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

In the matter of CITY OF WESTFIELD and WESTFIELD FIREFIGHTERS, LOCAL 1111, I.A.F.F. and REBECCA BOUTIN and DAVID KENNEDY and KYLE MILTIMORE	Case Nos. MUP-20-7800 MUP-20-7807 MUP-20-7808 MUP-20-7809 Date Issued: November 18, 2022

CERB Members Participating:

Marjorie F. Wittner, Chair
Kelly Strong, Member

Appearances:

Timothy Netkovick, Esq. Tanzania Cannon-Eckerle, Esq.	-	Representing the City of Westfield
Maurice Cahillane, Esq.	-	Representing Rebecca Boutin, David Kennedy, and Kyle Miltimore
John Connor, Esq.	-	Representing the Westfield Firefighters, Local 1111, I.A.F.F.

CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Summary

Kyle Miltimore (Miltimore), David Kennedy (Kennedy) and Captain Rebecca Boutin (Boutin) (collectively, "Charging Parties") were employed as uniformed firefighters in the City of Westfield (City or Employer) Fire Department (Department). In 2019, the City terminated the Charging Parties in connection with allegations they made that Deputy Chief Patrick Egloff (Egloff), who was soon expected to become the City's next Fire Chief, had inappropriately touched two female hospital employees (Nurse and Secretary[1]) and one Department employee while in uniform during a 2016 St. Patrick's Day parade in a neighboring town. The Charging Parties met with one another and spoke to the State Police regarding these allegations and other complaints that they had about Egloff. Boutin also attempted to discuss her concerns about Egloff with then-Fire Chief Mary Regan (Regan), but Regan declined to speak to Boutin.

In February 2018, the City received an anonymous letter signed by the "Westfield firefighters" that reiterated these allegations. Specifically, the Anonymous Letter further accused Egloff of engaging in workplace misconduct and unprofessional behavior, including acting in a "gross sexual manner verbally and physically" to Department employees and pulling employees' hair. The City hired Attorney Dawn McDonald (McDonald or Investigator) to investigate the letter. After interviewing the Charging Parties and other Department staff, the Investigator issued a report in August 2018 (McDonald Report), finding that some of the allegations against Egloff were true, including that he had sexually assaulted a hospital employee (Nurse) during the parade, pulled

[1] Nurse and Secretary are pseudonyms.

employees' hair, made a sexually crude comment to a crew of firefighters about Chief Regan, and publicly screamed and swore at Boutin over giving away Thanksgiving dinners (the so-called "Pie-Gate" incident). The Investigator concluded that Egloff's behavior was, among other things, immature, deplorable, insubordinate and contributed to low Department morale. She recommended that Egloff not be promoted to Fire Chief following Regan's imminent retirement and that he be sent for immediate training, including but not limited to Sexual Harassment Training, Personnel Management Training and Anger Management Training. She also recommended, however, that each of the Charging Parties be terminated for, among other things, not following the chain of command with respect to their accusations against Egloff, making the allegations in bad faith, conspiring to discredit and harm Egloff's reputation and to prevent his imminent promotion to Fire Chief, falsely reporting a rape, and publicly disparaging Egloff even after they learned that the allegations were not true. The McDonald Report included other findings about the Charging Parties, including that Boutin's conduct was "deplorable," and that she was a "terrible" captain; that Kennedy's "excitement" when talking about grievances he had filed was "disturbing;" and that Miltimore was always at the center of controversy involving lawyers and legal authorities. The Board of Fire Commissioners (Commissioners) [2] agreed with the Investigator's recommendations and, after a two-day

[2] .As set forth in the 2004 "Rules and Regulations for the Government and Discipline of the Westfield Fire Department" (Department Rules), the Commissioners, "acting as a body are the Head of the Fire Department and as such have the duty and authority to set policy for the Fire Department." The Commissioners promulgate the Department's Rules.

hearing pursuant to M.G.L. c. 31, §41, terminated all three employees in December 2019.[3] The termination notices stated that the Charging Parties had engaged in serious and substantial misconduct by "making a false report, insubordination and subverting the chain of command as more specifically set forth in the Investigator's recommendation," which was attached and incorporated into the termination notice. The Commissioners also found that the spread of what they deemed "inaccurate and harmful information" had the "potential to result in physical and/or emotional harm – or worse- to employees and citizens alike." The City promoted Egloff to Fire Chief sometime thereafter.

In 2020, the Westfield Firefighters, Local 1111, I.A.F.F. (Union) filed a timely prohibited practice charge with the Department of Labor Relations (DLR) alleging in part that the City had terminated the Charging Parties for engaging in protected, concerted activity in violation of Section 10(a)(3) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law).[4] Each of the Charging Parties filed individual charges containing substantially the same allegations. The DLR consolidated the four charges for investigation. The DLR Investigator issued a complaint/partial dismissal and the matter went to hearing. After five days of hearing, a DLR Hearing Officer concluded that the City

[3] The Commissioners originally notified the Charging Parties that it intended to terminate them in August 2018, but the Charging Parties successfully challenged their terminations in Superior Court based on violations of the Commonwealth's Open Meeting law.

[4] At the investigation, the Charging Parties withdrew their Section 10(a)(5) allegations. The Investigator also dismissed a Section 10(a)(1) allegation alleging a violation of Weingarten rights and a 10(a)(3) allegation asserting that the Charging Parties were terminated for writing an anonymous letter that they disclaim they wrote. The dismissal was appealed to the Commonwealth Employment Relations Board (CERB) which affirmed the dismissal. The Charging Parties did not appeal that finding and thus, the only allegations at hearing were other Section 10(a)(3) allegations, specifically that the City terminated the Charging Parties for engaging in protected, concerted activity.

had violated the Law as alleged. The Hearing Officer ordered the City to, among other things, reinstate the Charging Parties and make them whole for their lost benefits and wages.

The City appealed this decision to the CERB, mainly reiterating the arguments that it made to the Hearing Officer. After reviewing the hearing record, the Hearing Officer's decision, and the parties' arguments on appeal the CERB affirms the Decision and Order in its entirety.

FACTS

The City challenged several of the Hearing Officer's facts, which we address below. After a thorough review of the record, we reiterate only those facts necessary to understand our Opinion, supplemented as necessary by undisputed facts in the record. Further reference may be made to the extensive facts set out in the Hearing Officer's decision, reported at 48 MLC 248 (February 16, 2022).

Opinion[5]

The issue before us is whether the Hearing Officer correctly found that the City violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by terminating the Charging Parties. The CERB traditionally applies a three-step analysis to Section 10(a)(3) discrimination cases. Town of Clinton, 12 MLC 1361, 1364, MUP-5659 (November 9, 1985) (citing Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 563 (1981)). First, the CERB determines whether the charging party has established a prima facie case of discrimination by producing evidence to support each

[5] The CERB's jurisdiction is not contested.

of the following elements: 1) the employee engaged in concerted activity protected by Section 2 of the Law; 2) the employer knew of the concerted, protected activity; 3) the employer took adverse action against the employee; and 4) the employer's conduct was motivated by a desire to penalize or discourage the protected activity. Town of Carver, 35 MLC 29, 48, MUP-03-3384 (June 30, 2008). The burden then shifts to the employer to produce lawful reasons for its actions. Once the employer has done so, the charging party must prove that "but for" the protected activity, the employer would not have taken the adverse action. Trustees of Forbes Library, 384 Mass. at 561-564; Bristol County, 26 MLC 105, 109, MUP-2100 (January 28, 2000).

In discrimination cases where the charging party has proffered direct evidence of discrimination, the CERB applies the two-step analysis articulated in Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000); Town of Dennis, 29 MLC 79, 83, MUP-01-2976 (October 10, 2002). Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace." Wynn & Wynn, 431 Mass. at 667 (citing Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991)). Under Wynn & Wynn, the charging party must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. The burden of persuasion then shifts to the employer who may prevail by proving that it would have made the same decision even without the illegitimate motive. Id. at 669 - 670.

Protected, Concerted Activity

The Hearing Officer carefully analyzed each aspect of the prima facie case. She first found that the Charging Parties' protected, concerted activity consisted of filing

various grievances in 2018 and 2019;[6] Kennedy and Miltimore and two other firefighters Lee Kozikowski (Kozikowski) and Chris Genereux (Genereux)) meeting at Miltimore's home in early February 2018 to discuss their complaints and concerns about Egloff's behavior at the parade and at work;[7] and all three Charging Parties' cooperation with the State Police investigation into Egloff. The Hearing Officer also found that Boutin had separately engaged in protected, concerted activity when she unsuccessfully attempted in February 2018 to speak with Regan about her concerns with Egloff.[8]

We agree with the Hearing Officer that this conduct constitutes protected, concerted activity. Section 2 of the Law protects a public employee's right to engage in concerted activity for the purpose of influencing collective bargaining and for other mutual aid or protection. Lenox Education Association v. Labor Relations Commission, 393

[6] In January 2018, Kennedy filed a grievance over a verbal warning for being absent for a continuing education class. In June 2018, Boutin filed a grievance over a verbal warning that she received related to equipment transfers. TheCommissioners never heard Boutin's grievance. The Charging Parties also filed various grievances in 2019, after they received a notice of termination but before they were actually terminated. The Hearing Officer agreed with the City that any grievances that the Charging Parties filed *after* they received a notice of termination could not form the basis of a retaliation claim. The Charging Parties did not appeal this finding.

[7] The meeting at Miltimore's house was prompted by new information that Kennedy and Kozikowski had just received from two hospital employees. Nurse confirmed in person to Kozikowski that the rumors that had been circulating that Egloff had inappropriately touched her during the parade were true. Secretary also confirmed in person to Kennedy that Egloff had touched her inappropriately at the parade. Boutin first learned of the rumors about Egloff in 2016 from Chrissy Humason (Humason), who worked both in the hospital and in the Fire Department. Boutin told the State Police that Humason told her that Egloff had grabbed her "by the ass" but that another one of her friends "got it worse because he grabbed her by the vagina." Humason declined to be interviewed by the State Police and denied that Egloff had inappropriately touched her.

[8] As Boutin testified and McDonald found, Regan refused to speak to Boutin about this issue.

Mass. 276, 281-282 (1984). An employee engages in protected, concerted activity within the meaning of Section 2 when they engage in activity protesting working conditions or speak publicly or with other employees about issues affecting employee wages, hours or other terms and conditions of employment. Andover School Committee, 40 MLC 1, 11, MUP-12-2294 (July 2, 2013) (citing Town of Winchester, 19 MLC 1591, 1597, MUP-7514 (December 22, 1992)). However, conduct that may be deemed generally within the scope of Section 2 loses the protection of the statute if it is found to be unlawful, violent, a breach of contract, indefensibly disloyal to the employer or disruptive of the employer's business. Town of Bolton, 32 MLC 13, 18, MUP-01-3255 (June 27, 2005).

Here, the Charging Parties gathered as a group to discuss their concerns about Egloff's alleged sexual misconduct and cooperated with the State Police investigation into the sexual misconduct allegations. Furthermore, their discussions with each other and with the State Police were not limited to the sexual assault allegations but included the "Pie-Gate" incident and other ways in which they believed that Egloff had behaved unprofessionally over the years. These issues affected their terms and conditions of employment, including Egloff's fitness to lead the Department, as well as the health and safety of bargaining unit members, and thus, the Charging Parties collective efforts to address these issues constitutes concerted activity protected under Section 2 of the Law. See City of Lawrence, 15 MLC 1162, 1166, MUP-6086 (September 13, 1988) (employee criticism of or "disgruntlement" with administrators is protected if it is tied to workplace concerns).

The City challenges this conclusion on several different grounds. It first disputes that the conduct was concerted. It contends that the Hearing Officer erroneously found

that the Charging Parties acted in a concerted manner when they complained about Egloff. It points out that Miltimore decided to contact the State Police on his own, without group authorization, and that, other than the meeting at Miltimore's house, the Charging Parties acted alone when speaking to the State Police and raising other concerns regarding Egloff.

We disagree. The Hearing Office found that Miltimore's decision to call the State Police was a "natural extension" of, and consistent with, the group's collective efforts to address their concerns by meeting at Miltimore's house. The City argues that because the State Police only have jurisdiction over criminal, not employment, matters, there was nothing "natural" about going to the State Police to report an alleged sex crime. The record reflects, however, that Miltimore made a call to his friend from church who worked at the State Police just one day after he invited bargaining unit members to his home to discuss their shared concerns. Moreover, although Miltimore likely realized that the State Police had jurisdiction over criminal matters, he testified that he called his friend to seek advice about what to do next because he and the others were "bothered" by what Nurse and Secretary had told Kennedy and Kozikowski in recent weeks about their 2016 encounters with Egloff. The record therefore does not reflect that Miltimore called the State Police "to report a sex crime," as the Employer argues. Rather, consistent with the purpose of the previous evening's meeting, he was looking for guidance about what to do about the information that had just been discussed. Thus, based on its timing and its topic, we agree with the Hearing Officer that Miltimore's phone call was a natural extension of the previous evening's collective action.

We further agree that the Charging Parties' cooperation with the State Police investigation was part of their overall efforts to address their concerns about Egloff. First, the record indicates that the Charging Parties' decision to cooperate in the investigation was voluntary.[9] The record further indicates that when both Boutin and Kennedy spoke to the State Police they were aware that Miltimore had already spoken to them, which further reinforces the group nature of their cooperation. Further, the topics covered by the State Police interviews were essentially the same as those covered during the Miltimore house meeting. Thus, although the Charging Parties spoke individually with the State Police, we agree with the Hearing Officer that their cooperation with the State Police investigation had its genesis in the Charging Parties' collective efforts to address their concerns about Egloff becoming Chief. Those efforts constitute concerted activity.

The City next argues that the Charging Parties' conduct lost its protected status in a variety of ways, including by going to the State Police instead of addressing their workplace concerns by filing a grievance or an internal complaint. However, merely going to a third party to discuss or seek redress for workplace concerns does not cause conduct to lose its protected status. See, e.g., City of Lawrence, 15 MLC at 1166-1167 (letter that union president sent to members that was printed in local paper complaining of Chief's attitude, lying, failure to honor contracts, absence in time of need, etc. although "sharply worded," did not lose its protected status where the letter was tied to collective bargaining matters and to employees' mutual aid or protection).

[9] In contrast, the report that the State Police issued closing the investigation indicates that none of the alleged victims were willing to be interviewed by the State Police.

The City also contends that the Charging Parties' activities were not protected because the goal was not to protect their working conditions but to ensure that Egloff was not promoted to Fire Chief. As the Hearing Officer found, however, these goals were not mutually exclusive. As discussed above, the Charging Parties had a valid reason to be concerned about Egloff's imminent promotion given the sexual misconduct allegations that two women had confirmed in person to Kennedy, coupled with the Charging Parties' previous experience with Egloff's angry outbursts. The City disagrees, contending that the Charging Parties had been aware of Egloff's conduct for the past two years. The City contends, therefore, that because Egloff had already served in a supervisory capacity, their decision to come forward on the eve of his promotion, instead of earlier, demonstrates that their goal was to stop Egloff from being promoted and not to prevent him from causing harm, which he already had the platform to do. This argument, however, ignores that for the first time in 2018, Nurse confirmed the 2016 rumors about Egloff's conduct and Secretary told Kennedy that Egloff had assaulted her as well. When coupled with the other concerns that the Charging Parties had about Egloff's leadership, we disagree that speaking with the State Police under these circumstances, even if motivated by a desire to hinder Egloff's promotion, removed the Charging Parties' conduct from the Law's protection.

The City further argues that going to the State Police lost its protected status because, in doing so, the Charging Parties "went rogue" and ignored the proper chain of command for reporting such matters. In a related vein, it argues that the Hearing Officer erroneously found that the Charging Parties had, in fact, properly reported their complaints up the proper chain of command. Neither argument has merit.

First, the City provides no support for its claim that going to a third-party to report sexual misconduct complaints, instead of using internal complaint mechanisms, removes the complaint from the realm of protected, concerted activity. This is particularly the case where, as here, the complaints center around a supervisor who is allegedly part of the chain of command.[10]

Nor did the Hearing Officer err when she found that, in fact, the Charging Parties followed the chain of command by reporting the alleged misconduct to their respective supervisors.[11] The record reflects that Kennedy and Miltimore told Boutin, their supervisor, about the allegations before they went to the State Police, and Boutin then attempted to address the allegations with Regan, but Regan refused to address them. Accordingly, the Charging Parties did, or at least attempted to, follow the chain of command. Although the City argues that Boutin should have tried to speak with Regan *before* going to the State Police, as the Union points out, the State Police called Boutin and asked to meet with her the same day. Further, the grievance procedure defines a

[10] We take administrative notice of the "Guidelines on 151B - Sexual Harassment in the Workplace," promulgated by the Massachusetts Commission against Discrimination (MCAD) in 2017. Those guidelines state in pertinent part that, "Under no circumstances should an employer, "require an employee to complain directly to the person alleged to have engaged in the sexual harassment." See *https://www.mass.gov/doc/mcad-guidelines-on-sexual-harassment-laws-in-employment/download* (last accessed November 8, 2022).

[11] We agree with the City that the record does not support the Hearing Officer's statement in footnote 65 of the decision that the "Fire Commission concluded that the Charging Parties failed to follow the chain of command when they contacted a private attorney and attempted to gather information to come forward with a complaint as a group." The City correctly observes that the record does not indicate that the Charging Parties contacted a private attorney or that the City terminated them for that reason. In all other areas, however, the Hearing Officer correctly stated the basis of the City's termination decision and thus, this minor error does not affect the outcome of this matter.

grievance as a "written dispute, claim or complaint involving a question of interpretation or application of the agreement as it applies to wages, hours, standards of productivity and performance or other terms and conditions of employment..." The first step of the procedure is between the employee and the Fire Chief and if no settlement is reached, the grievance may be submitted to the Commissioners. Nowhere does the grievance procedure state that is the exclusive avenue for employees to address what could potentially be the subject of criminal charges. Cf. Edwin Parris & others v. Sheriff of Suffolk County, 93 Mass. App. Ct. 864 (2018) (provisions in CBA concerning the payment of overtime compensation did not include sufficiently clear and unmistakable language to waive the employees' ability to obtain judicial enforcement of their right to prompt payment under the negotiated schedule). In any event, as the Hearing Officer found, the City never indicated which contract provision the Charging Parties could have cited in their grievance. The City's rules and regulations also do not clearly prevent employees from speaking to third-parties about work-related issues. They only require disciplinary proceedings to be initiated by the Chief or Deputy Chief.

While we do not diminish the importance of following a chain of command in fire departments when matters of public safety or even life and death are implicated, in this case, the Charging Parties had a valid basis to be concerned about new revelations about Egloff's conduct at the parade and took steps, on their own time, to address these issues both amongst themselves and with law enforcement. The Charging Parties thus did not fail to follow the chain of command when discussing their concerns about Egloff with each other or with the State Police. Moreover, for all the reasons stated in the Hearing Officer's decision, the circumstances under which they did so was neither unlawful, violent, in

breach of contract, disloyal to the employer or disruptive of the employer's business. As such, their conduct did not lose its protected status.

Nevertheless, and for the first time on review, the City contends that the Charging Parties' contacting the State Police here was analogous to the civil lawsuit filed by the plaintiffs in Leviton Mfg. Co., Inc. v. NLRB, 486 F. 2d 686 (1973). There, the plaintiffs were former union officials who filed numerous grievances and complaints with the company after they lost their bids for reelection to union office. Id. at 687. They had also engaged in what the court deemed a "year long campaign of harassment and on-the job-truculence" directed toward their immediate supervisors and new union leaders, which included several incidents involving obscene gestures and profane language, as well as threats by one of the plaintiffs towards a supervisor that she would "take his house from him." Id. Finally, the plaintiffs filed a civil action in federal court against the company, the union, and sixteen individuals alleging that the company and union conspired to oust the four plaintiffs from their former union positions by improperly supporting the new union officers in the elections and sought significant damages. Id. at 688. The court dismissed the action for failure to allege a basis for federal court jurisdiction and the plaintiffs did not appeal. A week later, however, the company fired three of the plaintiffs due to "continuous harassment and aggravation of . . . fellow employees and management." Id.

The union filed a charge on the plaintiffs' behalf at the National Labor Relations Board (NLRB), alleging, among other things, that the plaintiffs had been fired for engaging in protected,concerted activity. Id. at 688-689. The NLRB trial examiner dismissed the charge. The trial examiner found that the plaintiffs had brought the civil action in bad faith for the purpose of forcing the newly-elected union officials to disregard the results of the

union election and restore them to office. For this reason, she found that the plaintiffs' conduct had lost its protected status and thus, that the terminations based on the civil action were not unlawful. In finding that the civil action had been brought in bad faith, the trial examiner specifically discredited most of the plaintiffs' denials of harassment. Id. at 689-690.

The plaintiffs appealed the decision to the full NLRB, which reversed the dismissal, finding that the civil action had been filed in good faith and thus constituted protected, concerted activity. Id. at 690. The employer appealed and the First Circuit reversed, finding that substantial evidence did not support the NLRB's conclusion that the plaintiffs had brought the civil action in good faith. In reaching this conclusion, the Court relied heavily on the trial examiner's findings, stating: "Where the issue is the motive of the employees who filed the lawsuit, the trial examiner's credibility findings are entitled to great weight." Id. at 690. The Court also criticized the NLRB for failing to address the fact that virtually all of the plaintiffs' grievances and complaints lacked merit. Id.

Here, by contrast, the Hearing Officer found that the Charging Parties had valid reasons to believe that the sexual assault allegations against Egloff were true and to act collectively for the purpose of redressing their concerns. Even if Secretary later recanted her allegations to the Investigator, the hearing testimony and documents support the finding that Secretary told the Charging Parties that she had been assaulted by Egloff and that the Charging Parties had no reasons to doubt her story. Moreover, unlike in Leviton, several of allegations that the Charging Parties made to the State Police about Egloff were substantiated by both the City's investigation and during the DLR hearing,

including that Egloff had sexually assaulted the Nurse, pulled employees' hair,[12] behaved unprofessionally by, among other things, making lewd comments in the workplace and publicly screaming and swearing at Boutin. Also, unlike the plaintiffs in Leviton, and as repeatedly noted (and criticized) by the City, the Charging Parties did not file any grievances concerning the matters that they discussed with the State Police.[13] Ultimately, unlike the Trial Examiner in Leviton, the Hearing Officer found and the record supports that the Charging Parties had a valid basis for raising their concerns about Egloff. Leviton is therefore distinguishable.

Knowledge of Protected, Concerted Conduct and Adverse Action

As to the next two parts of the prima facie case, there is no dispute that the City took adverse action against the Charging Parties by terminating them, and that the City knew of their protected, concerted conduct.

Unlawful Motivation

We therefore turn to the fourth element of the prima facie case, unlawful motivation. As stated above, unlawful motivation may be proven through direct or indirect evidence. Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002) aff'd sub nom Town of Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005).

Direct Evidence

[12] In addition to finding that Egloff had pulled Boutin's ponytail, the McDonald Report stated that most firefighters that she interviewed told her that Egloff also pulled or "tugged" firefighter Mike Albert's hair, but that this was done in a joking manner and Albert was not offended.

[13] The Union argued to the Investigator that not filing a grievance is protected activity under Section 2 of the Law. The Hearing Officer disagreed. The Union raises this issue again, but we need not address it as it is not material to our holding.

Here, the termination notices, as supplemented by the McDonald Report, reflect that the decision to terminate the Charging Parties was due at least in part to their decision to go to the State Police with their concerns about Egloff, and generally for their efforts to shine a light on Egloff's sexual assault allegations and other concerning behavior, instead of following what the Department deemed the appropriate chain of command. Because we have determined that the Charging Parties' conduct constitutes protected, concerted activity, this evidence "results in an inescapable, or at least a highly probable inference that a forbidden bias was present in the workplace." Wynn & Wynn, 431 Mass. at 667; Andover School Committee, 40 MLC 1, MUP-12-2294 (July 2, 2013).

Indirect Evidence

There is also indirect evidence of unlawful motivation in the record. Several factors may suggest unlawful motivation, including the timing of the alleged discriminatory act, triviality of reasons given by the employer, disparate treatment, an employer's deviation from past practices or expressions of animus or hostility towards a union or the protected activity. Town of Carver, 35 MLC at 47-48. There is evidence in this case to support several of these criteria.

First, the Hearing Officer found indirect evidence of unlawful motivation based on several derogatory statements that McDonald made in her report regarding grievances, including her comment that she found Kennedy's "excitement when he was talking about his grievances . . .disturbing" and that Kennedy "lives to file grievances and create upset and conflict in the department." She also described Miltimore as "always at the center of controversy involving lawyers and legal authorities," McDonald also implicitly criticized Miltimore for filing a complaint when he worked part-time at the Southampton Fire

Department[14] Finding that the Fire Commission based its decision to terminate the Charging Parties "solely" on the McDonald Report, the Hearing Officer imputed McDonald's motives to the Fire Commission and determined that the decision was motivated by a desire to penalize or discourage the protected activity.

The City contests that the Commissioners based their decision to terminate the Charging Parties solely on the recommendations in the McDonald Report. It claims that the record shows that the Commission held a two-day hearing and issued termination notices during which each of the Commissioners proffered their own reasons for agreeing with the Investigator's decision to terminate each of the Charging Parties. This argument directly contradicts the City's unequivocal statements in its post-hearing brief that the "entire basis for the Fire Commission's termination vote is the McDonald Report"[15] and that the Commissioner's "vote to terminate was based upon the information, findings and recommendations contained in the McDonald Report as evidenced in the statements made by the Fire Commissioners at the time of the vote of termination." The City's assertion on appeal that the Hearing Officer's consistent finding was "erroneous" is therefore disingenuous, if not waived. In any event, the record supports the Hearing Officer's finding because the Termination Notices themselves state that each Charging Party "engaged in insubordination and subverted the chain of command "*as more specifically set forth*" in the McDonald Report, which was attached and incorporated to those notices. (Emphasis added). Thus, even if each of the Commissioners made their

[14] In a footnote, the Hearing Officer found that Miltimore's complaint resulted in the Commonwealth finding that Southampton did not follow policies regarding narcotics logs and ordering employees to take remedial training.

[15] See City post hearing brief at p. 22.

own statement explaining their vote, the Hearing Officer accurately characterized those statements as based almost entirely on the McDonald Report and properly imputed McDonald's motives to the City. See Trustees of Forbes Library, 384 Mass. at 570 ("An employer should not be permitted to insulate its decision by interposing an intermediate level of persons in the hierarchy of decision, and asserting that the ultimate decision makers acted only on recommendation, without personal hostility toward protected activity.")

We also find evidence of unlawful motive in the shifting and inconsistent reasons that the City provided for the terminations. The City terminated the Charging Parties in part for failing to follow the chain of command, including that set forth in the Department's Rules and Regulations. However, under those regulations, the failure to follow the chain of command is only a Class C infraction, justifying an oral warning, or in more serious cases, suspension in the first instance, but not termination. Further, as the Hearing Officer points out, the City believed, based on the McDonald Report, that Kennedy and Miltimore wrote the Anonymous Letter to the Personnel Director and that Boutin assisted them. However, all three were criticized by McDonald and disciplined by the Commissioners for their part in sending that letter. As the Hearing Officer found, therefore, the City disciplined the Charging Parties both *for* contacting and for *not* contacting the Personnel Director or other persons allegedly in the chain of command about Egloff. Similarly, the City repeatedly criticizes the Charging Parties for not filing a grievance, but, in the McDonald Report, as adopted in the termination letters, Kennedy is criticized for his penchant *for* filing grievances. This inconsistent basis for discipline provides an

additional basis to infer, under the fourth part of the prima facie analysis, that the discipline was unlawfully motivated.

Finally, unlawful motivation may be inferred from evidence that the employer treated the Charging Parties differently than it treated other similarly-situated employees. See, e.g., Town of Carver, 35 MLC at 50-51; Suffolk County Sheriff's Department, 27 MLC 155, MUP-1498 (June 4, 2001). Here, for the reasons set forth above, we find that the City fully adopted McDonald's recommendations to terminate the Charging Parties. However, it ignored her recommendation not to promote Egloff, despite the fact that she also found that his behavior, including engaging in horseplay with his subordinates, and his rude statements and gestures with respect to Regan, "deplorable," insubordinate," a gross lapse in judgment," and subject to discipline.[16] McDonald further found that Egloff had contributed to spreading "the poison gossip" by "gathering his own posse" to "freeze out" the five conspirators." She found that "superior officers behaving as he does, do not help the morale problem; they contribute to poor morale as much as their subordinates do." Yet despite these findings, which echoed in key aspects, her description of the Charging Parties' behavior, the City chose to adopt her recommendations only as to the Charging Parties, but to ignore them as to Egloff.[17] Under the fourth part of the prima

[16] McDonald quoted from the Safety section of the Employee Handbook, which stated that, "Horseplay and practical joking can result in serious injuries or death, therefore anyone engaging in horseplay or practical joking will be subject to discipline, including dismissal."

[17]McDonald likewise found that Boutin's conduct was "deplorable;" and, based on interviews with other Department members, that Boutin had engaged in sexual harassment by using "sexually explicit language or gestures . . . an offensive overall environment, including the use of vulgar language and the telling of sexual stories." In the "Conclusions and Recommendations" of the McDonald Report, which explained why

facie analysis, the City's disparate treatment in adopting McDonald's recommendations regarding the Charging Parties, but not those regarding Egloff constitutes further circumstantial evidence from which unlawful motivation can be inferred.

For all these reasons and those stated in the decision, we agree that the Charging Parties met their burden of establishing a prima facie case of unlawful retaliation.

Legitimate Nondiscriminatory Reason

After an employee establishes a prima facie case under Section 10(a)(3) based on circumstantial or indirect evidence of the employer's illegal motives, the evidentiary burden shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for taking the adverse action. The employer's burden at this stage is more than simply stating nondiscriminatory reasons. School Committee of Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327, 335 (1996). It must produce supporting facts indicating that the proffered reason was actually a motive in the decision. Id. If the employer produces such evidence, the case becomes one of mixed motives and the burden of proof returns to the charging party to demonstrate that, but for the protected activity, the employer would not have taken the adverse action. Town of Carver, 35 MLC at 48.

Here, the City contends that it fired the Charging Parties for failing to follow the chain of command, i.e., for speaking with the State Police and each other regarding their concerns about Egloff instead of keeping the matter within the Department. The City also

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McDonald recommended not promoting Egloff and terminating the Charging Parties, McDonald found that each of the Charging Parties had violated several sections of the Employee Handbook, including "Insubordination;" "Cost Control - strive to keep employees' morale as high as possible;" and "Behavior," including, "Courtesy to the public and to one's superiors and fellow employees at all times."

contends in each of its termination notices that the "charges related to criminal conduct contained in the [anonymous] letter against Deputy Egloff were unfounded but were part of a conspiracy to discredit and harm the reputation of Deputy Egloff" and that the misconduct included making false reports, insubordination, disrupting operations and contributed to poor Department morale. The excerpted portions of the McDonald Report attached to the termination notices also found that each of the Charging Parties had "conspired" to have Egloff arrested for rape.

We agree that an employer has a right to expect employees to make truthful reports and not to falsely conspire to have other employees arrested for serious crimes. See Town of Carver, 35 MLC at 50. But the Hearing Officer thoroughly analyzed each of the Employer's stated motives and found that the evidence that the City presented that the employees had engaged in this misconduct was not substantiated by the record. We have thoroughly reviewed her analysis in this regard and find it sound. In particular, the Hearing Officer found, for reasons set forth above, that some of the allegations against Egloff were true and that, even though the McDonald Report found that the bulk of the allegations in the Anonymous Letter were untrue, the City had failed to prove that the Charging Parties actually wrote or assisted in writing the letter.

As to allegations that the Charging Parties made false accusations of rape, the evidence shows that Boutin did inform two bargaining unit members that the State Police were going to arrest Egloff for rape. The Hearing Officer found that this was not protected, concerted activity. However, the Hearing Officer also found that the City had not demonstrated that Boutin, Kennedy or Miltimore ever told the *State Police* that Egloff had raped anyone or conspired with one another to have him arrested. Instead, she found

that Kennedy's and Miltimore's involvement in the meeting and contacts with the State Police constituted protected, concerted activity. As to the other allegations of conspiracy and spreading false rumors, the Hearing Officer found these to be without merit, instead, correctly characterizing the facts underlying those allegations as actions taken by the Charging Parties to address concerns about sexual assault allegations they believed to be true about Egloff in light of his imminent promotion to Chief.

The Hearing Officer thus concluded that the City had not met its burden under the second stage of the Trustees of Forbes Library analysis. The City argues this was erroneous for many of the reasons stated above, which we have found lack merit. The City also claims that the Hearing Officer erred because she was supposed to exercise deference to the Fire Commission's decision as if it were an agency under the Administrative Procedures Act. This is inaccurate, as it is well-established that fire commissions are not state agencies within the meaning of M.G.L. c. 30A, §1(2). Brigonole v. City of Boston, 1 Mass. App. Ct. 829 (1973).

But-For Analysis

Even assuming that the City had met its burden of demonstrating legitimate reasons for its conduct, the Hearing Officer proceeded to analyze, under the final stage of the Trustees of Forbes Library analysis, whether the Charging Parties had demonstrated that, but for their protected,concerted activity, the City would not have terminated them. She found that the Charging Parties had met this burden for several reasons, including that the City terminated the Charging Parties for their alleged misconduct, yet did not discipline Egloff and even promoted him to Chief, despite his

admissions that he had grabbed Nurse in a sexual and inappropriate manner while drunk and in uniform at a local parade.

On appeal, the City argues that the City's decision to promote Egloff is not relevant to the analysis of whether it terminated the Charging Parties for engaging in protected conduct. However, disparate treatment evidenceis a well-established means of determining whether "but for" the protected activity, the employer would not have taken adverse action. See, e.g., Town of Carver, 35 MLC at 50-51; Suffolk County Sheriff's Department, 27 MLC at 160. Here, the record reflects that the City followed McDonald's recommendations to terminate the Charging Parties, but did not follow her recommendation not to promote Egloff to Fire Chief despite the fact that McDonald found that, like the Charging Parties, Egloff had been insubordinate, acted "deplorably," and contributed to the Department's low morale. And, as the Hearing Officer found, other employees were involved in gossiping about the sexual assault allegations, yet the City only chose to discipline those employees who had engaged in the protected, concerted conduct.

Finally, setting evidence of disparate treatment aside, the record reflects that most of the City's "legitimate" reasons were simply a reframing of the Charging Parties' protected, concerted decision to meet with each other and the State Police to discuss what they believed, in good faith, to be true about Egloff, as cause for termination.

Thus, for all of the foregoing reasons, the Charging Parties have met their burden of demonstrating that the City would not have terminated them but for their protected, concerted behavior.

For similar reasons, we find that the City has failed to meet its burden under the direct evidence test in Wynn & Wynn, of proving that its legitimate reasons, standing alone, would have induced it to terminate the Charging Parties. As explained above, there is direct evidence that the City terminated the Charging Parties for engaging in protected, concerted activity by meeting with each other and with the State Police to discuss their concerns about Egloff. Thus, as explained above, to the extent that the City contends that such meetings constituted "subverting" the chain of command or conspiring in bad faith to derail Egloff's promotion, these are not legitimate reasons for termination. What remain are the City's contentions that it terminated the Charging Parties for conspiring to have Egloff arrested for rape, lying, and/or or spreading false rumors about him. However, with the exception of Boutin's telling two bargaining unit members that Egloff was going to be arrested for rape (which is different from accusing him of having committed rape), the Hearing Officer found that the City did not provide evidence to support these allegations. And, even assuming that Boutin's conduct had, as stated in the termination notices, "the potential to result in physical and/or emotional harm – or worse, to employees and citizens alike," the same can be said regarding Egloff's conduct towards Nurse. That the City promoted Egloff but terminated the Charging Parties demonstrates that the City's legitimate reasons, standing alone, would not have caused it to terminate all three Charging Parties.[18]

[18] In its Supplementary Statement, the Charging Parties asked the CERB to take judicial notice of the Civil Service Commission's May 21, 2021 ruling on appeal of the City's decision to terminate the Charging Parties. We decline to do so, as there is no evidence that the decision was part of the record before the Hearing Officer.

Conclusion

For the foregoing reasons, and those stated in the Hearing Officer's decision, we conclude that the City terminated Boutin, Kennedy and Miltimore in retaliation for their protected, concerted activity in violation of Section 10(a)(3) and, derivatively Section 10(a)(1) of the Law and issue the following Order.

ORDER

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

1. Cease and desist from:

   a) Disciplining unit members in retaliation for their protected, concerted activity;

   b) In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

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

   a) Rescind the termination letters issued to Boutin, Kennedy, and Miltimore;

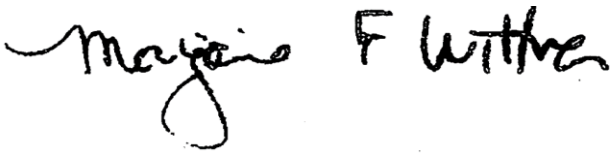
   b) Immediately reinstate Boutin, Kennedy, and Miltimore to their positions and make them whole for any loss of benefits and wages from the date of their terminations to the date of compliance with this Order, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly;

   c) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the City customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees;

   d) Notify the DLR in writing of the steps taken to comply with this decision within thirty (30) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



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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

The Commonwealth Employment Relations Board (CERB) has affirmed the decision of a Department of Labor Relations hearing officer that the City of Westfield (City) violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by terminating Kyle Miltimore (Miltimore), Rebecca Boutin (Boutin), and David Kennedy (Kennedy) in retaliation for engaging in concerted, protected activity.

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

WE WILL NOT retaliate against Boutin, Miltimore, or Kennedy for engaging in concerted, protected activities.

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

WE WILL immediately offer to reinstate Boutin, Kennedy, and Miltimore to their positions and make them whole for any loss of benefits and wages from the date of their terminations to the date of compliance with the CERB's decision and order, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly.

_____ _____
City of Westfield 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, 2 Avenue de Lafayette, Boston MA 02111 (Telephone: (617- 626-7132).