

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of: \*

ANDOVER SCHOOL COMMITTEE \*

and \*

ANDOVER EDUCATION ASSOCIATION \*

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Case Number: MUP-19-7730  
MUP-19-7736

Date Issued: September 27, 2021

Hearing Officer:

Sara Skibski Hiller, Esq.

Appearances:

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

Jocelyn Jones, Esq. - Representing the Andover Education Association

HEARING OFFICER'S DECISION

SUMMARY

1 The issues in this case are whether the Andover School Committee (School  
2 Committee) violated Section 10(a)(1) of Massachusetts General Law Chapter 150E (the  
3 Law) by: 1) creating an unlawful impression of surveillance and surveilling the Andover  
4 Education Association's (Association) meetings held on November 6, 2019 and  
5 November 25, 2019, and the Association's rally held on December 18, 2019; 2) prohibiting  
6 bargaining unit members from engaging in mutual aid and protection when it instructed  
7 employees during a workplace investigation not to discuss the content of interviews  
8 except with their Association representatives; and 3) interrogating bargaining unit  
9 members during a workplace investigation; and whether the School Committee violated

1 Section 10(a)(3), and derivatively Section 10(a)(1), of the Law by rescinding its decision  
2 to remove a letter of reprimand from a bargaining unit member's personnel file in  
3 retaliation for engaging in concerted, protected activity. I find that the School Committee  
4 independently violated Section 10(a)(1) of the Law when a Principal employed by the  
5 School Committee told bargaining unit members that she knew they were talking about  
6 her at their meeting and told a bargaining unit member that she knew the member had  
7 said negative things about her at a union meeting. Further, I find that the School  
8 Committee violated Section 10(a)(3), and derivatively Section 10(a)(1), of the Law when  
9 a Principal rescinded her decision to remove a written reprimand from a bargaining unit  
10 member's file in retaliation for engaging in concerted, protected activity. I dismiss all other  
11 allegations.

#### 12 STATEMENT OF THE CASE

13 On December 6, 2019, the Association filed a charge of prohibited practice with  
14 the Department of Labor Relations (DLR) alleging that the School Committee had violated  
15 Sections 10(a)(1) and 10(a)(2) of the Law. On December 10, 2019, the Association filed  
16 a second charge of prohibited practice alleging that the School Committee violated  
17 Section 10(a)(1) of the Law. On June 3, 2020, an Investigator issued a seven count  
18 Consolidated Complaint and Partial Dismissal (Complaint) alleging that the School  
19 Committee violated Section 10(a)(3) of the Law and derivatively and independently  
20 violated Section 10(a)(1) of the Law. On June 16, 2020, the School Committee filed its  
21 Answer to the Complaint. On November 10, 2020 and November 12, 2020, I conducted  
22 a hearing by videoconference during which the parties received a full opportunity to be

1 heard, to examine and cross-examine witnesses and to introduce evidence.<sup>1</sup> On January  
2 8, 2021, the parties filed post-hearing briefs. Based on my review of the record, I make  
3 the following findings of fact and render the following opinion.

4 STIPULATIONS OF FACT

- 5 1. Andover Education Association is an employee organization as defined in G.L. c.  
6 150E, § 1.  
7  
8 2. The Andover School Committee is an employer as defined in G.L. c. 150E, § 1.  
9  
10 3. The Union is the exclusive bargaining representative for a unit of educators  
11 employed by the District.  
12  
13 4. The DLR conducted an in-person investigation on January 23, 2020. A complaint  
14 of prohibited practice and a partial dismissal was subsequently issued on June 3,  
15 2020. The complaint dismissed three charges in which the Union alleged violations  
16 of Sections 10(a)(1), 10(a)(2) and 10(a)(3) of the Law.

17 FINDINGS OF FACT

18 The School Committee is the exclusive bargaining representative for the Andover  
19 School District (District). At all times relevant to the Complaint, Tracey Crowley (Crowley)  
20 was employed as Principal at the South Elementary School (South School) in the District.  
21 On November 4, 2019, Crowley held a staff meeting at the South School in which  
22 bargaining unit members participated in a quiz game called Kahoot (November 4<sup>th</sup> Staff  
23 Meeting). The game required bargaining unit members answer multiple choice questions  
24 about their coworkers on their computers. The results of the questions were then  
25 displayed to the room on a large screen. Some of the questions asked bargaining unit  
26 members to identify other staff members based personal details, such as their manner of  
27 dress, spending habits and the way they socialized outside of work. At some point during

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<sup>1</sup> I conducted the hearing remotely pursuant to Governor Baker's teleworking directive to executive branch employees.

1 the game, bargaining unit members began to slowly disengage by closing their computers  
2 until the staff meeting concluded. The following day, Crowley traveled out of state for a  
3 family matter and was absent from work from approximately November 5, 2019 to  
4 November 12, 2019.

5 On November 6, 2019, the Association held a meeting in a teacher's classroom in  
6 the South School at which bargaining unit members discussed union business as well as  
7 their opinions on the Kahoot game played at the November 4<sup>th</sup> Staff Meeting (November  
8 6<sup>th</sup> Association Meeting). Specifically, members talked about Crowley and expressed their  
9 displeasure with the game of Kahoot, sharing that it made them feel uncomfortable and  
10 embarrassed.<sup>2</sup> During the meeting at approximately 8:50 a.m., Assistant Superintendent  
11 Sandra Trach (Trach) noticed the door to the teacher's classroom was closed and  
12 observed students lining up in the hallway waiting to get into other classrooms.<sup>3</sup> At  
13 approximately 8:50 a.m., Trach opened the door to the classroom and told bargaining unit  
14 members meeting therein that students were present and it was time to get started.<sup>4</sup>  
15 Bargaining unit members left the meeting and went to their respective classrooms.  
16 Subsequently, Trach reported the incident to Superintendent Sheldon Berman (Berman)  
17 and to Crowley when she returned from leave.

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<sup>2</sup> Special Education teacher Ellen Zrike (Zrike) testified that she was present at the November 6<sup>th</sup> Association meeting but did not make any negative statements about Crowley during the meeting.

<sup>3</sup> Trach temporarily performed Crowley's duties as Principal in her absence.

<sup>4</sup> Article 7 of the Collective Bargaining Agreement between the School Committee and the Association, effective September 1, 2017 to August 31, 2020, states that the start of the school day for students at elementary schools in the District is 8:45 a.m.

1           On or about November 12, 2019, Crowley returned to the workplace. Upon her  
2 return, Crowley was approached by two bargaining unit members to discuss the game of  
3 Kahoot played at the November 4<sup>th</sup> Staff Meeting. One of the unit members, David  
4 Giribaldi (Giribaldi), came to Crowley's office and told her that he wanted to give her a  
5 "heads up" that people were offended by the Kahoot game. Crowley told Giribaldi that  
6 she felt terrible and that she wanted to apologize to the staff if they were offended. The  
7 other unit member, Connie Barber (Barber), who had assisted Crowley in creating the  
8 game, approached Crowley and told her that she tried to explain to staff that the game  
9 was in good fun. At some point in time afterwards, Crowley approached Association  
10 Building Representatives Lydia Wise (Wise) and Rene Theodorou (Theodorou)<sup>5</sup> in their  
11 classrooms and told them that she felt sorry if she had offended anyone with the game of  
12 Kahoot, and that she felt terrible about it.<sup>6</sup>

13 November 13<sup>th</sup> Staff Meeting

14           On November 13, 2019, Crowley called over the loudspeaker to ask teachers to  
15 meet for a staff meeting before the start of school (November 13<sup>th</sup> Staff Meeting). At this  
16 meeting, Crowley apologized and told staff that she was sorry if she had offended anyone  
17 with the Kahoot game. Crowley further stated that she knew there was a divide in the  
18 staff, and that she would not take a side but wanted to build a culture of collaboration. In

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<sup>5</sup> Theodorou also serves as Grievance Chair and Second Vice President of the Association.

<sup>6</sup> Crowley further testified that Wise and Theodorou said to Crowley in response, "Don't worry about it, we all make mistakes." Wise and Theodorou did not offer testimony about the conversation with Crowley or their response to her statements.

1 addition, Crowley stated that she knew people were talking about her<sup>7</sup> at their meeting  
2 and she was upset and hurt by this.<sup>8</sup> In response to her statement, Wise responded “we  
3 weren’t talking about you for very long.”<sup>9</sup>

4 November 14<sup>th</sup> Meeting between Singer, Crowley and Theodorou

5 On the morning of November 14, 2019, Crowley called Association Building  
6 Representative Lise Singer (Singer) and Theodorou into a meeting and told them that she

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<sup>7</sup> Crowley testified that she believed people were talking about her because they were displeased with her decision to move four teachers to different grade levels the year prior.

<sup>8</sup> In her testimony, Crowley admits that she stated she knew people were talking about her but denies that she referred to the November 6<sup>th</sup> Association Meeting. While there is no evidence that Crowley expressly referenced the November 6<sup>th</sup> Association Meeting, the culminative evidence offered indicates that Crowley referred to a meeting of bargaining unit members present and expressed her displeasure at the discussions that took place. Here, bargaining unit members Megan McCarthy (McCarthy), Theodorou and Wise testified that Crowley referred to people talking about her at a meeting. Wise testified that she definitively recalled Crowley stating that she heard about the meeting. Further, Crowley testified that she heard Wise respond, “we weren’t talking about you for very long.” I am unpersuaded by Crowley’s testimony that she did not understand what Wise was referring to by this statement. Crowley knew about Wise’s role in the Association and Wise’s response to Crowley’s statement only confirms Crowley’s reference to a meeting of bargaining unit members. Further, bargaining unit members Crystal O’Keefe (O’Keefe), Theodorou, McCarthy and Wise all testified that Crowley expressed displeasure in the fact that staff were talking about her.

<sup>9</sup> Theodorou further testified that at the November 13<sup>th</sup> Staff Meeting, Crowley stated she knew what people were saying about her at union meetings, that she hears everything, and that she wanted to let everyone know that what is said at union meetings get back to her. Crowley denies making the statements. Three other bargaining unit members who were present at the November 13<sup>th</sup> Staff Meeting testified in this matter. While McCarthy, O’Keefe, and Wise recall Crowley stating that she knew people were talking about her, I do not find that their testimony corroborates Theodorou’s testimony that Crowley made generalized statements about hearing everything stated at union meetings and warning bargaining unit members that what is said gets back to her.

- 1 was concerned about the culture in the building and believed the building was divided.<sup>10</sup>
- 2 Theodorou disagreed that the building was divided. Singer and Theodorou conversed
- 3 back and forth and Singer shared that she felt uncomfortable and threatened at times and
- 4 believed staff were talking about her.<sup>11</sup> Crowley intervened and told Theodorou and
- 5 Singer that they need to consider bringing in an outside consultant to assist.<sup>12</sup>

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<sup>10</sup> In September of 2019, bargaining unit members elected Matthew Bach (Bach) to the position Association President, displacing former Association President Kelly Costello (Costello). Theodorou testified that Crowley specifically stated that the divide in the building was caused by Bach's union leadership. Conversely, Crowley testified that she stated that the building was divided, but denied that she stated the divide was caused by Bach's leadership. Singer testified that the division was that staff didn't see eye to eye, and that bargaining unit members approached her to express that they felt extremely uncomfortable at times at union meetings in South School. Singer's testimony is consistent with Crowley's testimony that it was understood a divide existed within the Association, but that the cause was not specifically attributed to Bach or the new Association leadership elected in 2019.

<sup>11</sup> On several occasions, Singer told Crowley about the division that she believed existed in the building. Specifically, Singer told Crowley that she felt uncomfortable in union meetings, pressured by Association representatives, and felt she was treated differently if she did not agree with them. Singer also reported her concerns to her Association representatives.

<sup>12</sup> Theodorou testified that she heard Crowley state at the November 14<sup>th</sup> Meeting that what is said at union meetings get back to her and she hears everything. In her testimony, Crowley denies making this statement at the November 14<sup>th</sup> Staff Meeting. Singer, who was also present at the November 14<sup>th</sup> Meeting, denies that Crowley made the statements at issue but did not clarify, and the line of questioning does not discern, whether she was referring to the November 13<sup>th</sup> Staff Meeting or the November 14<sup>th</sup> Meeting. I am more persuaded by Crowley and Singer's recollection of the discussion at the November 14<sup>th</sup> Meeting. Further, while the Complaint alleges that Crowley's statement was made at the November 14<sup>th</sup> Meeting, Theodorou also testified that Crowley made the same statement at the November 13<sup>th</sup> Staff Meeting. Because of Theodorou's lapse in memory as to when Crowley made the statement, in addition to the lack of corroborating evidence, the Association has not met its burden of proof that Crowley made this statement at the November 14<sup>th</sup> Meeting.

1 Zrike Written Reprimand

2 Zrike is employed as a special education teacher for Grade 5 in the South School.  
3 On Friday, November 1, 2019, Zrike attended a special education team meeting with  
4 Crowley and other staff at which Crowley presented Zrike with a new schedule and asked  
5 her to begin providing special education services to a student in kindergarten. Zrike  
6 objected to the assignment and voiced her disagreement to the staff at the meeting. When  
7 Crowley asked Zrike to leave the meeting, Zrike aggressively shoved a notebook at her  
8 before leaving. On November 4, 2019, Crowley met with Zrike and her Association  
9 Representative to discuss the incident and issued Zrike a written letter of reprimand for  
10 her conduct at the November 1<sup>st</sup> meeting (letter of reprimand).

11 On November 15, 2019, Crowley again asked Zrike to meet with her in the  
12 Assistant Principal's office. In this meeting, Crowley told Zrike that she knew Zrike had  
13 said unkind things about her at the November 6<sup>th</sup> Association Meeting.<sup>13</sup> In response,  
14 Zrike told Crowley that she did not say anything of that nature at the Association meeting.  
15 Subsequently on or about November 21, 2019, Zrike again attended a meeting with  
16 Crowley and other staff members at which Zrike received compliments for her work with  
17 the kindergarten student. After this meeting, Crowley indicated to Zrike that she would  
18 remove the letter of reprimand from her personnel file and rip it up.<sup>14</sup> In the past, Crowley  
19 had removed letters of reprimand from employees' files at the end of the year.

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<sup>13</sup> Crowley did not offer testimony about her conversation with Zrike on November 15, 2019.

<sup>14</sup> Crowley testified that she told Zrike she would consider taking the letter of reprimand out of her file at the end of the year. Based on Crowley's statement to Zrike on November 26, 2019 correcting her position on ripping up the letter, I am persuaded by Zrike's



1           On Friday, November 22, 2019, Association President Bach sent Crowley a letter  
2 on behalf of the Association requesting that Crowley cease and desist from intimidating  
3 bargaining unit members. Specifically, in the letter Bach alleges that Crowley engaged in  
4 several unlawful actions including “indicating to individuals that you know what they have  
5 said at union meetings.”<sup>15</sup> Shortly thereafter, Crowley spoke with Berman who told her  
6 she could not rip up the letter of reprimand and could not remove it from Zrike’s file. On  
7 Monday of the following week, Crowley approached Zrike in the hallway and stated to  
8 her, “I just want you to know that I am sending the letter.” <sup>16</sup> Crowley also indicated to  
9 Zrike that she had to “go by the contract.”

#### 10 November 25<sup>th</sup> Association Meeting

11           On November 25, 2019, the Association held a meeting at the Library in the South  
12 School to discuss a school climate survey with bargaining unit members (November 25<sup>th</sup>  
13 Association Meeting). Crowley did know that the Association intended to meet on  
14 November 25<sup>th</sup> before the start of school. Upon arriving at school, Crowley called Berman  
15 to express her concern that students were in the building unattended while the  
16 Association was meeting. Berman told Crowley to go into the meeting at 8:30 a.m. to

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testimony that Crowley told her the letter of reprimand would be removed and ripped up immediately and that the matter was not still under consideration.

<sup>15</sup> In response, on November 25, 2019, Crowley sent Bach a letter denying the allegations of his November 22, 2019 letter. Crowley stated that she was approached by teachers who voiced dissatisfaction with the Association. She expressed no position on the teacher’s statements and shared their concerns with Association building representatives.

<sup>16</sup> By indicating she was going to send the letter, Crowley indicated to Zrike that the letter would not be ripped up and would be placed in her personnel file.

1 remind teachers that they need to be in their classrooms on time. At approximately 8:30  
2 a.m., Crowley knocked, opened the door to the Library and walked into the threshold of  
3 the door. Crowley told bargaining unit members “I just wanted to let you know that you  
4 need to be in your classrooms by 8:35 a.m.”<sup>17</sup> Association Representative Kevin Tierney  
5 responded to Crowley that the teachers would be in their classrooms on time. Crowley  
6 was present in the threshold of the door for approximately seven seconds before leaving  
7 and closing the door.<sup>18</sup> At approximately 8:35 a.m., Crowley returned to the Library and  
8 observed a few bargaining unit members present. Crowley asked them to go to their  
9 classrooms and they left immediately.

#### 10 Workplace Investigation

11 On or about November 25, 2019, the District received an anonymous letter  
12 outlining allegations of a hostile work environment by a group of teachers at the South  
13 School (Complaint Letter). The Complaint Letter alleged that a group of bargaining unit  
14 members, namely Theodorou, Caruso, McCarthy, O’Keefe, Wise, and Zrike would meet  
15 before the start of school, during lunch times or during common planning times, and  
16 engage in discussions in which they called people nicknames and made other derogatory

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<sup>17</sup> The Complaint alleges that Crowley stated teachers needed to be in their classrooms by 8:45 a.m. Witnesses offered conflicting testimony about the time Crowley stated teachers needed to be in their classrooms. Caruso and McCarthy testified that Crowley stated they needed to be in their classrooms by 8:30 a.m. Theodorou and Crowley recall Crowley stating 8:35 a.m. Here, I am more persuaded by Crowley’s recollection because it was corroborated by Theodorou, an Association witness. Further, the parties collective bargaining agreement in Article 7 indicates that start of the school day for teachers is ten minutes before 8:45 a.m., which is 8:35 a.m.

<sup>18</sup> Crowley testified that she did not see any documents and did not hear any discussion between bargaining unit members while she was present in the threshold of the doorway.

1 statements towards students, staff members and administrators. The Complaint Letter  
2 further indicated that the agenda of the group was to remove Crowley as Principal. After  
3 receiving the Complaint Letter, Berman met with three employees regarding the  
4 allegations.<sup>19</sup>

5 On December 5, 2019, Berman informed employees at a staff meeting that he  
6 intended to conduct an investigation into the allegations of the Complaint Letter and that  
7 the District had hired Attorney Wendy Chu (Chu) to conduct the investigation. Shortly  
8 thereafter, Chu scheduled interviews with over forty employees at the South School,  
9 including some bargaining unit members, who may have witnessed the conduct. In  
10 addition, Berman sent letters to Theodorou, Caruso, McCarthy, O'Keefe, Wise, and Zrike  
11 explaining that they were alleged to have engaged in conduct creating a hostile work  
12 environment and directing them to attend a fact-finding meeting with Chu.<sup>20</sup>

13 At the beginning of each witness interview, Chu told witnesses not to discuss what  
14 was talked about during the interview with others in the South School or District, other  
15 than with their Association Representative.<sup>21</sup> Chu then asked witnesses open ended  
16 questions to allow individuals to offer factual information that might be relevant to the  
17 investigation. Depending on a witnesses' response, Chu asked follow-up questions to

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<sup>19</sup> The identities of the employees were not introduced into evidence.

<sup>20</sup> The letter also indicated that they could bring an Association representative with them because discipline may result, but their representative could not be one of the other individuals who was the subject of the investigation.

<sup>21</sup> Chu testified that she instructed interviewees to not discuss the subject of the interview with others because she did not want witnesses to collaborate with each other or to influence any testimony Chu had not yet taken.

1 elicit more detailed information. Chu asked witnesses, “Did you witness any behavior from  
2 this group that caused you to cringe?”<sup>22</sup> Several witnesses reported to Chu that they had  
3 heard bargaining unit members refer to Crowley and Assistant Principal Kathy Caron by  
4 the nicknames, “dumb and dumber,” “angry midget,” “shit-for-brains” or “shithead.” In  
5 addition, a witness reported to Chu that they had heard Wise whisper in the ear of a  
6 student at an assembly, “you were a mess before you had me as a teacher.” Chu learned  
7 that the alleged conduct would take place before the start of school, during lunch and  
8 during common planning time, and that the group would meet in one of the teacher’s  
9 classrooms. Chu did not ask witnesses their opinion on Crowley or the administration,  
10 however, some witnesses offered their opinion.

11 After completing witness interviews, Chu conducted fact-finding meetings with  
12 Theodorou, Caruso, McCarthy, O’Keefe, Wise and Zrike. At each of the meetings,  
13 Association Representative Ted Lewis (Lewis) was present. Prior to starting, Chu  
14 instructed the bargaining unit members not to discuss what was talked about during the  
15 interview with others, except for with their Association Representative. Chu then asked  
16 bargaining unit members a series of questions about where, when and with whom they  
17 congregate during the school day. Specifically, Chu asked, “who do you eat lunch with  
18 and where,” “what time do you get to school in the morning,” and “do you have coffee in  
19 the morning in Wise’s room?” Chu also asked bargaining unit members specific questions  
20 about allegations, including “have you ever called students retards or have you heard that  
21 word before,” “have you ever used nicknames for other people,” “have you ever made fun

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<sup>22</sup> The group Chu refers to in her question are the individuals named in the Complaint Letter.

1 of staff members or mocked them,” and “have you ever called someone a midget or used  
2 the term ‘angry midget?’” To Wise, Chu also asked, “did you whisper in a boy’s ear ‘you  
3 were a mess before you had me as a teacher?’”

4 After concluding the investigation in February of 2020, Chu issued a report in which  
5 she substantiated the allegation that bargaining unit members engaged in name-calling,  
6 used derogatory and unflattering nicknames, and made derogatory statements about staff  
7 and students. Subsequently, Berman issued letters of reprimand to Theodorou, Caruso,  
8 McCarthy, O’Keefe, Wise, and Zrike.<sup>23</sup>

9 December 18, 2019 Association Rally

10 On December 18, 2019, the Association held a rally in front of the South School to  
11 show support for the six bargaining unit members who were subject to the investigation.  
12 In addition to bargaining unit members, the Association invited members of the  
13 community to attend (December 18<sup>th</sup> Rally). At approximately 3:00 p.m., Assistant  
14 Superintendent for Finance and Administration Paul Szymanski (Szymanski) arrived at  
15 the South School and stood just outside of the South School on the sidewalk in between  
16 the driveway for parents picking up students and the driveway for special needs buses.<sup>24</sup>  
17 At around 3:15 p.m., bargaining unit members exited the South School and walked past  
18 Szymanski on the sidewalk and continued to the street in front of the school where the

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<sup>23</sup> Berman also transferred three of the six bargaining unit members to positions at different schools.

<sup>24</sup> Szymanski’s job duties include safety and security and transportation operations. Szymanski testified that he had concerns because the students were going to be leaving school at the end of the day while the rally took place, and he decided to be onsite to assist with traffic control.

1 rally was scheduled to take place.<sup>25</sup> As they walked past, Szymanski did not engage or  
2 speak with bargaining unit members except on occasion to say hello.<sup>26</sup> Approximately 35  
3 to 40 bargaining unit members and members of the community attended the December  
4 18<sup>th</sup> Rally. Police were also present for crowd and traffic control.<sup>27</sup> At the time the rally  
5 started, the larger school buses had picked up students and exited the parking lot.  
6 However, while the rally was on-going, students continued to exit the South School to be  
7 picked up by special needs vans and parent vehicles. Szymanski remained on the  
8 sidewalk between the driveways until approximately 4:30 p.m.<sup>28</sup>

### 9 OPINION

10 A public employer violates Section 10(a)(1) of the Law when it engages in conduct  
11 that may reasonably be said to tend to interfere with, restrain or coerce employees in the  
12 exercise of their rights under Section 2 of the Law. Bristol County Sheriff's Department,  
13 31 MLC 6, 15, MUP-2872 (July 15, 2004) (citing Quincy School Committee, 27 MLC 83,  
14 91, MUP-1986 (Dec. 29, 2000)). Pursuant to Section 2 of the Law, an employee has the

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<sup>25</sup> Some bargaining unit members who attended the rally did not know who Syzmanski was.

<sup>26</sup> Wise testified that she recalled Syzmanski looking at bargaining unit member's badges to see their names. Based on the culminative testimony of Association witnesses and Syzmanski, I find that Syzmanski did not engage with bargaining unit members by inspecting their badges or seeking out their identification in any way.

<sup>27</sup> The Police Department contacted Bach prior to the rally to coordinate police presence. Although Bach testified that he felt there was a heavy police presence, he also indicated to the Police Department that he anticipated approximately 60 to 80 individuals in attendance.

<sup>28</sup> Although the Complaint alleges that Syzmanski remained on the sideway until 5:00 p.m., the evidence presented at hearing, including Syzmanski's testimony, indicates that he stayed until approximately 4:30 p.m.

1 right to “engage in lawful, concerted activities for the purpose of collective bargaining or  
2 other mutual aid or protection, free from interference, restraint, or coercion.” The  
3 Commonwealth Employment Relations Board (CERB) does not analyze the motivation  
4 behind the conduct or whether the coercion succeeded or failed. Town of Chelmsford, 8  
5 MLC 1913, 1916, MUP-4620 (March 12, 1982), aff’d sub nom, Town of Chelmsford v.  
6 Labor Relations Commission, 15 Mass. App. Ct. 1107 (1983). Rather, the focus of a  
7 Section 10(a)(1) inquiry is the objective effect that the employer’s conduct would have on  
8 a reasonable employee. Id. The subjective impact that the employer’s conduct had on a  
9 specific employee is not determinative of a violation. Bristol County Sheriff’s Department,  
10 31 MLC at 15. Further, the CERB does not consider the employer’s motivation for the  
11 conduct and whether it was successful in coercing or restricting an employee’s exercise  
12 of protected rights. Id.

### 13 Surveillance

14 It is well established that employer surveillance of union meetings violates Section  
15 10(a)(1) of the Law. Commonwealth of Massachusetts, 44 MLC 220, 224, SUP-16-5168  
16 (April 12, 2018); (citing, Plymouth County House of Correction, 4 MLC 1555, 1571-72,  
17 MUP-2234, 2429 (December 6, 1977)). Even if actual surveillance of union meetings does  
18 not occur, creating the impression of surveillance constitutes unlawful interference.  
19 Commonwealth of Massachusetts, 44 MLC at 224 (citing, CBS Records Division, 223  
20 NLRB 709 (1976)) (creating the impression of surveillance was unlawful because of the  
21 tendency of the conduct to affect the freedom to support or not support the Union). An  
22 employer creates an unlawful impression of surveillance where, under all of the  
23 circumstances, an employee could reasonably conclude from the statement or conduct

1 in question that their protected activities had been placed under surveillance. Bridgestone  
2 Firestone South Carolina, 350 NLRB 526, 527 (2007) (citing, Flexsteel Industries, 311  
3 NLRB 257, 257 (1993).

4 Count I and II of the Complaint allege that the School Committee violated Section  
5 10(a)(1) of the Law by surveilling and creating an unlawful impression of surveillance of  
6 the November 6<sup>th</sup> Association Meeting when Crowley asked four bargaining unit members  
7 to inform her about the November 6<sup>th</sup> Association Meeting. Count I of the Complaint  
8 further alleges that the School Committee violated Section 10(a)(1) of the Law by creating  
9 an unlawful impression of surveillance of the November 6<sup>th</sup> Association Meeting when  
10 Crowley: 1) stated at the November 13<sup>th</sup> Staffing Meeting that bargaining unit members  
11 had “talked about her for far too long” at their November 6<sup>th</sup> Association Meeting; 2) stated  
12 at the November 14<sup>th</sup> Meeting with Theodorou and Singer that she knows the building is  
13 divided because of Bach’s leadership, that things that are said at union meetings do not  
14 stay in the meeting and she hears everything, and that she knew Zrike made negative  
15 comments about her; and 3) stated to Zrike on November 15, 2019 that she knew Zrike  
16 said negative things about her at the November 6<sup>th</sup> Association meeting. Count I and  
17 Count II of the Complaint further allege that the School Committee violated Section  
18 10(a)(1) of the Law by surveilling and creating an unlawful impression of surveillance of  
19 the November 25<sup>th</sup> Association Meeting when Crowley opened the door and told teachers  
20 they were expected to be in their classrooms. In addition, Count V and Count VI of the  
21 Complaint allege the School Committee, through Szymanski, violated Section 10(a)(1) of  
22 the Law by surveilling and creating the impression of surveillance of the December 18<sup>th</sup>



1 Rally when Szymanski stood outside the elementary school close to the front entrance  
2 and watched teachers who exited the building. I address each allegation in turn.

3 *Questioning Bargaining Unit Members*

4 There is no evidence in the record to substantiate that Crowley asked four  
5 bargaining unit members to inform her about the November 6<sup>th</sup> Association Meeting.  
6 While the record shows interactions between Crowley and bargaining unit members  
7 within the weeks that followed the November 6<sup>th</sup> Association Meeting, her conversations  
8 were directed at the November 4<sup>th</sup> Staff Meeting. The Association offered no evidence  
9 that in these interactions, Crowley asked about what was said at the November 6<sup>th</sup>  
10 Association Meeting. For this reason, I do not find that Crowley surveilled the November  
11 6<sup>th</sup> Association Meeting or created the impression of surveillance in the manner alleged.

12 *November 13<sup>th</sup> Staff Meeting*

13 The record shows that at the November 13<sup>th</sup> Staff Meeting, Crowley told bargaining  
14 unit members that she knew people were talking about her at their meeting and that she  
15 was upset and hurt by this. I find that an employee under the circumstances could  
16 reasonably conclude from Crowley's statement that their protected activities had been  
17 placed under surveillance. In reaching this conclusion, I look to the totality of the  
18 circumstances. Commonwealth of Massachusetts, 44 MLC at 224 (citing, Rossmore  
19 House, 269 NLRB 1176, 178 (1984)) (See also Bridgestone Firestone South  
20 Carolina, 350 NLRB at 527 (2007)). Crowley was aware that the Association held a  
21 meeting on November 6, 2019 because Trach informed her upon her return to work.  
22 Crowley made the statement during a staff meeting, where a majority, if not all, bargaining  
23 unit members who worked in the South School were present. While Crowley may not

1 have explicitly referenced the November 6<sup>th</sup> Association Meeting, there is no other  
2 explanation for her statement. Further, if an employee was unsure what meeting Crowley  
3 was referring to, they were informed when Wise, a bargaining unit member and  
4 Association Building Representative, stated “we weren’t talking about you for very long.”

5 Crowley also demonstrated that she disagreed with the discussions at the meeting  
6 by stating that she was hurt and upset. Here, Crowley’s expression of displeasure  
7 regarding the conversations of bargaining unit members at their November 6<sup>th</sup> Association  
8 meeting was chilling. A threat need not be explicit if the language used can reasonably  
9 be construed as threatening. Southern Worcester County Regional Vocational School  
10 District v. Labor Relations Commission, 377 Mass. 897, 905 (1979). Further, expressions  
11 of anger, criticism, or ridicule directed to employee’s protected activities have been  
12 recognized to constitute interference, restraint and/or coercion of employees. Groton-  
13 Dunstable Regional School Committee, 15 MLC 1551, MUP-6748 (March 20, 1989).

14 The School Committee argues that in order to determine the effect of Crowley’s  
15 conduct on an objective employee, I should not consider the perspective of a bargaining  
16 unit member who was present at the November 6<sup>th</sup> Association Meeting. While the CERB  
17 considers the objective effect that the employer’s conduct would have on a reasonable  
18 employee, Boston School Committee, 39 MLC 366, MUP-09-5543 (June 6, 2013) and not  
19 the subjective impact on a specific employee, Bristol County Sheriff’s Department, 31  
20 MLC at 15, the focus of a Section 10(a)(1) analysis is the effect of the employer’s conduct  
21 on reasonable employees exercising their Section 2 rights. Town of Bolton, 32 MLC 13,  
22 MUP-01-3254 (June 27, 2005) (citing Town of Winchester, 19 MLC 1591, 1596, MUP-  
23 7514 (December 22, 1992)). In this respect, an objective employee who exercised their

1 Section 2 rights by participating in an Association meeting would have heard Crowley  
2 indicate that she knew individuals were talking about her, understood that her statements  
3 were in reference to their meeting, and heard her express her disappointment. An  
4 objective employee exercising their Section 2 rights under these circumstances would  
5 fear that if they were to talk about workplace concerns caused by Crowley's actions, they  
6 would be subjected to the same criticism in a staff meeting. For these reasons, I find that  
7 Crowley's statements at the November 13<sup>th</sup> Staff Meeting interfered with, coerced and  
8 restrained employees in the exercise of their rights in violation Section 10(a)(1) of the  
9 Law.

10 *November 14<sup>th</sup> Meeting*

11 The Complaint further alleges that Crowley created an unlawful impression of  
12 surveillance of the November 6<sup>th</sup> Association Meeting when in a meeting on November  
13 14<sup>th</sup>, she stated that: a) she knows the building is divided because of Bach's leadership;  
14 b) things that are said at union meetings do not stay in the meeting and she hears  
15 everything; and c) she knew Zrike made negative comments about her. The cumulative  
16 evidence does not show that Crowley stated that things said in union meeting do not stay  
17 in union meetings and she hears everything; or that Crowley stated that Zrike made  
18 negative comments about her.

19 The record shows that Crowley told Singer and Theodorou in the November 14<sup>th</sup>  
20 Meeting that she knew the building is divided. Contrary to the allegation in the Complaint,  
21 the cumulative evidence does not show that Crowley indicated that the reason for the

1 divide was Bach's leadership.<sup>29</sup> By stating that she knew the building is divided, I do not  
2 find that Crowley's statements would have caused a reasonable employee under the  
3 circumstances to feel that their union activity was being monitored. At the November 6<sup>th</sup>  
4 Association Meeting, bargaining unit members talked about Crowley and expressed their  
5 displeasure with the game of Kahoot played at the November 4<sup>th</sup> Staff Meeting. The  
6 Association offered no evidence that bargaining unit members discussed a divide in the  
7 building at the November 6<sup>th</sup> Association meeting. In addition, the record shows that  
8 Crowley learned about an apparent division within the building from information offered  
9 to her by Singer, not through surveillance of union activity. Clearly, Crowley's intention in  
10 having a meeting with Theodorou and Singer was to address the workplace issue with  
11 the Association's Building Representatives and to offer resources to help. A reasonable  
12 person under the circumstances would not have found Crowley's statement chilling or  
13 indicative of union surveillance.

14 *November 15<sup>th</sup> Conversation with Zrike*

15 The record further shows that in a meeting with Zrike on November 15, 2019,  
16 Crowley stated "I know that you've been saying unkind things about me at the union  
17 meetings." Here, Crowley's statement to Zrike would give a reasonable person the  
18 impression that Crowley was monitoring their discussions at Association meetings.  
19 Crowley clearly indicated that she knew the content of Zrike's discussions at the union

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<sup>29</sup> The Association argues that the School Committee was not pleased by Bach's displacement of Costello as Association President, evidenced by a series of letters exchanged in September of 2019 in which the Association alleges Berman continued to communicate with former Association leadership and not Bach. However, the record does not show that Crowley made any reference to Bach's leadership or to the change in leadership in her statements to Theodorou and Singer.

1 meeting. While not explicitly threatening, the manner and tone of this statement indicates  
2 Crowley's criticism of Zrike's protected activity. See Groton-Dunstable Regional School  
3 Committee, 15 MLC at 1551. A reasonable person under the circumstances would find  
4 her statement chilling. In this regard, Crowley created an unlawful impression of  
5 surveillance of the November 6<sup>th</sup> Association Meeting in violation of Section 10(a)(1) of  
6 the Law.

7 *November 25<sup>th</sup> Association Meeting*

8

9 Counts I and II of the Complaint allege that the School Committee violated Section  
10 10(a)(1) of the Law by creating the impression of surveillance and engaging in  
11 surveillance of the November 25<sup>th</sup> Association Meeting. I do not find that Crowley's  
12 conduct on November 25, 2019 constitutes unlawful surveillance under Section 10(a)(1)  
13 of the Law. The record shows Crowley knocked on the door to the November 25<sup>th</sup>  
14 Association Meeting to announce that she was entering and promptly left after advising  
15 bargaining unit members that they had to be in their classrooms by 8:35 a.m. There is no  
16 indication that Crowley sought to overhear the discussions of bargaining unit members.  
17 Further, apart from reminding employees about the time, Crowley did not ask any  
18 questions about the discussions of bargaining unit members or make any statements to  
19 indicate her knowledge of the discussions. The evidence does not show that Crowley  
20 engaged in any conduct to intimidate or coerce the bargaining unit members meeting  
21 within.<sup>30</sup> Crowley only returned to the Library a second time after the meeting had  
22 dispersed.

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<sup>30</sup> In comparison, the employer in Commonwealth of Massachusetts engaged in unlawful surveillance when the administrator walked by a meeting several times in the course of an hour and looked into the room through the window. 44 MLC at 224.

1           In addition, Crowley was aware that, just weeks prior, Trach needed to interrupt an  
2 Association meeting which had run 15 minutes over the start of the teacher's workday,  
3 because students were waiting in the hallway to get into their classrooms. In this regard,  
4 Crowley had a legitimate operational concern in reminding bargaining unit members that  
5 they needed to be in their classrooms in five minutes to ensure students could get into  
6 their classrooms and prevent the same from reoccurring. *Id.* at 225. There is no indication  
7 that the Association was authorized to meet during the workday. Further, Crowley's timing  
8 was not unreasonable, considering that teachers would need a period of time to exit the  
9 Library and travel to their respective classrooms. Thus, Crowley's brief interruption of the  
10 November 25<sup>th</sup> Association meeting would not give a reasonable employee the  
11 impression that their meeting was being monitored.

12 *December 18<sup>th</sup> Association Rally*

13           Counts V and VI of the Complaint allege that Szymanski created an unlawful  
14 impression of surveillance and actually surveilled the December 18<sup>th</sup> Rally when he stood  
15 outside the South School and observed the rally. I do not find that Szymanski's conduct  
16 constitutes unlawful surveillance. The fact that an employer's representative is present  
17 during a union rally is not a per se violation of the Law. To find a violation, the surveillance  
18 must be excessive or coercive such that it chills a reasonable employee in the exercise  
19 of their rights. See Intertape Polymer Corp. v. N.L.R.B., 801 F.3d 224, 235 (4th Cir. 2015).

20           Here, the record shows that Szymanski's observance was limited to the period at  
21 which bargaining unit members walked past him as he stood just outside of the South  
22 School on a pathway between the parent pickup driveway and the special needs pickup  
23 driveway. However, Szymanski had a legitimate business concern which required he be

1 present outside during the rally. See Commonwealth of Massachusetts, 44 MLC at 224.  
2 Although the larger buses had left for the day, students continued to exit the building  
3 throughout the rally to be picked up by parents or special needs buses. Szymanski had a  
4 legitimate concern of ensuring parents were able to pick up students and students were  
5 able to find their transportation home while the rally was taking place just outside the  
6 school. Szymanski's conduct in assisting students from the pathway was consistent with  
7 this purpose. Further, the record does not show that Szymanski stayed past the point  
8 when all students had been picked up.

9         Based on the totality of the circumstances, I do not find that a reasonable employee  
10 exercising their Section 2 rights would have felt chilled by Szymanski's conduct or would  
11 have the impression that their union activity was under surveillance. There is no indication  
12 that Szymanski followed the teachers to the street where the rally took place or otherwise  
13 approached the rally. Szymanski did not engage with bargaining unit members, make any  
14 verbal comments towards them, or take notes or video that would cause them to believe  
15 their activity was under surveillance. Many of the bargaining unit members did not know  
16 who Szymanski was when they passed him. Finally, the rally was a public event in which  
17 members of the community attended and police were present for traffic control. In this  
18 regard, I do not find that the School Committee violated the Law in the manner alleged.

#### 19 Prohibiting Employee Speech

20         Count III of the Complaint alleges that the School Committee violated Section  
21 10(a)(1) of the Law by prohibiting bargaining unit members from discussing any matters  
22 under investigation and engaging in mutual aid and protection when Chu instructed  
23 bargaining unit members that they could not discuss the content of the interviews with

1 anyone other than Association Representatives. Generally, an employer's rule that  
2 conflicts with employees' Section 2 rights must be supported by a legitimate and  
3 substantial business justification. Salem School Committee, 35 MLC 199, 214, MUP-04-  
4 4008 (April 14, 2009). Any diminution of employee rights occasioned by application of  
5 the employer's rule must be balanced against the employees' interests. Id. A rule that is  
6 enforced only against communications or literature that constitutes protected, concerted  
7 activity demonstrates the lack of any legitimate purpose for the rule. Id. See also Bristol  
8 County Sheriff's Office, 31 MLC at 15 (employer rule prohibiting discussion of union  
9 matters at roll call was unlawful when discriminatorily applied); City of Quincy, 23 MLC  
10 201, MUP-9867 (March 3, 1997) (discriminatory denial of use of table outside cafeteria  
11 held unlawful); Quincy School Committee, 19 MLC 1476, MUP-5951 (October 21, 1992)  
12 (blanket policy prohibiting union solicitation held unlawful).

13 The CERB considered the issue of a confidentiality rule in a workplace  
14 investigation in City of Somerville. 47 MLC 59, MUP-17-5980 (October 2, 2020). In City  
15 of Somerville, the CERB affirmed a hearing officer's finding that an employer's instruction  
16 to bargaining unit members not to discuss an internal investigation had a chilling effect  
17 on employees where the internal investigation had no legitimate purpose and violated  
18 Section 10(a)(1) of the Law. Id. In the present matter, the Association argues that, similar  
19 to City of Somerville, the School Committee's investigation sought information regarding  
20 employees' associational activities and discussions and therefore, the confidentiality rule  
21 against discussing the investigation is unlawful. I disagree with the Association's position  
22 and its interpretation of City of Somerville. First, I do not find that School Committee's



1 investigation asked questions about conduct protected under Section 2 of the Law.<sup>31</sup>  
2 Second, the act of asking questions about concerted protected activity is not in and of  
3 itself unlawful. An employer may question employees in response to protected activity if  
4 the inquiry serves legitimate managerial needs independent of the protected activity, but  
5 only to the extent necessary to accomplish the legitimate goals, and only if conducted in  
6 a fashion that limits the coercive effect. City of Boston, 17 MLC 1546, 1558, MUP-7704  
7 (February 27, 1991).

8 In City of Somerville, the CERB also recognized that there are circumstances  
9 under which an employer can restrict employee communications about an internal  
10 investigation to protect the integrity of the investigation. 47 MLC at 62, fn. 9 (citing Globe  
11 Newspaper Company v. Police Commission of Boston, 419 Mass. 852 (1995) (discussing  
12 public policy underlying the investigatory exemption set forth in the definition of public  
13 record in G.L. c. 4, Section 7, Twenty-sixth (f))). The CERB noted “if the investigation had  
14 a legitimate purpose that did not interfere with Section 2 rights, telling those suspected of  
15 wrongdoing or witnesses not to discuss those aspects of the investigation with anyone  
16 except their union representatives and legal counsel could be a reasonable step to protect  
17 the integrity of the investigation by, among other things, ensuring that there was no  
18 collaboration between the witnesses.” City of Somerville, 47 MLC at 62, fn. 9. Their  
19 reasoning is consistent with the National Labor Relations Board’s (NLRB) holding in  
20 Apogee Retail, LLC d/b/a Unique Thrift Store, finding that an employer’s written rules  
21 requiring employees to maintain confidentiality and prohibiting unauthorized discussions

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<sup>31</sup> My decision on the allegation that the School Committee violated Section 10(a)(1) of the Law by unlawfully interrogating bargaining unit members is addressed subsequently herein.

1 during a workplace investigation did not violate Section 8(a)(1) of the National Labor  
2 Relations Act. Apogee Retail, LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (2019).

3 <sup>32</sup> In weighing the potential adverse impact on protected rights with the justification for the  
4 rule, the NLRB found that the slight impact on protected rights was substantially  
5 outweighed by the employer's pejorative in assuring confidentiality to employees to  
6 protect witnesses from retaliation and guaranteeing the integrity of its investigations. Id.

7 Here, the School Committee had a legitimate and substantial business justification  
8 in prohibiting bargaining unit members from talking with others in the school or District -  
9 other than their Association representative - about what was discussed in the interviews.  
10 The Complaint Letter involved sensitive allegations of harassment in the workplace made  
11 by employees about other employees. To investigate these allegations, Chu interviewed  
12 approximately 40 employees and asked them to offer information about misconduct by  
13 their colleagues that they observed in the workplace. In such circumstances, an employer  
14 has a legitimate and substantial interest in keeping witness statements confidential to  
15 reduce the risk for retaliation in the workplace. Further, the Complaint Letter contained  
16 broad allegations which required Chu to ask open ended interview questions to solicit  
17 information that may substantiate allegations, form the basis for new allegations, or  
18 identify other individuals who may have witnessed misconduct. In this regard, the School

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<sup>32</sup> The Association also argues that I should adopt the standard cited in Banner Health Systems and find a violation because the employer failed to prove that the confidentiality rules were necessary. Banner Health Systems d/b/a Banner Estrella Medical Center, 362 NLRB 1108, 1109 (2015). I decline to do so because in Apogee Retail, LLC, the NLRB overruled its decision in Banner Health Systems, finding that the decision failed to consider the NLRB precedent requiring balancing an employer's business justifications and the Section 7 rights of employees, failed to consider the importance of confidentiality assurances to employers and employees during an investigation, and is inconsistent with federal guidance. Apogee Retail, LLC, 368 NLRB No. 144.

1 Committee had a legitimate interest in ensuring that witnesses did not collaborate with  
2 each other or influence each other's statements during the investigation.

3 In balancing the rule with the rights of bargaining unit members to discuss  
4 workplace concerns, I find that the rule is narrowly tailored to achieve its purpose while  
5 also providing ample opportunity for bargaining unit members to exercise their Section 2  
6 rights. The rule did not expressly prohibit discussions protected under Section 2, but only  
7 prohibited employees from discussing what information they learned or provided in the  
8 course of the investigation with other employees. The rule allowed bargaining unit  
9 members to discuss the investigation with their Association Representative. In addition,  
10 the rule did not prohibit bargaining unit members from discussing their opinions on the  
11 investigation itself, or the threat of disciplinary action, or any other workplace concerns.  
12 Further, there is no evidence that the rule was discriminatorily or selectively applied to  
13 only prohibit discussions about concerted, protected activity. In this regard, the School  
14 Committee's justification substantially outweighs any potential impact on Section 2 rights.

15 Interrogation

16 Count IV of the Complaint alleges the School Committee violated Section 10(a)(1)  
17 of the Law by unlawfully interrogating bargaining unit members during the interviews that  
18 Chu conducted during her investigation. Contrary to the allegations of the Complaint,  
19 there is no evidence in the record to indicate that Chu asked bargaining unit members  
20 whether they had heard others speak negatively about the administration or their opinion  
21 on the school climate. Rather, the record shows that Chu asked bargaining unit members  
22 several questions about where and with whom they have coffee, ate lunch, and  
23 congregated in the building before and after school. Chu further asked bargaining unit

1 members interviewed as witnesses if they had witnessed any behavior by the group that  
2 caused them to cringe.

3 An employer who coercively interrogates employees about their protected union  
4 activities violates Section 10(a)(1) of the Law. Lawrence School Committee, 33 MLC 90,  
5 99, MUP-02-3631 (December 13, 2006) (citing, Plymouth House of Correction, 4 MLC  
6 1555, 1572, MUP-2234, 2429 (December 6, 1977)). To constitute an interrogation under  
7 Section 10(a)(1) of the Law, there must be some basis of inquiry into protected activity.  
8 Compare City of Gloucester, 46 MLC 42, MUP-17-6076 (September 5, 2019) (unlawful  
9 interrogation occurred where employer asked questions pertaining to employee's role as  
10 Association President when acting on behalf of the bargaining unit, including who directed  
11 him to disseminate a letter to the membership, why he waited to share bargaining  
12 proposals, and the purpose of emails to the bargaining unit); City of Springfield, 17 MLC  
13 1239, MUP-7468, September 7, 1990) (interrogation violated Section 10(a)(1) where  
14 employees were subjected to questioning about affidavits filed with DLR); Salem School  
15 Committee, 35 MLC at 199 (unlawful interrogation occurred when school administrator  
16 asked five employees a number of questions in a meeting about a "Vote No" letter  
17 distributed to teachers).

18 Here, there is no evidence in the record to suggest that Chu asked questions about  
19 union activity, internal discussions between union members, or other opinions, initiatives  
20 or conduct regarding collective enforcement of terms and conditions of employment. The  
21 Association argues that by asking bargaining unit members who they associate with, Chu  
22 interrogated bargaining unit members about protected activity. However, at no point did  
23 Chu ask bargaining unit members about their opinion of or connection to Association

1 leadership. Chu's questions did not threaten, demean or otherwise discourage  
2 association with other bargaining unit members or Association leadership. Therefore,  
3 there is no basis to conclude that such inquiry interfered with bargaining unit members'  
4 right to associate for the purposes of discussing terms and conditions of employment.

5 In addition, the record shows that Chu asked witnesses whether they had  
6 witnessed conduct by another staff member that "caused them to cringe." Again, the  
7 question itself is not directed at union activity. Chu asked bargaining unit members about  
8 their subjective observations of employee conduct and not the internal discussions or  
9 protected activities of union members. In the context of the investigation, a reasonable  
10 person under the circumstances would have understood this question to solicit  
11 information about the misconduct referred to in the Complaint Letter and not to solicit  
12 information about protected activity.<sup>33</sup>

13 The Association further argues that the investigation which forms the basis for  
14 Chu's questioning was an inquiry into concerted, protected activity and thus, Chu's  
15 questioning about the Complaint Letter constitutes an unlawful interrogation. However,  
16 the record shows that Berman directed the investigation for the purposes of investigating  
17 misconduct by Theodorou, Caruso, McCarthy, O'Keefe, Wise, and Zrike, creating a  
18 hostile work environment.<sup>34</sup> In her findings, Chu substantiated some of the allegations,

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<sup>33</sup> The Association argues that I should find the interrogation coercive under the standard set forth in Lawrence School Committee, 33 MLC 90, 99, MUP-02-3631 (December 13, 2006) (citing, Plymouth County House of Correction, 4 MLC 1555, 1572, MUP-2234, 2429 (1977)). Because I do not find that Chu interrogated bargaining unit members about union activity, I need not determine whether the interrogation was coercive.

<sup>34</sup> In the Complaint issued in this case, the Investigator dismissed an allegation of the charge of prohibited practice alleging that the School Committee violated Section 10(a)(1) of the Law when Berman announced the investigation and interviews to be conducted.

1 finding that bargaining unit members engaged in name-calling and made derogatory  
2 statements made about staff and students. I am not persuaded that bargaining unit  
3 members were engaged in protected activity when the misconduct occurred. While the  
4 anonymous Complaint Letter references that the agenda of the group was to remove  
5 Crowley as Principal, the Association presented no evidence that this indeed was their  
6 agenda, and Chu did not ask any questions or solicit any information from bargaining unit  
7 members about this issue.<sup>35</sup> To the extent the Association argues that their members  
8 were engaging in union business when the alleged misconduct occurred as described in  
9 the Complaint Letter, the record is devoid of evidence to support this allegation.<sup>36</sup>  
10 Regardless, the fact that speech takes place within the context of protected activities does  
11 not preclude an inquiry into the nature of the statements made. Plymouth Police  
12 Brotherhood. v. Labor Relations Commission, 417 Mass. 436, 438 (1994) (citing, Harwich  
13 School Committee, 2 MLC 1095, MUP-720 (August 26, 1975)).

14 Even if bargaining unit members had engaged in concerted, protected activity, the  
15 School Committee had a legitimate managerial need to investigate the allegations of the  
16 Complaint Letter. The manner in which Chu conducted the investigation was not coercive.

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The Investigator found that Berman had a legitimate interest in investigating the complaint letter and that no reasonable employee could find the investigation announcement chilling. The Association did not appeal the Investigator's dismissal of this allegation.

<sup>35</sup> Employee activity may be unprotected if it is directed not at addressing terms and conditions of employment, but rather at changing the management and direction of the enterprise. City of Holyoke and Local 233, IBPO, 9 MLC 1876, MUP-4955 (May 27, 1983).

<sup>36</sup> Association witnesses provided no testimony regarding their discussions or meetings with fellow bargaining unit members as alleged in the Complaint Letter and did not provide their answers to the questions Chu asked during the investigation.

1 Chu's questioning was limited in scope to determining if the witnesses and bargaining  
2 unit members had observed the name calling, mockery or other derogatory statements or  
3 contributed to the conduct. See City of Boston, 17 MLC at 1558 (interrogation violated  
4 Section 10(a)(1) where employee was not directly questioned about protected activity,  
5 but questioning was instigated by protected activity, and manner and scope of questioning  
6 exceeded limited purpose for inquiry.) There is no evidence that Chu questioned  
7 bargaining unit members about concreted, protected activity or that she made any  
8 statements to witnesses or bargaining units that interfered with or coerced members in  
9 the exercise of such activity. In this regard, I do not find that Chu coercively interrogated  
10 bargaining unit members in the manner alleged, and I dismiss this allegation of the  
11 Complaint.

## 12 Discrimination

13 Count VII of the Complaint alleges that the School Committee violated Section  
14 10(a)(3), and derivatively Section 10(a)(1), of the Law when Crowley told Zrike that she  
15 was rescinding her decision to remove a letter of reprimand from Zrike's personnel file.  
16 The Complaint alleges that Crowley did so in retaliation for Zrike's participation in the  
17 November 6<sup>th</sup> Association Meeting and the November 25<sup>th</sup> Association Meeting and for  
18 statements made in Bach's letter to Crowley dated November 22, 2019. A public employer  
19 that retaliates or discriminates against an employee for engaging in activity protected by  
20 Section 2 of the Law violates Section 10(a)(3) of the Law. Southern Worcester Reg. Voc.  
21 School District v. Labor Relations Commission, 388 Mass. 414 (1982); School Committee  
22 of Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327 (1996). To establish a  
23 prima facie case, a charging party must show that: (1) the employee engaged in activity

1 protected by Section 2 of the Law; (2) the employer knew of the protected activity; (3) the  
2 employer took adverse action against the employee; and (4) the employer's conduct was  
3 motivated by a desire to penalize or discourage the protected activity. Town of Brookfield,  
4 28 MLC 320, 327, MUP-2538 (May 1, 2002), aff'd sub nom. Town of Brookfield v. Labor  
5 Relations Commission, 443 Mass. 315 (2005); See also Town of Carver, 35 MLC 29, 47,  
6 MUP-03-3894 (June 30, 2008). There is no evidence in the record to show that Zrike  
7 attended the November 25<sup>th</sup> Association meeting, and thus the School Committee could  
8 not have had knowledge of her attendance as referenced in the Complaint. However,  
9 Zrike's participation in the November 6<sup>th</sup> Association meeting and the discussion of  
10 workplace concerns that took place therein is concerted activity protected under Section  
11 2 of the Law. The record further shows that Crowley, an agent of the School Committee,  
12 was aware of Zrike's attendance at the November 6<sup>th</sup> Association Meeting and confronted  
13 Zrike on November 15<sup>th</sup> about statements Zrike made at the meeting.

14 More importantly, the Complaint alleges that Bach's letter to Crowley, which  
15 Crowley received on November 22, 2019 after Crowley told Zrike she would remove the  
16 letter of reprimand from her file, was concerted activity on behalf of Zrike and is protected  
17 under Section 2 of the Law. The School Committee argues that Bach's letter, written on  
18 behalf of the Association, does not name Zrike specifically and therefore cannot be  
19 attributed to her own protected conduct. It is undisputed that Bach's letter on behalf of the  
20 Association is protected activity. See Suffolk County Sheriff's Department, 27 MLC 155,  
21 MUP-1498 (June 4, 2001). Bach's letter to Crowley tells her to cease and desist from  
22 numerous actions that Bach alleges had interfered with the Association. The issue,  
23 however, is whether the School Committee, or its agents, knew that the portion of the



1 letter which referenced “indicating to individuals that you know what they have said at  
2 union meetings” was referring to Crowley’s conversation with Zrike on November 15,  
3 2019. A charging party may prove an employer’s knowledge of an employee’s union  
4 activities by direct or circumstantial evidence. Richard Fowler v. Labor Relations  
5 Commission, et al. 56 Mass. App. Ct. 96 (2002); Bristol County, 26 MLC 105, MUP-2100  
6 (January 28, 2000). Where circumstantial evidence exists, the CERB considers the timing  
7 of the alleged discriminatory actions, the employer’s general knowledge of its employee’s  
8 union activities, the employer’s animus against the union and the pretextual reasons given  
9 for the adverse personnel actions. Fowler, 56 Mass. App. Ct. at 100 (2002). Here, the  
10 record shows that Crowley reversed her decision to remove the letter of reprimand and  
11 rip it up on the next business day following receipt of Bach’s Letter. Further, Crowley knew  
12 that she had spoken with Zrike the week prior about Zrike’s statements made during the  
13 November 6<sup>th</sup> Association Meeting and expressed her disapproval. Although Bach’s letter  
14 did not mention Zrike by name, the evidence persuades me that Crowley knew after  
15 reading Bach’s letter that he was referring to the conversation she had with Zrike just  
16 days prior.

17 The third element of the Association’s prima facie case requires a showing of  
18 adverse action. The CERB has consistently defined adverse action as an adverse  
19 personnel action. City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (Jan. 9, 2009) (citing  
20 Town of Dracut, 25 MLC 131, 133, MUP-1397 (Feb. 17, 1999)). Here, the School  
21 Committee, through Crowley, engaged in adverse action against Zrike when Crowley told  
22 Zrike she would no longer remove the letter of reprimand from Zrike’s personnel file and  
23 would not rip it up. It is well-established that employee reprimands constitute adverse

1 employment action. See Athol-Royalston School Committee, 28 MLC 204, 214-15, MUP-  
2 2279 (January, 14, 2002). Consequently, Crowley's decision not to rescind the letter of  
3 reprimand constitutes an adverse employment action. Crowley's action materially  
4 affected Zrike in that the disciplinary letter would remain a part of her personnel file and  
5 may impact her employment with the District or a prospective employer in the future. City  
6 of Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009), (citing Sallis v. Univ. of  
7 Minnesota, 408 F.3d 470, 476 (8<sup>th</sup> Cir. 2005) (changes in employment that significant  
8 affect an employee's future career prospects constitute material employment  
9 disadvantage).

10 The final element of a prima facie case to establish a violation under Section  
11 10(a)(3) requires the Association to show that the School Committee's motive was to  
12 penalize or discourage Zrike's concerted, protected activity. To support a claim of  
13 unlawful motivation, a charging party may proffer direct or indirect evidence of  
14 discrimination. Lawrence School Committee, 33 MLC 90, 97, MUP-02-3631 (December  
15 13, 2006) (citing Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002),  
16 aff'd sub nom., Town of Brookfield v. Labor Relations Commission, 443 Mass.  
17 315 (2005)). Absent direct evidence of unlawful motivation, the charging party may  
18 establish unlawful motivation through circumstantial evidence and reasonable inferences  
19 drawn from that evidence. City of Holyoke, 38 MLC at 156; Town of Carver, 35 MLC 29,  
20 48 MUP-03-3894 (June 30, 2008) (citing Town of Brookfield, 28 MLC at 327-28); Suffolk  
21 County Sheriff's Department, 27 MLC at 159). Several factors may suggest unlawful  
22 motivation, such as: the timing of the alleged discriminatory act in relation to the protected  
23 activity; the triviality of reasons given by the employer; shifting or inconsistent reasons

1 given by the employer; disparate treatment; an employer's deviation from past practices;  
2 or expressions of animus or hostility towards a union or the protected activity. Town of  
3 Carver, 35 MLC at 48 (citing Melrose School Committee, 33 MLC 61, 69, MUP-02-3549  
4 (Sept. 27, 2006)).

5 The Association offered no direct evidence of unlawful motivation; however, the  
6 indirect evidence, considered as a whole, substantiates that Crowley's conduct was  
7 unlawfully motivated in retaliation for Zrike's concerted, protected activity. The timing of  
8 Crowley's decision is significant. Crowley received Bach's letter on Friday, November 22,  
9 2019. On the following Monday after the weekend, Crowley informed Zrike she would  
10 rescind the decision to remove the reprimand and rip it up. In addition, Crowley treated  
11 Zrike differently from other bargaining unit members, and deviated from her past practice.  
12 Crowley testified that in the past, she had removed letters of reprimand from employees'  
13 files at the end of the year. In the present matter, Crowley told Zrike that she had to "go  
14 by the contract." The School Committee gave no justification as to why the past practice  
15 was not followed or could not be considered with Zrike's reprimand. In addition, the School  
16 Committee offered no legitimate reason as to why Crowley changed her position.  
17 Crowley's testimony that she did so at the direction of Berman is unpersuasive because  
18 the School Committee offered no reason why Berman directed Crowley in this manner.<sup>37</sup>  
19 Based on the totality of the indirect evidence, including the close proximity of Crowley's  
20 decision to Bach's letter, the deviation from past practice, and the lack of a legitimate  
21 reason for her conduct, I find that Crowley's conduct in rescinding her decision to remove

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<sup>37</sup> Berman did not testify at the hearing.

1 the letter of reprimand from Zrike's personnel file and rip it up was unlawfully motivated  
2 in retaliation for Zrike's concerted, protected activity.

3 As the Association has established a prima facie case of retaliation, the School  
4 Committee may rebut it by producing evidence that the action was motivated by a  
5 legitimate reason. Suffolk County Sheriff's Department, 27 MLC at 159. Crowley told  
6 Zrike she was not going to remove the letter because she had to "go by the contract;"  
7 however, the School Committee offered no justification as to why this circumstance  
8 warranted deviation from past practice. Further, the School Committee offered no  
9 evidence of the reason why Berman instructed Crowley not to remove the letter of  
10 reprimand from Zrike's file and rip it up.<sup>38</sup> Therefore, I find that the School Committee,  
11 through Crowley and Berman, violated Section 10(a)(3), and derivatively Section 10(a)(1),  
12 of the Law.

### 13 CONCLUSION

14 Based on the record and for the reasons stated above, I conclude that the School  
15 Committee independently violated Section 10(a)(1) of the Law as alleged in Count I of the  
16 complaint when Crowley created an unlawful impression of surveillance when she told  
17 bargaining unit members at the November 13<sup>th</sup> Staff Meeting that she knew they were  
18 talking about her at their meeting, and when Crowley told Zrike on November 15, 2019  
19 that she knew Zrike had said negative things about her at the union meeting. I further  
20 conclude that the School Committee violated Section 10(a)(3), and derivatively Section

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<sup>38</sup> The Association argues that I should draw an adverse inference against the School Committee for Berman's failure to testify at the hearing in connection with his instruction to Crowley not to remove the letter from Zrike's personnel file. I decline to draw an adverse inference against the Employer because the Association has established a prima facie case of discrimination.

1 10(a)(1), of the Law as alleged in Count VII of the Complaint when Crowley informed Zrike  
2 that she was rescinding her decision to remove a letter of reprimand from her file and rip  
3 it up in retaliation for Zrike's complaints about Crowley's questioning of her over the union  
4 meeting.

5 I dismiss the remaining allegations in Count I that the School Committee violated  
6 Section 10(a)(1) of the Law by creating an unlawful impression of surveillance when  
7 Crowley: a) asked four bargaining unit members to inform her about the Association's  
8 November 6<sup>th</sup> Meeting; b) made statements in a meeting on November 14, 2019, and c)  
9 interrupted the November 25<sup>th</sup> Association Meeting to tell teachers they needed to be in  
10 their classrooms. I also dismiss the allegations of Count II alleging that Crowley engaged  
11 in unlawful surveillance of the November 6<sup>th</sup> Association Meeting and November 25<sup>th</sup>  
12 Association Meeting. In addition, I dismiss the allegations of Counts III and IV of the  
13 Complaint alleging that the School Committee violated Section 10(a)(1) of the Law when  
14 it instructed bargaining unit members that they could not discuss the content of their  
15 interviews with anyone but Association Representatives, and engaged in unlawful  
16 interrogation during those interviews. Finally, I dismiss Counts V and VI of the Complaint  
17 alleging that the School Committee violated Section 10(a)(1) of the Law by surveilling and  
18 creating an unlawful impression of surveillance of the Association's December 18<sup>th</sup> Rally.

19 ORDER

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

22 1. Cease and desist from:  
23

- 1 a) Interfering with, restraining or coercing employees in the exercise of their rights  
2 under the Law by making statements or engaging in any conduct that gives  
3 employees the impression that their union meetings are under surveillance;  
4  
5 b) Retaliating against Ellen Zrike for engaging in concerted, protected activity;  
6  
7 c) In the same or similar manner interfering with, restraining or coercing employees  
8 in the exercise of their rights guaranteed under the Law.  
9
- 10 2. Take the following action that will effectuate the purposes of the Law:  
11  
12 a) Refrain from interfering with, restraining or coercing employees in the exercise of  
13 their rights under Section 2 of the Law.  
14  
15 b) Refrain from discriminating against employees for engaging in concerted activity  
16 protected under Section 2 of the Law.  
17  
18 c) Remove the letter of reprimand dated November 4, 2019 from Ellen Zrike's  
19 personnel file.  
20  
21 d) Immediately post signed copies of the attached Notice to Employees in all  
22 conspicuous places where members of the Association's bargaining unit usually  
23 congregate, or where notices are usually posted, including electronically, if the  
24 School Committee customarily communicates with these union members via  
25 intranet or email and display for a period of thirty (30) days thereafter, signed  
26 copies of the attached Notice to Employees.  
27  
28 e) Notify the DLR in writing of the steps taken to comply with this decision with ten  
29 (10) days of receipt of this decision.  
30  
31 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

  
SARA SKIBSKI HILLER, ESQ.  
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11 and 456 CMR 13.19 to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Department of Labor Relations no later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.



# NOTICE TO EMPLOYEES

**POSTED BY ORDER OF A HEARING OFFICER OF  
THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS  
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A hearing officer of the Massachusetts Department of Labor Relations (DLR) has held in Case No. MUP-19-7730 and MUP-19-7736 that the Andover School Committee (School Committee) independently violated Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by creating the impression of surveillance of Association meetings through statements made by Principal Crowley to bargaining unit members. The hearing officer further found that the School Committee violated Section 10(a)(3), and derivatively Section 10(a)(1), of the Law by rescinding its decision to remove a written reprimand from a bargaining unit member's personnel file in retaliation for engaging in concerted, protected activity.

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 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.

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Andover School Committee

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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).