley stated

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[8] Bach's letter listed the following alleged unlawful actions:

- Indicating to AEA members that you know what is discussed at AEA union meetings;
- Expressing dissatisfaction with what is discussed at AEA union meetings to groups of teachers;
- Indicating to individuals that you know what they have said at union meetings; and
- Discussing dissatisfaction with the AEA to individual teachers.

[9] Berman did not testify.

[10] The Hearing Officer found that Crowley spoke with Berman on Friday November 22 and told Zrike that she could not remove the letter from her file on the following Monday, which would have been November 25.

that she had been approached by a number of teachers who were upset by the conduct at the Union meeting[11] and that she had brought those complaints to Union building representatives. Crowley denied expressing any position on the Union's statements or conduct during this meeting. Crowley concluded the letter by noting that the Union meeting had ended at 8:50 a.m. or later, which was at least "15 minutes or more after the start of the contractual work day" and asked the Union to "cease and desist from holding meetings . . .at times when [Union] members are required to be working."

Two other events occurred on November 25. First, the Union held a meeting at the South School library in which it distributed a "school climate survey" that certain bargaining unit members had prepared.[12] Crowley knew about this meeting and notified Berman about it. Berman told Crowley to go to the classroom at 8:30 a.m. to make sure that teachers were in their classrooms on time, which Crowley did.[13]

Second, the District received an anonymous letter (Complaint letter) from three employees.[14] The Complaint letter alleged that six bargaining unit members, including

[11] The letter does not state the date of the Union meeting, but because it described the meeting as not ending until 8:50 a.m., Crowley was most likely referring to the November 6 Union meeting that Trach interrupted to tell bargaining unit members to get back to work.

[12] Wise testified that the purpose of the survey was to poll teachers about how they felt about the South School.

[13] The Complaint alleged that Crowley engaged in unlawful surveillance when she interrupted this Union meeting. The Hearing Officer dismissed this allegation. The Union did not appeal.

[14] The Complaint letter was not admitted into evidence and its authors remained anonymous throughout these proceedings.

Theodorou, Wise and Zrike,[15] would meet before the start of school, during lunch times or during common planning times, and engage in discussions in which they called people nicknames and made derogatory statements towards students, staff members and administrators. The Complaint letter also alleged that the goal of this group was to remove Crowley as principal.

Berman subsequently met with the three employees who sent the Complaint letter. At a staff meeting on December 5, 2019, Berman informed employees about the letter and that he had hired Chu to investigate the allegations contained therein. Chu decided to interview approximately 40 South School employees, including employees who may have witnessed the alleged behavior (witnesses) as well as the six employees named in the Complaint letter (subject employees).

Berman sent letters to the identified witnesses thanking them for "cooperating with the investigation into allegations that there is a hostile work environment and inappropriate conduct during the contractual workday at South Elementary School." The letter provided the time and date for their meeting with Chu, and stated in bold that they were "**directed to attend the meeting**." The letter also notified recipients that they did not have a right to bring a Union representative to the interview because they were only a witness and not subject to discipline. The letter finally indicated that Berman would be directing the subject employees not to retaliate against anyone who had reported their conduct or cooperated in the investigation.

[15] All of the bargaining unit members named in the Complaint letter were Union witnesses at the hearing.

The letters to the six subject employees notified them that they were the subject of the investigation and that they would have an opportunity to provide information regarding the reported misconduct in a "fact-finding meeting" to be conducted by Chu. The letter further indicated that because the meeting could result in discipline, they could bring their Union representative or their own legal counsel to the meeting. The letter finally directed the subject employees not to retaliate against anyone who reported the conduct or who cooperated in the investigation.

Chu began meeting with employees shortly thereafter. The interviews took place over a two-month period from December 2019 to February 2020. She first interviewed the witnesses. She instructed them that they could not discuss what was talked about during the interview after they left. More specifically, Chu testified that she "instructed the individuals that I spoke with not to discuss what we talked about, generally with people in the District and with people in the school other than perhaps with their Union representatives if they had concerns."

Chu testified that she generally gives such an instruction when she is conducting a workplace investigation and that she specifically gave it in this case because:

> [C]onfidentiality is an integral part of any investigation and I wanted to maintain the integrity of that investigation as much as I could. And I didn't want witnesses to talk with one another about what we talked about because I wanted - - - I didn't want them, you know collaborating with one another before they came in and spoke with me.

Chu did not indicate whether her directive remained in force after the investigation was concluded.

As to the substance of the interviews, Chu's strategy was to first ask the witnesses open-ended questions such as whether they had witnessed behavior from the subject

employees that had caused them to "cringe" and then to follow-up with more specific questions. Chu also questioned employees about statements that the subject employees had made about the principal and/or assistant principal of the South Elementary School.[16] Chu testified that she asked these questions because the Complaint letter alleged that the six bargaining unit members had ridiculed and made derogatory statements towards staff members, including administrators, and that "the agenda of the group was to get rid of Tracy Crowley."[17]

During the interview, some witnesses told Chu that they had heard the subject employees refer to staff members, including Crowley and Caron, by specific, very derogatory nicknames.[18] These responses became the basis of some of Chu's questions to subject employees, such as "have you ever made fun of staff members or mocked them," and "have you ever called someone a midget?"

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[16] Although the Hearing Officer found that Chu asked these questions about Crowley and Assistant Principal Kathy Caron (Caron), in the Opinion section of the decision, the Hearing Officer also stated that "Contrary to the allegations of the Complaint, there is no evidence in the record to indicate that Chu asked bargaining unit members whether they had heard others speak negatively about the administration." As described above, however, Chu testified that because the Complaint letter alleged that the subject employees had used ridicule, mockery and nicknames towards staff, *including administrators* and because the letter also stated that the group's agenda was to get rid of Tracy Crowley, her questions included statements made about the principal or assistant principal of South School. The Union claims that the Hearing Officer ignored this evidence when considering whether Chu's directives not to discuss the investigation impacted Section 2 rights. We agree with the Union that Chu asked bargaining unit members about statements that they made about administrators and address the weight that we give to this fact below.

[17] Chu testified that while she focused on personal comments, a lot of times employees offered their opinion of Crowley.

[18] The nicknames included "dumb and dumber," "angry midget," and two vulgar epithets.

Chu concluded her investigation in February 2020. She subsequently issued a report in which she substantiated some, but not all of the allegations that the subject bargaining unit members had engaged in name-calling, bullying and derogatory and unflattering nicknames.[19] As a result, Berman issued letters of reprimand to all six subject employees and transferred three of them to positions at different schools.[20]

Opinion

An employer violates Section 10(a)(1) of the Law when it engages in conduct that may reasonably be said to interfere with, restrain or coerce employees in the exercise of their rights under the Law. Quincy School Committee, 27 MLC 83, 91, MUP-1986 (December 29, 2000) (additional citations omitted). The focus of a Section 10(a)(1) analysis is the effect of the employer's conduct on reasonable employees' exercise of their Section 2 rights. Town of Winchester, 19 MLC 1591, 1596, MUP-7514 (December 22, 1992). Proof of illegal employer motivation is not required to establish a Section 10(a)(1) violation. Town of Chelmsford, 8 MLC 1913, 1916, MUP-4620 (March 12, 1982) *aff'd sub nom*. Town of Chelmsford v. Labor Relations Commission, 15 Mass App. Ct. 1107 (1983). It also does not matter whether the coercion succeeded or failed. Groton-Dunstable Regional School Committee, 15 MLC 1551, 1556, MUP-6748 (March 20, 1989).

Here, the Hearing Officer held that the Union had proven two of the Complaint's Section 10(a)(1) allegations. First, the School Committee independently violated Section

[19] Chu testified that she did not think that she substantiated the allegation that Wise had called a student "a mess."

[20] As referenced at hearing, the transfers and reprimands are the subject of a different prohibited practice charge pending before the DLR.

10(a)(1) of the Law on November 13 when Crowley told employees at a staff meeting that she knew that people were talking about her, and that she was upset and hurt by those statements. The Hearing Officer also concluded that the School Committee violated the Law on November 15, when Crowley told Zrike that she knew that Zrike had been saying unkind things about her.

As to the November 13 violation, the Hearing Officer found, based on the totality of the circumstances, that a reasonable employee would conclude that Crowley's November 13 statements referenced the November 6 Union meeting and thus, a reasonable person would also conclude that their protected activities had been placed under surveillance. Characterizing Crowley's statement that she was "upset and hurt" by what was being said about her at Union meetings as expressions of "disappointment" and "displeasure," the Hearing Officer found that such statements would cause a reasonable person to fear that if they were to discuss "workplace concerns caused by Crowley's conduct," they too would be subject to public criticism at staff meetings. The Hearing Officer thus concluded that Crowley's November 13 statements interfered with, coerced, and restrained employees in the exercise of their Section 2 rights.

The Hearing Officer similarly concluded that when Crowley told Zrike that she knew that Zrike had been saying unkind things about her, Crowley created an unlawful impression of surveillance of the November 6 Union meeting. The Hearing Officer further found that these statements implicitly criticized Zrike for discussing Crowley at Union meetings, thereby violating Section 10(a)(1) of the Law. See, e.g., Groton-Dunstable Regional School Committee, 15 MLC at 1556-1557 (expressions of anger, criticism or

ridicule directed at protected activities interfered with, restrained or coerced employees in the exercise of their Section 2 rights).[21]

The Hearing Officer dismissed the remaining Section 10(a)(1) counts in the Complaint, including, as pertinent to this appeal, Counts III and IV. Count IV alleged that the School Committee engaged in unlawful interrogation during the investigation of the Complaint letter when, among other things, Chu asked bargaining unit members whether they had heard the six subject employees "speak negatively about the administration or other staff members" and asked them to disclose information about protected Union activity. The Hearing Officer dismissed this count, finding that Chu's questioning was conducted in a noncoercive manner and was directed at substantiating the allegations that the six bargaining unit members had engaged in name-calling, bullying and similar misconduct.

The Union did not appeal from Count IV's dismissal, but challenges certain aspects of the findings that led the Hearing Officer to reach this conclusion, most notably the conclusion that Chu's investigation was not directed towards conduct protected by Section 2 of the Law. The Hearing Officer based this conclusion on several findings,

[21] The Hearing Officer also concluded that the School Committee violated Section 10(a)(3) of the Law when Crowley reversed her decision to remove the reprimand from Zrike's personnel file just days after Bach sent the letter asking her to cease and desist from engaging in numerous actions, including indicating to individuals that "you know what they have said at union meetings." The Hearing Officer found that Crowley knew that the letter was referring to the conversation she had held with Zrike about the November 6 union meetings, and that the timing of the letter, coupled with Crowley's deviation from past practice of rescinding discipline, established a prima facie case of unlawful retaliation. Because the School Committee never rebutted the prima facie case by explaining why Berman told Crowley that it could not remove the warning, the Hearing Officer concluded that the Union had established that the decision not to remove the discipline, as previously promised, was motivated by a desire to retaliate against Zrike for engaging in protected, concerted activity.

including that there was no evidence in the record to indicate that Chu had ever asked bargaining unit members whether they had heard others speak negatively about the administration, or their opinion on the school climate. The Hearing Officer further found that, although the Complaint letter indicated that the agenda of the group was to remove Crowley as principal, the Union had presented no evidence that this was in fact their agenda, and Chu did not ask any questions or solicit information from bargaining unit members about this issue.

As the Union points out, and as noted above, however, Chu testified that she questioned employees about statements made about the principal or assistant principal of South School. She further testified that she asked these questions because the Complaint letter alleged that the subject employees had used ridicule, mockery and nicknames towards staff, including administrators, and that the group's agenda was to get rid of Crowley. Thus, contrary to the Hearing Officer's findings, at least part of Chu's questioning was aimed at substantiating this aspect of the Complaint letter. Furthermore, because the evidence shows that bargaining unit members discussed Crowley at the November 6 meeting and expressed displeasure with her actions, including possibly saying "unkind" words, bargaining unit members responding to a question regarding statements made about Crowley would very likely require them to disclose what had gone on at the November 6 Union meeting.

It is in this context that we review the Union's appeal of Count III of the Complaint. That count alleged that Chu's instructions not to discuss the contents of the interview with anyone but their Union representatives prevented them from discussing any matters under investigation and engaging in mutual aid and protection in violation of Section

10(a)(1) of the Law. The Hearing Officer dismissed this allegation. For the reasons discussed below, we reverse.

We first address the issue of what legal standard to apply when analyzing the lawfulness of orders given to employees to maintain the confidentiality of investigations. Although the CERB has not established a formal standard to assess the lawfulness of such instructions,[22] it is well-established that an employer's rule that conflicts with employees' Section 2 rights must be supported by a legitimate and substantial business justification. Salem School Committee, 35 MLC 199, 214, MUP-04-4008 (April 14, 2009); City of Haverhill, 8 MLC 1690, 1695, MUP-4204 (December 16, 1981). If the employer meets that burden, any diminution of employee rights occasioned by application of the employer's rule must be balanced against the employer's interest in the rule. Salem

[22] As the Hearing Officer and the parties on appeal point out, the CERB addressed a similar instruction in City of Somerville, 47 MLC 59, MUP-17-5980 (October 2, 2020). In that decision, the employer conducted an investigation into a discussion in which the union president allegedly told the union vice president not to participate in a training that was the subject of a pending grievance. Despite this conversation, the training went forward without disruption. Under those circumstances, the CERB held that the employer's stated interests in preventing a potential disruption to public safety, which had not occurred, did not outweigh the employees' interests in discussing internal union matters. The CERB therefore held that, on balance, the investigation unlawfully interfered with employees' right to engage in protected discussion and that the employer's further efforts to restrict those discussions by telling employees not to discuss the investigation with anyone but their union representative or legal counsel had a similarly chilling effect. In dicta, however, CERB agreed with the Hearing Officer that there are circumstances when an employer can restrict communications about an internal investigation to protect the integrity of the investigation. As an example, the CERB stated that, "if the investigation has a legitimate purpose that did not interfere with Section 2 rights, telling those suspected of wrongdoing or witnesses not to discuss those aspects of the investigation with anyone except their union representatives and legal counsel could be a reasonable step to protect the integrity of the investigation by, among other things, ensuring that there was no collaboration between witnesses." Id. at 62, n.9.This case provides an opportunity for the CERB to provide concrete guidance on this issue.

School Committee, 35 MLC at 214. Such inquiry must be conducted on a case-by case basis. City of Haverhill, 8 MLC at 1695-1696. If the CERB determines that the employees' interests outweigh the employer's, it will find that the rule chills employees in the exercise of their rights under Section 2 of the Law, in violation of Section 10(a)(1) of the Law. Id.

The Hearing Officer referenced and applied this balancing test. She concluded that the School Committee's interests in keeping the investigation confidential and avoiding collaboration between witnesses outweighed employees' rights to discuss what she characterized as "information they learned or provided in the course of the investigation with other employees." In so holding, however, the Hearing Officer also referenced and appeared to adopt the standard for evaluating confidentiality instructions set forth in Apogee Retail, LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (2019) on grounds that it was consistent with the CERB's ruling in City of Somerville, supra. The Hearing Officer expressly declined adopt the standard set forth in Banner Health Systems d/b/a Banner Health Systems d/b/a Banner Estrella Medical Center, 362 NLRB 1108, 1109 (2015), which Apogee Retail overruled, and which the Union had urged her to adopt instead. [23]

[23] In Banner Estrella, the NLRB set forth a balancing test similar to the one that the CERB applies, but additionally presumed that all investigatory confidentiality requirements were unlawful unless employers could demonstrate the necessity of a confidentiality order under the particular circumstances of the case. In Apogee Retail, the NLRB overturned Banner Estrella, stating that blanket investigative confidentiality rules contained in the employer's loss prevention policy or reporting illegal or unethical behavior policy were categorically lawful to the extent that they applied to open investigations. If the order extended beyond the closing of an investigation, the NLRB held that a balancing test must be utilized on a case-by-case basis. For the reasons stated below, the CERB declines to adopt either standard. Instead, it will continue to apply a balancing test to analyze the lawfulness of all confidentiality orders related to investigations on a case-by-case basis.

Although the CERB often looks to National Labor Relations Board (NLRB) precedent for guidance, particularly in cases of first impression, it is by no means required to do so. Rather, that determination lies within the CERB's discretion and is a function of whether the CERB believes there is a need to look beyond Chapter 150E precedent for guidance, and if so, whether the CERB finds the guidance helpful or persuasive. See, e.g., Office and Professional Employees International Union, Local 6, AFL-CIO v. Commonwealth Employment Relations Board, 96 Mass. App. Ct. 764 (2019) (CERB did not abuse discretion when it rejected union's request to abandon its longstanding, judicially-approved precedent and adopt current NLRB precedent instead). Here, because the balancing test set forth in Salem School Committee and Haverhill provides a well-established framework to address the issue before us, we decline to adopt either the Apogee Retail or Banner Estrella standard. Instead, in line with our well-established balancing test, we address the particulars of this case below.

We first examine whether Chu's instruction to "not discuss what [Chu and the interviewed employee] talked about" with anyone other than their Union representative interfered with the employees' Section 2 rights. We hold that it did on several levels. First, as described above, at least some of Chu's questions were directed at whether employees had made negative statements about Crowley and other administrators. Because the evidence shows that some bargaining unit members had criticized Crowley at the November 6 Union meeting, blanketly prohibiting interviewees from talking about what was discussed during the interview, could be reasonably viewed by employees as a prohibition against discussing the November 6th meeting.

Moreover, the instructions cannot be viewed in a vacuum. At least some of the allegations in the Complaint letter pertained to employees' allegedly derogatory remarks about Crowley. The Hearing Officer found, however, that Crowley's statements that she knew that employees were talking about her and that this upset her, had a chilling effect on employees' protected, concerted activities by making employees fear that there could be consequences if they were to talk about workplace concerns caused by Crowley's actions. Under these circumstances, employees could similarly construe a broad instruction from an attorney with the firm that represented the School Committee in labor matters not to disclose what was discussed during the investigation as prohibiting employees from discussing their opinion of the administration with one another, even if done in the context of addressing workplace concerns caused by the administrator's conduct. See City of Lawrence, 15 MLC 1162, 1166, MUP-6086 (September 13, 1988) (employee criticism of or "disgruntlement" of administrators protected if tied to workplace concerns).

Further, as the Union points out, even if the investigation did not specifically pertain to Section 2 activity, the investigation and the potential discipline resulting from it are themselves terms and conditions of employment that employees have a right to discuss due to the obvious impact such matters have on terms and conditions of employment, especially continued employment. See, e.g., City of Somerville, 47 MLC at 60 (discussions between a union president and vice president about an issue that was the subject of a bargaining demand and a possible grievance constitutes concerted activity); Cf. City of Newton, 46 MLC 20, MUP-16-5532 (August 20, 2019) *aff'd sub nom.* City of Newton v. Commonwealth Employment Relations Board, 100 Mass. App. Ct. 574 (2021)

(employer rule that affects terms of employee's continued employment is a term and condition of employment subject to mandatory bargaining). Here, given recent events that gave employees the impression of surveillance and chilled them from having protected discussions, a reasonable employee could easily construe the non-specific instruction not to discuss what was talked about during the investigation as a general prohibition against discussing the investigation itself.

Having determined that the instructions conflicted with the exercise of Section 2 activities, we turn to whether the instruction was supported by legitimate and substantial business justifications. The School Committee argued that its instructions were justified by a need to keep the investigation confidential and to avoid witnesses collaborating with each other. As we stated in City of Somerville, in general, an employer has a right to take reasonable steps to preserve the integrity of an investigation by, among other things, ensuring that there is no collaboration among witnesses. 47 MLC at 62, n. 9. Consistent with the principle underlying sequestering witnesses during hearings, instructing people not to discuss any information that they became aware of for the first time during the investigatory interview, and not to disclose the legitimate questions they were asked during an interview and their responses to those questions, prevents witnesses' statements from being molded by other witnesses' testimony and prevents improper attempts to influence another witness's testimony. This is especially true in "he said, she said" situations where an investigator may be required to choose one person's version of events over another's. This type of instruction also allows the fact-finder to assess the truthfulness of answers by comparing witnesses' responses.

As to the Employer's confidentiality concerns, given that the Complaint Letter expressed concerns about bullying, the School Committee had a legitimate concern about keeping the identities of those who wrote the letter or participated in the investigation confidential, to the extent such information was disclosed during the interview itself.[24] While such concerns about possible retaliation were addressed in Berman's correspondence to interviewees, the School Committee still had a legitimate reason to continue emphasizing this point at different stages of the investigation.

Balancing these concerns against employees' rights to discuss workplace concerns, including the investigation itself, we find that the instructions given to both witnesses and subject employees were not narrowly tailored to achieve their purposes. Rather, under the totality of the circumstances, a broad, and open-ended instruction to employees not to discuss what was talked about with anyone other than their Union representative exceeded the employer's legitimate concerns because it could cause a reasonable employee to believe that they could not discuss anything having to do with the investigation, including the investigation itself, union meetings and/or their opinion of the administration at all, even if done in the context of addressing other workplace concerns.

The School Committee could have avoided this outcome in a manner that balanced both parties' interests by providing clear, time-limited instructions to employees about

[24] Given that Berman openly announced the investigation at a staff meeting, and notified approximately half the staff that they would be interviewed, to the extent the School Committee argues that it had legitimate concerns about keeping the *fact* that it was conducting an investigation confidential, we give little weight to those concerns.

what they could and could not disclose to anyone other than their Union representative about the interview and the reasons for these restrictions. In this case, that could mean:

1) Reminding employees of the purpose of the investigation, i.e., to determine whether the subject employees had created a hostile work environment by making discriminatory, demeaning and derogatory statements about staff members and students.

2) Explaining the need to keep certain parts of the investigation confidential to ensure the accuracy of both witnesses' and subject employees' responses and avoid retaliation against witnesses or the authors of the Complaint letter.

3) Instructing employees not to disclose to anyone other than their Union representative:

   a) The specific questions posed during the interview;
   b) Their specific answers to the questions;
   c) Any information that they learned for the first time in the interview, e.g., who wrote the Complaint letter or overheard the alleged statements that led to the Complaint letter.[25]

4) Concluding the interview by stating that the restrictions were in place only for the duration of the investigation and were not intended to restrict employees from discussing working conditions with each other.

With these or similar safeguards, which must be determined on a case by case basis, the right of employees to engage in concerted, protected activity by discussing working conditions and concerns with co-workers under Section 2 of the Law, can be

[25] As we noted above, in City of Somerville, the CERB held that the employer's entire investigation into an internal union conversation was an unlawful interrogation, and thus, the employer's instruction to employees not to talk about the investigation was likewise unlawful. In this case, however, where the Hearing Officer held, and the Union did not appeal, that the Employer's investigation was not an unlawful interrogation, and where we have affirmed the Hearing Officer's conclusion that the Employer had expressed legitimate confidentiality concerns, instructing employees not to disclose the specific questions they were asked during the investigation and their specific responses thereto, would, on balance, be lawful, as long as such instructions are placed in their proper context, as suggested above. We note, however, that we might reach a different conclusion in cases such as Bristol County Sheriff's Office, 31 MLC 6, 15, 18, MUP-2872 (July 15, 2004) where some parts of an investigation were deemed lawful, but others were not.

reconciled with the right of an employer to conduct an investigation into potential employee misconduct in a manner aimed at ensuring that witnesses will share their independent recollections of events and not suffer retaliation.

Conclusion

For the foregoing reasons, we conclude that the confidentiality directives given to witnesses and subject employees were overly broad and, under the circumstances of this case, had the effect of interfering with, restraining and/or coercing employees in the exercise of their rights under Section 2 of the Law. We therefore overrule this aspect of the Hearing Officer's decision and modify the Order and Notice to Employees accordingly.

SO ORDERED.

ORDER

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the School Committee shall:

1. Cease and desist from:

   a) Interfering with, restraining or coercing employees in the exercise of their rights under the Law by making statements or engaging in any conduct that gives employees the impression that their union meetings are under surveillance;

   b) Interfering with, restraining or coercing bargaining unit members in the exercise of their rights under the Law by imposing overly broad restrictions upon employee communications;

   c) Retaliating against Ellen Zrike for engaging in concerted, protected activity;

   d) In the same or similar manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law.

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

   a) Refrain from interfering with, restraining or coercing employees in the exercise of their rights under Section 2 of the Law.

b) Refrain from discriminating against employees for engaging in concerted activity protected under Section 2 of the Law.

c) Remove the letter of reprimand dated November 4, 2019 from Ellen Zrike's personnel file.

d) Immediately post signed copies of the attached Notice to Employees in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the School Committee customarily communicates with these union members via email, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

e) Notify the DLR in writing of the steps taken to comply with this decision with ten (10) days of receipt of this decision. Should it be 30?

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F Wittner

_____
MARJORIE F. WITTNER, CHAIR

_____
KELLY STRONG, CERB MEMBER

APPEAL RIGHTS

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

NOTICE TO EMPLOYEES

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

On partial appeal of a Hearing Officer's decision in Case Nos. MUP-19-7730 and MUP-19-7736, the Commonwealth Employment Relations Board (CERB) has held that the School Committee violated Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law), by imposing overly broad restrictions upon employee communications. The Hearing Officer previously held that the School Committee violated Section 10(a)(1) and Section 10(a)(3) of the Law. The CERB therefore orders the School Committee to post this Notice to reflect the violations found by the Hearing Officer and the CERB.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

> to engage in self-organization to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their rights under the Law by making statements or engaging in any conduct that gives employees the impression that their union meetings are under surveillance;

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their rights under the Law by imposing overly broad restrictions upon employee communications;

WE WILL NOT retaliate against employees for engaging in concerted, protected activity;

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of their rights protected under the Law.

WE WILL take the following affirmative action that will effectuate the purpose of the Law:

- Refrain from interfering with, restraining or coercing employees in the exercise of their rights under Section 2 of the Law.
- Refrain from discriminating against employees for engaging in concerted activity protected under Section 2 of the Law.
- Immediately remove the letter of reprimand dated November 4, 2019 from Ellen Zrike's personnel file.

_____ _____

Andover School Committee Date

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Lafayette City Center, 2 Avenue de Lafayette, Boston, MA 02111 (Telephone: (617) 626-7132).