

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF BOSTON

and

BOSTON POLICE SUPERIOR
OFFICERS FEDERATION

Case No.: MUP-20-8149

Date issued: February 20, 2025

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Robert J. Boyle Jr., Esq. - Representing the City of Boston

Patrick N. Bryant, Esq. - Representing the Boston Police
Superior Officers Federation

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of Boston (City) violated Section 10(a)(3),
2 and, derivatively, Section 10(a)(1) of M.G.L. c.150E (the Law) by discriminating against
3 Boston Police Superior Officers Federation (Federation) bargaining unit member Timothy
4 Kervin (Kervin) for engaging in concerted, protected activity, For the reasons described
5 below, I find that the City has violated the Law in the manner alleged.

Statement of the Case

7 On August 14, 2020, the Federation filed a charge of prohibited practice with the
8 Department of Labor Relations (DLR) alleging that the City violated Sections 10(a)(1),

1 (3), and (4) of the Law. A DLR investigator investigated the charge on November 18,
2 2020. On March 4, 2021, the investigator issued a complaint alleging that the City violated
3 Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by discriminating against
4 Kervin for engaging in concerted, protected activities when the City: a) transferred Kervin
5 from the Police Department's (BPD or Department) Operations Division to the Hackney
6 Carriage Unit, b) issued a reprimand to him on or about that time, and c) reduced Kervin's
7 overtime opportunities and pay by the transfer. ¹ The City filed its answer to the complaint
8 on March 9, 2021.

9 I conducted five days of hearing between October 5, 2021² and February 2, 2022.³
10 Both parties had an opportunity to be heard, to call witnesses, and to introduce evidence.
11 During the hearing, I inquired whether the Federation intended to introduce a copy of the
12 reprimand, which is referenced in the complaint, into evidence, because the City, in its
13 answer, had denied that the reprimand existed. The Federation confirmed on the record
14 that the City had not issued a reprimand to Kervin. To the extent that the allegation
15 regarding the reprimand was not withdrawn explicitly, it is summarily dismissed.

16 The parties submitted their post-hearing briefs on May 6, 2022. Upon review of
17 the entire record, including my observation of the demeanor of the witnesses, I make the
18 following findings of fact and render the following opinion.

¹ The investigator dismissed the allegation that the City violated Section 10(a)(4) of the Law by discriminating against Kervin for participating in an earlier DLR proceeding in Case No. MUP-16-5618.

² On the first day of the hearing, I allowed the Federation's motion to amend the complaint to include an alternative allegation that the City's actions also constituted an independent violation of Section 10(a)(1) of the Law.

³ I conducted the hearing remotely via the Webex videoconferencing platform.

Findings of Fact⁴Background

The City has four bargaining units of sworn police officers: a) a unit of patrol officers, who are represented by the Boston Police Patrolman's Association (BPPA), b) a unit of detectives, and c) a unit of detective superior officers, both of whom are represented by the Boston Police Detectives Benevolent Society (BPDBS), and d) a unit of uniformed sergeants, lieutenants and captains, who are represented by the Federation. The Federation's bargaining unit has 250 members. The Federation and the City were parties to a fully integrated collective bargaining agreement dated July 1, 1979 (July 1, 1979 CBA) and a Memorandum of Agreement dated April 14, 2014 (April 14, 2014 MOA), which contained provisions pertaining to the eligibility of unit members to be granted leaves of absence without loss of pay or benefits to perform union business (paid union leave). Those provisions currently remain in effect as part of the collective bargaining agreement between the parties. The provisions state in pertinent part:

Article XVI, Section 2 of July 1, 1979 CBA

The members of the Federation Bargaining Committee, not to exceed five (5), and the President of the Federation, shall be granted leaves of absence without loss of pay or benefits for all meetings between the City and the Federation for the purpose of negotiating the terms of a contract or supplement thereto. Federation officers, district representatives and Grievance Committee members, not to exceed five (5) in any instance, shall be granted leave of absence without loss of pay or benefits for time required to discuss and process grievances or incidents which could lead to grievances, with the employer or others involved, and to attend the "standing committee" meetings with the City as provided in this contract, and may enter any premises of the Department at any reasonable time for such purposes provided they give notice of their presence immediately upon arrival to the person in charge. Such officers, district representatives and Grievance Committee members who work with any night platoon shall have their hours and schedule of work accordingly adjusted to effectuate the purpose of this Section.

⁴ The DLR's jurisdiction in this matter is uncontested.

1 Article XVI, Section 2 of April 14, 2014 MOA

2 **The following language will be added to Article XVI, Section 2** [Emphasis in Original].

3
4 Section 2 Federation officers covered by Section 2 shall not be compensated in any
5 matter for Section 2 covered activities performed on a regularly scheduled day off or
6 vacation day, or other leave days, except for meetings attended by: agents of the city,
7 arbitrators, mediators, representatives of labor relations and labor and employment
8 agencies who request their attendance. Federation officers attending such meetings on
9 a non-working day when the activity cannot be reschedule[d] shall receive a minimum of
10 four (4) hours of compensatory time, and after that shall receive compensatory time on
11 an hour for hour basis.

12 Overview of the BPD's Operations Division

13 The BPD's Operations Division receives all calls to the City's 911 phone line⁵ at its
14 call center and dispatches police officers to respond to calls requiring police services.
15 The Operations Division answers calls 24 hours per day, 365 days per year. The
16 Operations Division is located on the fourth floor of the BPD's Headquarters at One
17 Schroeder Plaza and is part of the Bureau of Administration and Technology. A deputy
18 police superintendent manages and oversees the Operations Division, while a police
19 captain, who works the day shift, Mondays through Fridays, oversees its administrative
20 functions.⁶ Three lieutenants and nine sergeants supervise⁷ the approximately sixty-four
21 civilian call-takers and forty-five dispatchers and are referred to as sworn supervisors.⁸

⁵ The Operations Division also receives and transfers 911 calls for fires and emergency medical assistance to the City's Fire Alarm Department and the City's Emergency Medical Services (EMS) respectively, who have their own call-takers and dispatchers.

⁶ The deputy superintendent and the captain also oversee police officers on the first floor who provide security for the building.

⁷ The lieutenants and sergeants in the Operations Division receive a stipend of \$40 per week because they are classified as specialists.

⁸ Deputy Superintendent Carmen Curry (Curry), who commanded the Operations Division during the time of the events at issue here and at the time of the hearing, described the

1 The captain, the lieutenants, and the sergeants are members of the Federation's
2 bargaining unit, while the call-takers and dispatchers are members of SEIU, Local 888's
3 bargaining unit.

4 The call-takers and dispatchers are assigned to one of three shifts: a day shift from
5 8:00 a.m. to 4:00 p.m., a first-half shift from 4:00 p.m. to 12 midnight, and a last half shift
6 from 12 midnight to 8:00 a.m. The call takers and dispatchers work fixed five-day
7 schedules with two days off. Generally, eleven call-takers and seven dispatchers work
8 during a shift although additional personnel may be added if a big event is taking place in
9 the City. The call-takers and dispatchers must be certified as Enhanced 911-
10 Telecommunicators in accordance with State 911 Department regulations and undergo at
11 least sixteen hours of annual continuing education to retain their certifications. The call-
12 takers sit on one side of the call center, and the dispatchers sit on the other side. When
13 a call-taker answers a call seeking police services, the call taker enters all relevant
14 information about the call into the computer-aided dispatch system (CAD) and selects a
15 code for the call. The CAD saves the information about the call and transmits it to a
16 dispatcher based on the location where the services are needed. The City is divided into
17 geographic areas, A, B, C and D, with dispatchers assigned to each of those areas. The
18 dispatcher assesses the priority nature of the call, determines how busy the police district
19 that will respond to the call is at that time, and then dispatches the necessary police
20 services using the I-Dispatch system. When a call-taker receives a non-emergency call

sworn supervisors' responsibilities as protecting the call-takers and dispatchers and making sure that the call-takers and dispatchers were doing their jobs because the call-takers and the dispatchers could be held liable if they made mistakes.

1 seeking information, the call taker will provide the caller with the requested information or
2 transfer the call. If a call-taker does not enter a call into the CAD to be transmitted to the
3 dispatchers, transfer the call, or resolve the call by providing requested information, the
4 call-taker will send the call to what is referred to as "Group 40." The Operations Division
5 sworn supervisors are responsible for reviewing all calls sent to Group 40 to ensure that
6 those calls were handled appropriately, and that police officers should not have been
7 dispatched in response to the call.

8 Lieutenants and sergeants are assigned to one of the following shifts: 7:30 a.m. to
9 4:00 p.m., 4:00 p.m. to 11:45 p.m., or 11:45 p.m. to 7:30 a.m.,⁹ but they report to work
10 one hour early to prepare for the upcoming shift.¹⁰ Because the sworn supervisors report
11 to work one hour early, the call-takers and the dispatchers generally will have different
12 supervisors at the beginning and end of their shifts. One lieutenant and two sergeants
13 generally supervise a shift. The lieutenants and sergeants do not actually answer 911
14 calls or dispatch police officers. The sworn supervisors work on a platform that is raised
15 above where the call-takers and dispatchers sit, which allows the sworn supervisors to
16 observe the call takers and dispatchers and step in if they need assistance. There are
17 monitors in the platform area that allow the sworn supervisors to assess how many call-
18 takers are on the phones and how many calls are pending. The sworn supervisors also

⁹ The record does not reveal why the lieutenants' and sergeants' shifts vary slightly from the call-takers' and dispatchers' assigned shifts.

¹⁰ Lieutenants and sergeants who work a) the 7:30 a.m. to 4:00 p.m. shift receive a lunch differential, b) the 4:00 p.m. to 11:45 p.m. shift receive a 9% differential, and c) the 11:45 p.m. to 7:30 a.m. shift receive a 10% differential.

1 have access to the CAD to determine how many calls are awaiting action from each
2 dispatcher.

3 When lieutenants and sergeants begin to work as supervisors in the Operations
4 Division, they undergo one week of emergency telecommunicator training with the State
5 911 Department and take two additional days of training specific to supervisors. They
6 earn VESTA¹¹ and APCO¹² certifications each year and attend sixteen hours of additional
7 training to retain those certifications.

8 The Operations Division lieutenants work five-day schedules with two fixed days
9 off, which means that each shift will consist of two days per week in which a lieutenant is
10 not assigned to work. The sergeants, who are members of squads, work four and two
11 schedules with rotating days off. Supervisors, call-takers, and dispatchers who are
12 assigned to the same shift in the Operations Division will not always work with the same
13 individuals because of the differences in the schedules, as well as vacations, personal
14 leave, etc. When a lieutenant or sergeant is absent from a shift, the City fills the absence
15 on overtime and offers the opportunity to work first to the sergeants and lieutenants who
16 currently work in the Operations Division. The overtime opportunity is offered initially to
17 the sergeant or lieutenant who previously has received the lowest amount of overtime.¹³
18 Sergeants as well as lieutenants are eligible to fill in for absent lieutenants on overtime.

¹¹ VESTA is a system for handling 911 calls.

¹² APCO, the Association of Public Safety Communication Officials, oversees minimum national training requirements for emergency telecommunicators.

¹³ Later in these findings, I will discuss the circumstances under which sergeants and lieutenants who previously had worked in the Operations Division were eligible to work overtime there. Unlike overtime opportunities in the police districts, it is undisputed that

1 The lieutenant or sergeant who oversees a shift is referred to as the duty supervisor. If
2 no Operations Division sergeants or lieutenants accept an overtime opportunity, an
3 Operations Division sergeant will be forced to do mandatory overtime. When only
4 sergeants work on a shift in the Operations Division with no lieutenant present, one of the
5 sergeants¹⁴ will act as the duty supervisor for the shift and will receive pay as an acting
6 lieutenant for the day.

7 The Operations Division uses software known as Schedule Express to track
8 employees' schedules¹⁵ and attendance, including their use of various types of leave.
9 When Federation unit members take paid leave for union business, pursuant to the
10 contractual provisions supra, they enter certain codes in Schedule Express. When
11 Federation unit members perform union business during their regularly assigned shifts,
12 they will input the payroll code LB for labor business. When Federation unit members
13 perform union business during shifts to which they are not assigned, the unit members
14 will designate that time with the LI payroll code. When unit members input the LI payroll
15 code, they then earn an LO, a labor out, which they will use to cover their absences from
16 their regularly assigned shifts on that same day. When Federation unit members perform
17 union business on their days off, they also input the LI payroll code for that time and earn
18 an LO, which is akin to compensatory time that can be used on a later date. Prior to April

sergeants and lieutenants who have never worked in the Operations Division are not eligible to work overtime there.

¹⁴ The sergeants rotate amongst themselves who will be the duty supervisor on a particular shift.

¹⁵ The Operations Division is the only unit in the BPD that uses Schedule Express.

1 2019, employees in the Operations Division who requested to use paid release time for
2 union business, would submit in advance a so-called "Blue Form" for the captain's
3 approval.¹⁶

4 Members of the Federation Leadership Who Served in the Operations Division

5 Both the Federation's current president Sergeant Jeanne Carroll (Carroll) and vice-
6 president Lieutenant Timothy Kervin (Kervin) worked in the Operations Division prior to
7 the present controversy. As of the hearing, Carroll had twenty-seven years of service with
8 the BPD, had held the rank of sergeant for thirteen years, and had worked as a sworn
9 supervisor in the Operations Division for approximately thirteen years. Prior to early 2020,
10 Carroll had been assigned to a squad on the day shift for several years. As part of the
11 BPD's annual shift bid, she bid into a position in the first-half shift in the Operations
12 Division in early 2020¹⁷ but did not move into the first-half position until June 2020.¹⁸

13 Carroll had been the Federation president for two years when the hearing took
14 place and held the positions of vice-president, treasurer, and union representative for
15 seven years prior to her presidency. The City designates Carroll, as the Federation
16 president, as being on full-time paid release from her assignment in the Operations

¹⁶ Retired BPD Captain Alfredo Andres (Andres) indicated at hearing that when he was the District E-13 captain, Lieutenant Steve Sweeney (Sweeney), who was then the Federation vice-president, would submit Blue Forms seeking approval for paid union leave, although the BPD subsequently designated Sweeney as being on full-time release.

¹⁷ When Carroll bid on the first-half shift opening, the City did not raise any concerns about fact that she and Kervin would be assigned to the same first-half shift even though she was on full-time release, and he would be eligible to take paid union leave when needed.

¹⁸ For unexplained reasons, Carroll's move to the first-half shift was delayed for several months.

1 Division (full-time release). The BPD also has assigned an additional sergeant full-time
2 to Carroll's squad to cover her absence. Even though Carroll is on full-time release, she
3 still enters the LI, LO, or LB codes in Schedule Express.¹⁹

4 When the hearing took place, Kervin, the alleged discriminatee in the present case,
5 had approximately thirty-five years of service with the BPD, which includes holding the
6 rank of lieutenant for fifteen years. He served as a sworn supervisor in the Operations
7 Division for approximately twelve years before his transfer. For much of that time, Kervin
8 worked on the day shift in the Operations Division with Fridays and Saturdays off.
9 However, on February 2, 2019, he moved into a position on the first-half shift with the
10 same days off. Kervin became the Federation vice-president on or about July 1, 2019.
11 He previously was a member of the Federation's bargaining and grievance committee
12 from 2013 through June 30, 2019 and its elected secretary from 2015 through July 2019.²⁰
13 In all of those roles, Kervin was eligible to receive paid union leave, although a dispute
14 exists between the Federation and the City as to whether Kervin as the Federation vice-

¹⁹ Because Carroll was assigned to a squad, she had rotating days off even though she was on full-time release.

²⁰ Kervin also was the Union representative for BPD Headquarters for an undetermined amount of time before July 2019.

1 president was eligible for full-time release.²¹ Kervin took paid union leave²² for: a) 18
2 shifts in 2013, b) 60 shifts in 2014, c) 24 shifts in 2015, c) 160 shifts in 2016, d) 192 shifts
3 in 2017, e) at least 82 shifts in 2018, f) at least 190 shifts in 2019, and g) at least 120
4 shifts for the period from January 1, 2020 through August 8, 2020 when he was
5 transferred out of the Operations Division. At some point between April 2019 and January
6 2020, then Operations Division Captain Keith Dalrymple (Dalrymple)²³ informed Kervin
7 that he no longer needed to submit Blue Slips to receive advance approval to take paid
8 union leave, but that Kervin needed to enter the appropriate code in Schedule Express.²⁴

²¹ At hearing, the Federation made the general assertion that Kervin, as vice-president, was entitled to be on full-time release. The City challenged that contention and introduced testimony from Andres, who had been the deputy superintendent in charge of labor relations for the BPD for several years prior to being the District E-13 captain, about the way two prior Federation vice-presidents, Mark Parolin (Parolin) and Sweeney, received paid union leave. Regarding Parolin, Andres noted that because the Federation could request that up to five unit members per day be released on paid union leave, Parolin frequently received paid union leave as one of those five unit members. Also, Andres indicated that the BPD ultimately designated Sweeney as being on full-time release as the result of an agreement with the Federation that only pertained to Sweeney. While not conceding the accuracy of Andres' assertions, the Federation then argued that Kervin was on what was the equivalent of full-time release. However, I need not resolve whether Kervin as vice-president was eligible to be on full-time release because that issue is not pertinent to the outcome of the case. The City did not contend that it transferred Kervin from the Operations Division because he incorrectly claimed that he was entitled to be on full-time release or because he used his paid union leave improperly on matters other than union business.

²² Carroll compiled a chart from Kervin's Schedule Express records from 2013 through 2020. She designated one of the columns in the chart as "Labor Business" but acknowledged at hearing that she was referencing Kervin's use of both LBs and LIs.

²³ In April 2019, the BPD assigned Dalrymple as the Operations Division captain.

²⁴ Because Dalrymple was a member of the Federation's grievance committee and its sergeant at arms, he also was eligible to take paid union leave, and he did so.

1 At the hearing, Carroll, Andres, and Deputy Superintendent Luis Cruz (Cruz)²⁵ all
2 acknowledged seeing lists in the media that identified Kervin as one of the BPD's top
3 wage earners. A review of Kervin's Schedule Express Records for the period from
4 January 1, 2018 through August 8, 2020 shows that while Kervin often was listed as on
5 paid union leave, consistent with the figures above, he also regularly worked overtime
6 shifts on his days off, which were Fridays and Saturdays.²⁶ He also frequently worked a
7 second shift on overtime before or after working his regularly scheduled shift.²⁷ For
8 example, Kervin worked: a) 111 overtime shifts in 2018, b) at least 153 overtime shifts in
9 2019, and c) 88 overtime shifts with 32 of those shifts occurring on the first-half shift from
10 January 1, 2019 through August 15, 2020. Also, Kervin worked: a) 47 of his regularly
11 scheduled shifts (regular shifts) in 2018, b) at least 41 of his regular shifts in 2019, and
12 c) at least 20 of his regular shifts from January through part of August 2020.

13 On twelve dates in 2019, Kervin submitted an LI for the day shift, an LO for his
14 regularly scheduled first-half shift, and then worked an overtime assignment in the

²⁵ Cruz has been the Director of the BPD's Office of Labor Relations since 2019.

²⁶ On August 25, 2015, then Operations Division captain Robert Ciccolo (Ciccolo) sent a memo to the sworn supervisors indicating that all supervisor overtime must be approved by him or the deputy superintendent of the Operations Unit. Ciccolo also noted that overtime for the replacement of duty supervisors, 911 supervisors and back-room supervisors was authorized.

²⁷ As the City correctly noted, Kervin also commonly worked details on later shifts after taking paid union leave on day shifts. However, the City has not argued that Kervin's conduct violated any BPD regulations.

1 Operations Division on that first-half shift.²⁸ Those dates were: February 25, April 16,
2 June 17, July 1, July 17, July 22, July 24, August 1, August 7, August 8, August 20 and
3 August 22, 2019.²⁹ On nine dates from January 1, 2020 through August 15, 2020, Kervin
4 submitted an LI for the day shift, an LO for his regularly scheduled first-half shift and then
5 worked overtime assignments on the first-half shift in the Operations Division. Those
6 dates were: January 29, February 20, May 25, June 1, June 2, June 3, June 4,³⁰ June 10
7 and June 25, 2020.³¹

8 Changes in Operations Division Personnel Commencing in Late Summer 2019

9 Curry Assumes Command of the Operations Division

²⁸ It is unclear from the parties' exhibits whether the overtime shifts that Kervin performed in 2019 resulted from his being technically absent from the first-half shift due to his submission of an LO or resulted from the absence of another sworn supervisor. Carroll claimed that Kervin must have worked overtime on his regularly scheduled shift because another sworn supervisor on the first-half shift was absent and that Kervin wanted to avoid a sergeant being required to perform mandatory overtime. However, she provided no specific details in support of that contention.

²⁹ The City also asserted that Kervin took paid union leave on the day shift on May 6, 2019, submitted an LO for the first-half shift, and then worked overtime on that shift. A review of the Schedule Express records does not show that Kervin worked overtime in the Operations Division on that shift, but he may have worked overtime elsewhere, which would not have been reflected in the Schedule Express records.

³⁰ On June 1 through 4, 2020, the BPD cancelled all leave except for those employees on week-long vacation leave and issued a full call-up of all sworn personnel, a situation which will be addressed later in this decision.

³¹ The City also contended that on September 17, 2019 and July 20, 2020, Kervin submitted an LI or an LB for the same shift that he worked overtime. As the City did not reference those alleged occurrences as reasons why it transferred Kervin, I decline to make any findings as to Kervin's actions on those dates. Additionally, the City contended that Kervin acted in a similar manner on August 6, 2020, which was the day after the City informed Carroll of the transfer decision, and thus not material to the facts before me.

1 On August 5, 2019, Curry took command of the Operations Division. Curry had
2 served in the BPD for thirty-four years as of the hearing and previously had been assigned
3 to the Civil Rights Unit for twenty-six years, where she investigated and oversaw
4 investigations of hate crimes, conducted training, and performed community outreach.
5 Curry, who attained the rank of sergeant in 1992 and subsequently became a sergeant-
6 detective, had been assigned as Night Command for the Civil Rights Unit before her
7 promotion to deputy superintendent on August 1, 2019.³² When Curry began at the
8 Operations Division, her immediate supervisor was Superintendent John Daley (Daley),
9 Chief of the Bureau of Administration and Technology. In October 2019, Daley retired,
10 and Superintendent James Hasson (Hasson) became Bureau Chief.

11 *Markunas Transition Report*

12 On September 6, 2019, Christopher Markunas (Markunas), the civilian Director of
13 Quality Assurance for the Operations Division, sent Curry a copy of an Operations
14 Division Transition Report Update (Markunas Transition Report), which he created on or
15 about April 29, 2019. The Markunas Transition Report, which was ten pages in length,
16 noted in pertinent part:

17 **Future Needs/Considerations/Challenges** [Emphasis in Original]

18
19 **911 Call-Taker Staffing**-It is important that the Division work with the
20 Department's Human Resource Department to ensure that all vacant
21 civilian positions are filled as quickly as possible. It has been a challenge
22 to adequately staff the Division, particularly 911 positions, with vacant
23 positions remaining unfilled for long periods of time. The importance of
24 these positions to public safety needs to be stressed to Human Resources.
25

³² Curry previously had not served in the Operations Division during her career with the BPD.

1 Analysis of current and future workloads is needed. 911 call volumes
2 currently exceed the ability of present staffing to meet industry answering
3 time standards during several periods of the day and/or year. The
4 combination of a growing city population and the addition of new next-
5 generation technologies will only exacerbate this issue. Many "busy hours"
6 during the year frequently result in 911 calls being answered on delay or not
7 answered at all.

8
9 A plan needs to be established to increase 911 call-taker staffing levels in
10 the immediate future. ...

11 12 **Operations Quality Assurance Program**

13
14 **Civilian Work Schedule**-The current work schedule for civilian personnel
15 in the Operations Division (other than administrative staff) is a fixed five
16 days on/2-days off. This schedule is not conducive to the high-pressure,
17 critical nature of work performed in the Division by civilian personnel.
18 Outside of sworn officers, police dispatchers and 911 call-takers perform
19 under some of the most stressful conditions in the Department. The 24-
20 hour-a-day, 365-day-a-year schedule demanded of these positions
21 warrants a schedule like that of sworn personnel. The Department and the
22 City need to seriously consider a 4-and-2 work schedule or similar
23 arrangement for Operations personnel, particularly dispatchers and 911
24 call-takers.

25
26 **Supervision**-Sworn superior officers provide supervision of Operations
27 Division personnel in the PSAP and support units. The Department needs
28 to ensure that supervisors interested in, and capable of, overseeing an
29 increasingly technical unit are assigned to Operations. The previous
30 practice of assigning "any" supervisor to the Operations floor will be
31 detrimental to [the] future success of the unit as the complexity of the job
32 continues to increase. The most recent additions to the supervisory staff
33 have been positive and welcomed.

34
35 **Staff Meetings**-Need to be held regularly with administrative staff and
36 sworn supervisors. Supervisor meetings have not been held regularly in
37 some time. A common complaint from all staff is lack of communication in
38 Operations. Monthly update meetings are held for Operations Division
39 Commanders by the Director of Quality Assurance. These meetings are
40 helpful to discuss the status of current and future initiatives, as well as
41 determine solutions for identified problems or concerns.

42
43 The addition of civilian supervisors for the Division should be considered in
44 the future. The frequent transfer of sworn personnel is detrimental to
45 successful supervision of an all-civilian staff in an increasingly technical,
46 complex environment. In addition to more stability in supervision, the

1 addition of civilian supervisory positions would create a professional career
2 path for current employees of the division and provide an incentive for
3 employee retention. The optimal arrangement would maintain sworn
4 representation at some level for law enforcement issues that arise, while
5 adding civilian positions to perform day-to-day supervision and issue
6 resolution.

7 *Andres' Appointment as Captain of the Operations Division*

8 In a late December 2019 telephone call, then Police Commissioner William Gross
9 (Gross)³³ told Andres that Gross wanted to assign Andres to the Operations Division.
10 Andres had served with the BPD since 1995, had been promoted to the rank of: sergeant
11 in 2004, lieutenant in 2006, and deputy superintendent from 2009 to 2014. As deputy
12 superintendent, he served for two plus years as the director of the BPD's Office of Labor
13 Relations.³⁴ In 2014, Andres returned to his permanent Civil Service rank of captain and
14 was the commander of District E-13 in Jamaica Plain for three years. When Gross
15 contacted Andres, Andres expressed concerns that he had no prior experience serving in
16 the Operations Division and had no expertise in technological matters. Gross informed
17 Andres that he wanted Andres to manage personnel issues, which included monitoring
18 the shift bid process and employees' use of sick and vacation leave, and that Curry would
19 oversee the computer systems and upgrades to the E911 system. Andres at hearing

³³ Gross subsequently retired on January 29, 2021.

³⁴ As deputy superintendent in the BPD's Office of Labor Relations, Andres represented the BPD in negotiations with the Federation and other labor relations matters.

1 paraphrased Gross as commenting that: the Operations Division was out of control;³⁵ the
2 situation was a little overwhelming; and that Curry needed help.³⁶

3 *January 17, 2020 Transfer of Sergeants*

4 In mid-January 2020, Carroll and Kervin attended a promotion ceremony. Before
5 the start of the ceremony, Superintendent William Ridge (Ridge), then Chief of the Bureau
6 of Field Services, informed Carroll and Kervin that some sergeants would be transferred
7 out of the Operations Division.³⁷ When Carroll asked for the names, Ridge responded
8 that Curry had the list. Dalrymple subsequently informed Carroll that three sergeants,
9 Jeffrey King, John Farrell and John Doe (Doe),³⁸ were going to be reassigned from the
10 Operations Division. Carroll reminded Dalrymple that Doe was on light duty and was
11 restricted in the duties that he could perform. Prior to the issuance of the personnel order,
12 the BPD removed Doe's name from the transfer list and Curry informed him that he would

³⁵ The Operations Division was short-staffed, and call-takers and dispatchers previously had gotten into arguments with each other.

³⁶ Andres noted that the Operations Division had many employees, especially civilian employees, and was responsible for the entire City.

³⁷ At hearing, Curry described how at some point shortly after her assignment to the Operations Division, former Superintendent-in-Chief Dennis White (White) informed her that the Operations Divisions did not have a "great pool of supervisors" and that he was going to send her some new supervisors. Curry also claimed that before she started at the Operations Division, Gross and White had looked at the supervision in the Operations Division.

³⁸ The parties agreed that a pseudonym would be used instead of the third sergeant's actual name.

1 remain assigned to the Operations Division.³⁹ On January 21, 2020, Carroll sent an email
2 to Curry and Dalrymple entitled Operations Supervisors Transfers stating in pertinent part:

3 As I'm sure you're aware there has been a lot of concern and questions from
4 Federation members and Operations employees concerning Friday's
5 transfers. As both union officials and also assigned to Operations, myself
6 and Lt. Kervin respectfully request to meet with you to discuss these matters.
7 We are at HQ tomorrow on another matter if that works. If not we are open
8 to other times as your respective schedules allow.⁴⁰

9 On January 31, 2020, Carroll again requested that Curry and Dalrymple meet with
10 Kervin and her. Also, on that date, the BPD issued a personnel order transferring
11 Dalrymple from the Operations Unit to the Hackney Carriage Unit effective February 1,
12 2020. As part of that same personnel order, the BPD transferred Andres from the Hackney
13 Carriage Unit to the Operations Unit effective February 1, 2020.⁴¹

14 On February 5, 2020, Ciccolo sent an email (February 5, 2020 email) to
15 Curry, Markunas and Andres noting in pertinent part:

16 Per your request.
17

18 Please find attached the Memo from Deputy Cox regarding outside
19 supervisors working in Operations. To the best of my knowledge this has
20 never been rescinded and should thus still be in force.

³⁹ On January 24, 2020, the BPD placed Doe on administrative leave, and on January 31, 2020, the Federation filed Grievance #15-0582 (Doe Grievance) alleging that the City violated the parties collective bargaining agreement when it placed Doe on administrative leave. On February 11, 2020, the BPD ended Doe's placement on administrative leave, and he returned to the Operations Division. Despite Doe's return to active duty, the Federation continued to process the Doe Grievance through the steps of the contractual grievance-and-arbitration procedure.

⁴⁰ Carroll did not receive a response to her January 21, 2000 email.

⁴¹ At hearing, Andres described himself as being the commander of the Licensing Division and denied being a captain in the Hackney Carriage Unit.

1 The attachment, which was dated October 17, 2013 (October 17, 2013) and was
2 addressed to the Operations Supervisors, stated as follows:⁴²

3 In order to work in the Operations Division, Supervisors must hold current
4 certifications as determined by the commander of the Operations Division.
5

6 There are currently no outside Supervisors certified. As such, no outside
7 Supervisors shall be allowed to work overtime in the Operations Division.

8 *Meeting Regarding the Operations Division*

9 On February 11, 2020, Carroll and Kervin met with Curry, Cruz, and John Wilton
10 (Wilton), counsel in the BPD's Office of Labor Relations, about the transfers of King,
11 Farrell and Dalrymple from the Operations Division and the placement of Doe on
12 administrative leave. Carroll and Kervin expressed concerns that those Federation unit
13 members were being blamed for several high-profile, fatal incidents.

14 *Curry's Inquiry about Kervin and Carroll's Use of Release Time*

15 On February 12, 2020, Bernadette Holiday (Holiday), the Head Clerk and
16 Secretary for the Operations Division, who was responsible for converting the Schedule
17 Express records to Payroll records, sent an email to Curry stating:

18 I was just informed by Darlene Buford in HR that Sgt. Carroll has 100%
19 release time. Lt. Kervin can be released as needed and just needs to let his
20 Commander know. Please let me know how you would like to proceed.⁴³

⁴² At hearing, Carroll acknowledged as a sworn supervisor in the Operations Division that she likely received a copy of Cox's October 17, 2013 memo when it issued but that she had no memory of it. For the reasons discussed supra, she believed that despite the memo, the Operations Division followed a practice of filling overtime that deviated from the October 17, 2013 memo. She also confirmed that she received a copy of the October 17, 2013 attachment at the July 20, 2021 arbitration pertaining to the Farrell and King grievance. Wilton also indicated that he received a copy of Cox's memo on or about the same time.

⁴³ At hearing, Curry indicated that she contacted Holiday because Curry was looking into whether Carroll and Kervin needed to complete Bule Forms when they took paid leave to perform union business.

1 *Contractual Step II Hearing Regarding the King and Farrell Grievance*

2 On February 18, 2020, Carroll and Kervin met with Cruz and Wilton for the
3 contractual Step II hearings⁴⁴ for the Farrell and King grievance and the Doe grievance.
4 During the Step II hearing on the Farrell and King grievance, Kervin commented that with
5 such a small number of lieutenants and sergeants assigned to the Operations Division,
6 those sworn supervisors would become burned out if sergeants and lieutenants who
7 previously worked in the Operations Division were no longer eligible to work overtime
8 when the overtime list was exhausted. Cruz stated⁴⁵ at the meeting that sergeants and
9 lieutenants who previously worked in the Operations Division would be eligible to work
10 overtime if they held up-to-date APCO and VESTA certifications, which, as discussed
11 above, varied from what the Federation contended was the past practice.⁴⁶ The record
12 does not reveal that the Federation representatives had any response to Cruz's

⁴⁴ The Department's Office of Labor Relations conducted the Step II hearings for grievances with Cruz and Wilton typically attending on behalf of the Department.

⁴⁵ At hearing, Cruz indicated that he consulted with and received Hasson's approval before making the statement.

⁴⁶ Cruz stated that he became aware in mid-1999, when he was commander of the city-wide domestic violence unit, that former Operations Division supervisors could continue to perform overtime assignments there if their VESTA or APCO certifications were up to date. He learned of the purported past practice during a conversation with Sergeant Detective Susan Edgehill-Yard (Edgehill-Yard) who also had previously worked as a sergeant in the Operations Division. At that time, Cruz and Edghill-Yard both worked at the Family Justice Center, although in different units. While discussing overtime opportunities in her current unit, Edgehill-Yard also informed Cruz that she still occasionally worked overtime assignments in the Operations Division. She noted that Cox previously had allowed former supervisors to perform overtime assignments in the Operations Division if their certifications were current.

1 statement. On February 20, 2020, Cruz issued the following Step II response regarding
2 the Farrell and King grievance:

3 A Step II hearing was held on **February 18, 20[20]** [emphasis in the
4 original] regarding the above-mentioned grievance. The Department
5 finds that there was no violation of the collective bargaining
6 agreement.

7
8 The Department hereby provides notice that it reserves and retains
9 its rights to contest the procedural and substantive arbitrability claims
10 of any and all aspects of this grievance.

11
12 Therefore, the grievance is denied.

13 The Federation subsequently moved the grievance to Step III of the contractual⁴⁷
14 grievance procedure.⁴⁸

15 *Other Administrative Issues*

16 On February 20, 2020, Curry sent an email to Kervin stating in relevant part:

17 As you know we have a CJIS Audit scheduled for March and we are non-
18 compliant with Missing Persons. I have spoken to several employees who
19 are assigned to the Support Unit and have been informed that this has been
20 an ongoing problem for years, and each time frame there is a CJIS Audit we
21 are either found to be non-compliant or are scrambling to meet the legal
22 requirements of the CJIS security policy. ...

23
24 Please speak with those employees in the Support Unit who have worked
25 with Missing Persons to identify what are the issues. ... Please let me know
26 in writing what you identify as the problem(s) and what your

⁴⁷ The Federation in its post-hearing brief argues that it is inconsistent that Cruz would have stated at the Step II hearing that former Operations Division supervisors, who held current APCO and VESTA certifications, could perform overtime assignments there, and then still denied the Farrell and King grievance. However, it is plausible that Cruz did so because the Federation maintained that the practice was that former Operations Department supervisors did not need up-to-date certifications to perform overtime assignments there. Also, the King and Farrell grievance, in part, challenged their transfers.

⁴⁸ Cruz also denied the Doe grievance at Step II, but the record does not contain a copy of Cruz's response or the date of the response.

1 recommendations are for resolving them so moving forward from the 2020
2 Audit Operations will remain in compliance with the CJIS Requirements. ...

3 On February 28, 2020, Hasson sent an email to Curry stating in pertinent part:

4 Carmen can you create a report on everything we've/you've decided on
5 reforming your division since you've taken command-new management
6 software, transfers, training and planned training, policy development,
7 discipline/investigations (IAD), counseling etc.? I want it so I can forward it
8 around so everyone knows what you've done. Thanks.

9 On March 2, 2020, Curry sent an email to Operations Division Lieutenant Joseph
10 DiGirolamo (DiGirolamo) requesting the training curriculum for new supervisors, the
11 duration of the training, and whether DiGirolamo was the main trainer or whether other
12 lieutenants provide training. In a March 3, 2020 email to Curry, DiGirolamo responded by
13 attaching an Operations Supervisor training curriculum. He also noted in his email that:

14 Currently, the training duration for new supervisors is (15) tours of duty. This
15 is in addition to the state certification. Supervisory training has always
16 occurred on the day shift and a few years ago I took the initiative to oversee
17 the training.

18
19 Further, all of the sgts are proficient with the various systems and greatly
20 assist with conducting training.

21
22 Lt. Kervin used to assist with training prior to his full-time union duties. Lt.
23 Curtis also assists when necessary.

24 On March 6, 2020, Curry sent a Memo to Hasson, which was dated March 1, 2020, that
25 stated in pertinent part:⁴⁹

26 ... The Division has some challenges and needs some formal restructuring.
27 The areas that are the first priority are staffing, training, supervision and
28 accountability. Please find listed below some of the areas that I have been
29 working on since taking command of the Division.

30
31 **HQ EVACUATION**-The Evacuation plan for Police Headquarters, I have
32 engaged in several meetings with Mark Lynch, Michael Loney, Facilities

⁴⁹ Curry entitled her memo as "Actions Taken to Reform the Operations Division."

1 Management and several Operations' Supervisors to review and modify the
2 current Evacuation Special Order. ...

3
4 **STAFFING**-Call taker, Dispatcher and Support Unit Staffing. I have been
5 and will continue to work closely with Human Resources to ensure that all
6 vacant civilian positions are filled as quickly as possible. We have hired and
7 trained 5 dispatchers and 4 call-takers. ...

8
9 **CJIS COMPLIANCE**-There is an Audit scheduled for March and July 2020.
10 I have been working with the Supervisors and Support Unit to bring
11 Operations into full compliance in preparation for the upcoming audit. ...

12
13 **SUPERVISION**-Supervision has been a huge challenge in how the Division
14 operates, there seems to be minimal oversight and supervision by those
15 supervisors who have been assigned to Operations for a long time. This
16 issue is being addressed in the following ways:

17
18 The transfer of a new Captain and 4 new Sergeants into the division is giving
19 new life to supervision of the Division. I had a mandatory staff meeting with
20 all supervisors assigned to Operations, Captain Andres and I talked about
21 Supervision, Accountability, Liability, Training, Quality Assurance and what is
22 expected of them. ... I plan to have a Supervisors meeting quarterly.

23
24 ... I am in the process of reviewing previously issued directives, all of the
25 rules and special orders that pertain to Operations to streamline and compile
26 into a Supervisors Protocol Manual.

27
28 In addition to supervision we are also discussing the accountability of
29 dispatchers and call takers.

30
31 **SUPERVISORS TRAINING**-I will begin scheduling a mandatory training for
32 all supervisors within the next [sic]. All supervisors will receive in-depth
33 training on how to navigate the CAD system. I believe once the Supervisors
34 are trained, they we be better equipped to be able to monitor, navigate and
35 hold dispatchers accountable.

36
37 I had an additional CAD terminal installed at the Supervisors workstation,
38 there were only two CAD terminals. This will allow the three supervisors
39 more accountability, since each will have an individual CAD terminal to log
40 onto during their tour of duty.

41
42 New headsets to use for NICE were purchased for all supervisors. They will
43 receive an in-depth training on how to use the NICE Recording System. This
44 system can be utilized for 911 oversight and training one of the features is
45 that it allows active 911 calls to be monitored live. ...

1 *Grievance Protesting the BPD's failure to fill vacancies.*

2 On May 8, 2020, the Federation filed a class action grievance #15-0586 alleging
3 that the City violated various provisions of the parties' collective bargaining agreement by
4 failing to fill vacant supervisory positions (failure to fill vacancies grievance). The
5 Federation argued that: there were several vacant positions; a promotional list existed;
6 and the BPD should fill the positions even if they had to promote individuals. The BPD
7 denied the grievance at Step II,⁵⁰ and the Federation advanced the grievance to Step III
8 of the contractual grievance procedure. The Step III hearing about the failure to fill
9 vacancies grievance will be discussed later in this decision.

10 *Andres' Worksheets Concerning Kervin and Carroll's Use of Paid Leave*
11 *Perform Union Business*

12 On May 12, 2020, Andres sent an email to Cruz that was copied to Stephen Sutliff,
13 the Department's Deputy Director of Labor Relations, and Wilton⁵¹ stating in pertinent
14 part:

15 Attached please find a worksheet I did to try and track union release time
16 from Lt. Kervin and Sgt. Carroll, we can go over it for our meeting on
17 Thursday.⁵²

⁵⁰ The hearing record contains no additional information about the Step II hearing or answer.

⁵¹ Andres copied Sutliff and Wilton on the email message because he had previously communicated with the BPD's Office of Labor Relations about whether a full-time lieutenant could be assigned to the first-half shift to cover for Kervin, like the arrangements that had been in place for Carroll and for Sweeney.

⁵² Andres referred to the biweekly meetings that he attended with Hassan, Curry, and O'Brien. Andres confirmed at hearing that he saw Hassan with the worksheets at their biweekly meetings, although Andres did not elaborate upon how many meetings that he saw Hassan with the worksheets.

1 The worksheets consisted of calendar pages from January through April 2020 in which
2 Andres handwrote LI, LO, or LB reflecting the information that Kervin and Carroll had put
3 in Schedule Express. Andres' worksheets did not reflect when Kervin or Carroll worked⁵³
4 in the Operations Division. Andres previously had created a similar worksheet when former
5 Federation vice-president Sweeney worked under Andres' command in District E-13, and
6 before the City agreed to place Sweeney on full-time paid release pursuant to an
7 agreement referenced in footnote 21.⁵⁴

8 Andres compiled the worksheet regarding Kervin because Andres wanted to show
9 how much he needed a full-time lieutenant on Kervin's first-half shift, a need which Andres
10 claimed that he became aware of and conveyed to Curry shortly after he was assigned to
11 the Operations Division. Andres indicated at the hearing that he had no point of contact on
12 the first-half shift to make sure his orders were being carried out when Kervin was on union
13 release. Because different sergeants filled in as the duty supervisor when Kervin was on
14 union leave, Andres opined that there was no consistency in supervision on the first-half
15 shift. Andres acknowledged that a similar situation existed on the last half shift because
16 the lieutenant assigned to that shift Stephanie Curtis (Curtis) had been on medical leave
17 since the summer of 2019, and the BPD had not assigned a full-time lieutenant to cover
18 her absence. However, Andres claimed that the first-half shift had a greater call volume
19 than the last half shift and that the calls were more serious in nature.

⁵³ Because Carroll was on full-time release, it is unclear how frequently she worked in the Operations Division, including when she attended training or performed overtime.

⁵⁴ Andres wanted a low-tech, visual aid to show Superintendent Bernard O'Rourke, then commander of the Bureau of Field Services, how frequently Sweeney was absent from the district on paid union leave and to support Andres' request that another lieutenant be assigned full-time to cover Sweeney's absences.

1 Although Carroll was on full-time release, Andres compiled a worksheet for her
2 because in his experience, it was atypical for a union president on full-time release to be
3 assigned to a squad and have rotating days off. In Andres' experience, union presidents
4 on full-time release were assigned a Monday through Friday day schedule and their payroll
5 records would show an LB designation each day. In contrast, Carroll's Schedule Express
6 attendance entries showed LBs but also showed LIs and LOs, including when Carroll
7 performed union business on her scheduled days off.

8 *Curry's Inquiry into Kervin's and Carroll's LI Banks*

9 On May 13, 2020 at 1:42 p.m., Curry sent an email message to Holiday inquiring
10 whether Holiday was able to investigate the LI banks for both Carroll and Kervin.
11 Approximately thirty minutes later, Holiday responded that:

12 I can give you what I have so far which is January-April 2020 and January-
13 June 2019. I'm still working on it and it's not an easy task since I was taken
14 out of the loop many years ago. I had to try and figure out the best way to
15 configure a list.

16 On May 15, 2020, Curry forwarded White the information that she had received from
17 Holiday.⁵⁵

18 Aftermath of May 31, 2020 Civil Unrest

19 In the last week of May 2020, demonstrations took place nationwide to protest the
20 killing of George Floyd. On May 31, 2020, peaceful demonstrations took place in Boston
21 in the earlier part of the day. However, later that evening, the demonstrations turned
22 violent, which resulted in significant property damage primarily in downtown Boston and

⁵⁵ Curry previously had spoken with White about Carroll's and Kervin's absences from the Operations Division.

1 serious injuries to numerous police officers.⁵⁶ On June 1, 2020, the City unveiled a Civil
2 Unrest Action Plan. On June 1, 2020, the BPPA wrote a letter to Cruz demanding to meet
3 to discuss how better to prepare and equip officers for future protests. The Federation
4 and the BPDBS also requested to meet to discuss the BPD's response on May 31, 2020,
5 including why a full call-up of sworn personnel was not instituted. The BPD subsequently
6 scheduled a meeting for July 24, 2020 (July 24, 2000 Meeting) with the three unions to
7 discuss safety and equipment issues.

8 *Full-Call Up*

9 The BPD also issued a full call-up of sworn personnel beginning at 4:00 p.m. on
10 June 1, 2020 and June 2, 2020. As part of the full call-up, the BPD cancelled all days off,
11 except for previously scheduled vacation weeks. The BPD subsequently extended the full
12 call-up to June 3, June 4th and June 7th, 2020.⁵⁷ On June 1 through June 4, 2020, Kervin
13 was on paid union leave for the day shifts and submitted LIs for those shifts. He then
14 submitted LO's for his regular first-half shifts on those dates. Kervin also worked his first-
15 half shifts on those dates because of the full call-up and subsequently submitted overtime
16 slips for those dates. On June 9, 2020, Andres sent an email to Curry with copies to Sutliff
17 and Wilton that stated in pertinent part:

18 I wanted to make you aware that LT Kervin has submitted OT slips for the
19 four (4) nights there was a full Dept. call out during the protests last week.
20 He submitted slips for Monday, 6/01, Tuesday 6/02, Wednesday 6/03, and
21 Thursday 6/04 during the FH shift which is his regularly scheduled tour of
22 duty. My understanding from our conversations was that since it was a full

⁵⁶ The parties stipulated that most of the violence and destruction in Boston on May 31, 2020 was directed at BPD officers.

⁵⁷ The parties stipulated that the BPD instituted a full call-up of sworn officers on June 1st, 2nd, 3rd, 4th and 7th in response to intelligence suggesting possible civil unrest.

1 call out and all discretionary days off were cancelled his LO request was
2 also cancelled and he was considered to be working his regular scheduled
3 FH tour of duty. I am looking for guidance on how you want me to proceed
4 with this issue.⁵⁸

5 On June 10, 2020, Curry sent an email to Cruz, Sutliff, and Wilton with copies to Andres
6 and Hasson stating in pertinent part:

7 As we can all see the “full call out” directives are happening quite frequently.
8 Captain Andres and I are looking for direction on how to correctly handle
9 this situation with Lt. Kervin. Please advise. Thank you.

10 Thereafter, the BPD paid Kervin for the disputed four overtime shifts.

11 *Evacuation Plan for the Operations Division*

12 On June 9, 2020, Curry sent an email to DiGirolamo and Kervin with a copy
13 to Andres that stated in pertinent part:

14 Just a follow-up regarding our conversation on developing a written step by
15 step evacuation plan for the Operations Division. You both articulated how
16 you would evacuate Operations and go to Boston Fire Alarm should the
17 need arise.

18
19 However, in addition to the new supervisors that have recently been
20 assigned to the Operations Division, there are occasions where there isn't
21 a Lieutenant and/or a senior supervisor working who would be able to help
22 the new supervisors navigate an evacuation.

23
24 We are currently experiencing COVID19 pandemic and Civil Unrest In
25 the foreseeable future, we don't know what's next to come and want to be
26 prepared if there is a need to evacuate Operations. Having a written plan
27 will provide clear instructions on what to do and is crucial to mitigating some
28 of the confusion.

29
30 I realize things have been busy, however, I would ask if you could make this
31 a priority. Thank you for your leadership on this important assignment. If

⁵⁸ At hearing, Andres indicated that he believed that the full-call out order precluded Kervin from using discretionary leave, i.e. submitting LOs for June 1 through 4, 2020, and that Kervin should have kept the LOs for future use or disregarded them. Andres subsequently informed Kervin that he was not going to authorize Kervin to receive overtime for those four days and instead was going to seek further guidance on the matter.

1 you could provide a draft plan no later than June 21, 2020 I would greatly
2 appreciate it.

3 In a June 11, 2020 email to Curry, DiGirolamo responded that:

4 I have started the Ops Evaluation Plan project you recently assigned. Myself
5 and Sgt. [Doe] are collaborating on this effort. I am on vacation starting
6 tomorrow, June 12 and will return on June 21.

7
8 During my absence, Sgt. [Doe] will be responsible for creating an initial step-
9 by-step evacuation template, as well as distributing the draft to all Ops
10 Supervisors for additional input. I will review the Evacuation Plan prior to
11 submission.

12 *Unsafe Working Conditions Grievance*

13 On June 26, 2020, the Federation filed Class Action Grievance #15-0589 alleging
14 that the City violated the parties' collective bargaining agreement by subjecting unit
15 members to unsafe working conditions during the civil unrest that occurred on May 31,
16 2020 and June 1, 2020. It is undisputed that Cruz subsequently requested that the Union
17 withdraw the grievance and, instead, meet with him regarding the subject of the
18 grievance. The Union declined Cruz's request.⁵⁹

19 Increase in the Operations Division's Call Volume⁶⁰

⁵⁹ At the hearing, Carroll testified that Cruz made the request at the Step II or Step III grievance hearing, but the record does not indicate when the Step II hearing took place. Cruz and Wilton, in their testimonies, also did not provide a timeframe when Cruz made his withdrawal request. The Federation in its post-hearing brief contends that Cruz made the withdrawal request within days of a July 24, 2020 meeting, which is discussed further below. However, I decline to make that finding in the absence of specific evidence in the record to support it. It is more plausible that Cruz requested the meeting with the Union before the Office of Labor Relations conducted the Step II hearing, which occurred sometime between June 26, 2020, the date on which the Federation filed the grievance, and July 30, 2020, the date on which the City issued the Step II answer.

⁶⁰ The Operations Division's overall call volume in 2020 decreased from prior years due to the pandemic. However, the volume of calls began to increase in late May, early June 2020 due to civil unrest and complaints about fireworks.

1 *June 2020*

2 On June 10, 2020, Markunas sent an email to the State 911 Department and
3 Comtech, the vendor that supported the Motorola CallWorks 911 system (911 system),
4 and copied Curry and Andres. Markunas raised concerns about two problems that had
5 arisen during periods of high call volumes. Markunas described two instances, including
6 an instance on May 31, 2020, when the 911 system failed to assign calls to the call-takers
7 from a queue of waiting calls and the call-takers had to manually select individual calls to
8 answer them. Also, Markunas described a recent increase in issues with "Assigned
9 Abandoned" calls that call-takers were unable to clear, even though the 911 system
10 detected that the callers had hung up.

11 On June 19, 2020, Markunas sent an email to Andres with copies to Curry and the
12 sworn supervisors stating that he had a lengthy discussion with representatives from the
13 State 911 Department, Comtech, and Motorola CallWorks and that he had reiterated the
14 importance of ameliorating the 911 system's failure to assign calls and to allow call takers
15 to clear abandoned calls during periods of high call volume. He described how Operations
16 Division supervisors had to open tickets with Comtech's helpline on three occasions in
17 the last month when there were more than 300 calls in an hour. He also noted that
18 engineers from Motorola CallWorks were working on a solution.

19 On June 22, 2020, Markunas sent an email to Curry with copies to Andres and the
20 sworn supervisors stating in pertinent part:

21 I just wanted to provide a brief update on the extraordinarily high call volume
22 that we have been experiencing as of late. We continue to get inundated at
23 **RECORD HIGH** [emphasis in original] call volume levels between the hours
24 of 9 pm to Midnight on most nights largely as a result of fireworks complaints.
25 The additional staffing on the First-Half Shifts and Last-Half Shifts appears to

1 be allowing us to better handle this volume and answer more calls in a
2 relatively reasonable amount of time. ...
3

4 This past weekend we broke the all-time daily call volume record recorded on
5 any day since 2008! On Friday, June 19, 2020, Operations Division 911 call-
6 takers received a record-breaking 2,902 incoming calls with 38% of these
7 received between the hours of 9 pm and Midnight! On Saturday, June 20,
8 2020, call-takers received the new second-highest daily call volume for a total
9 of **2,748** calls with 29% of those received between 9pm and Midnight, Sunday
10 June 21, 2020 was not much quieter as call volume totaled **2,711 incoming**
11 **calls**, with 32% being received between 9pm and Midnight.
12

13 Prior to this weekend, the highest daily **incoming** call volume received by the
14 Operations Division since 2008 was on July 3, 2014, with a total of 2,718 calls
15 received.
16

17 I will keep you updated on these numbers and our ability to answer calls as
18 more data becomes available, and the days roll on!

19 On June 25, 2020, Markunas sent an email to Curry, Andres and the sworn supervisors
20 confirming that Motorola CallWorks had performed a software update on the 911 system,
21 a so-called patch, that afternoon, which should have alleviated issues of call takers having
22 to manually select calls during periods of high call volume.

23 *July 2020*

24 On Saturday, July 4, 2020, Kervin worked overtime on both the day shift and the
25 first-half shift in the Operations Division as Saturday was his regular day off. The first half
26 was extremely busy with a record number of calls, many of which were complaints about
27 fireworks. From 8:00 p.m. to 9:00 p.m., the call volume began to build. Callers, who were
28 on hold waiting for the call-takers to answer their calls, began hanging up, which resulted
29 in abandoned calls remaining in the queue for unanswered calls (the queue) as the call-
30 takers did not have time to contact the callers and then clear the calls. Some of those
31 callers would then call 911 again, which added to the calls waiting in the queue. At
32 approximately 9:00 p.m., there were approximately 700 to 800 abandoned calls in the

1 queue. At approximately 9:30 p.m., Boston Fire and Boston EMS both contacted
2 Comtech's help line to submit work orders because they were not receiving calls and
3 could not return calls. The Comtech helpline issued them service tickets but did not
4 realize they were related to the BPD's 911 system and did not advance the work orders
5 to a more senior Comtech staff member. At about 10:00 p.m., there were approximately
6 1,000 abandoned calls in the queue. Kervin and the other sworn supervisors⁶¹ on the
7 first-half shift did not contact Comtech or notify Curry, Andres, or Markunas⁶² about the
8 high number of abandoned calls in the queue. On July 4, 2020 at 11:00 p.m., Kervin sent
9 an email (July 4, 2020 email) to Curry, Andres, and Markunas.⁶³ Kervin's July 4, 2020
10 email stated in pertinent part:⁶⁴

11 Overtime hiring capabilities were exhausted in an attempt to properly staff
12 the First-Half Shift. Eleven call takers were mustered to staff the emergency
13 lines on this July 4th evening. As one would expect, the call volume was
14 non-stop throughout the tour. The public at times was understandably
15 frustrated.

16
17 Our staff worked incredibly hard under extremely adverse conditions and
18 should be commended for their stellar performance.

19 Although there were approximately 2,500 abandoned calls waiting in the queue as of
20 midnight, the last half duty supervisor Sergeant Swan (Swan) and the other sworn
21 supervisors on the last-half shift did not contact Comtech or notify Curry, Andres, or

⁶¹ The record did not identify the other sworn supervisors that worked with Kervin on the July 4, 2020 first-half shift.

⁶² Curry, Andres or Markunas were not scheduled to work on July 4th.

⁶³ At the end of each shift, the lieutenant or sergeant acting as the duty supervisor completed an informal email describing the highlights of the shift.

⁶⁴ Kervin also listed the availability of various members of the BPD command staff.

1 Markunas about the high number of abandoned calls in the queue. At some point
2 between 12:30 a.m. and 1:00 p.m., the 911 call system became overloaded with calls and
3 crashed.⁶⁵ The 911 system was unable to appropriately process any new incoming calls
4 and four or five of the call-takers' workstations were inoperable. Swan then contacted
5 Comtech and Curry, who in turn notified Andres and Markunas. At some point, Markunas
6 spoke with a senior engineer at Comtech about the problem. For approximately ninety
7 minutes, the Operations Division could not receive calls. Curry, Andres and Markunas
8 spent an hour discussing various alternatives, which included possibly routing the calls
9 through the state police 911 system. Comtech ultimately discarded approximately 2,500
10 calls to make the 911 system operational again.

11 On Sunday, July 5, 2020 at 5:49 a.m., Curry sent an email⁶⁶ stating in pertinent
12 part:

13 At approximately 12:45 am there were 2,500 abandoned calls, this historic
14 high call volume caused the 911 NextGen system to crash. The Call-Takers
15 were unable to take 911 calls. State 911, the 911 Next Gen vendor Comtech
16 and Motorola CallWorks were notified of the problem. A Comtech
17 representative responded to HQ to assist, Motorola CallWorks remotely
18 cleared out the 2,500 abandoned calls. After clearing these calls, the Call-
19 Takers were able to take 911 calls again. Next Gen 911 was down for
20 approximately 1 ½ hours.

21
22 Tonight we experienced an unprecedented high call volume, 6,243, three
23 times our last peak that occurred on June 19, 2020, we broke the all-time

⁶⁵ At the hearing, Curry described the 911 call system as crashing while Kervin was on duty during the first-half shift. In response to questions on cross-examination, she contended that the system became overloaded while Kevin was on duty and that constituted a crashed system because calls could not be answered. However, Curry in her July 5, 2020 memo, which is reprinted above, described the system as crashing at approximately 12:45 a.m., as well as giving a detailed description of how many calls were abandoned and how many calls were answered while Kervin was on-duty. Because Curry wrote her memo shortly after the event, I credit the timeline in that memo.

⁶⁶ The record does not indicate to whom Curry sent the email.

1 high daily call volume record, recorded on any one day since 2008, that
2 number 2,900.

3
4 Our call volume for July 4, 2019 between the hours of 9PM-10PM was 200,
5 for July 4, 2018 between the hours of 9:00-10:00 PM was 573, for July 4,
6 2020 between the hours of 9:00-10:00PM was 1,900. Tonight between the
7 hours of 9:00 PM and 10PM, many calls sat in a queue for 3-4 minutes
8 before they were able to speak with a call taker.

9
10 Between the hours of 8:00 PM-9:00 PM there were 626 incoming calls. 196
11 of those calls were answered. **Between the hours of 9:00 PM-10:00 PM,**
12 **there were 1,900 calls, 268 calls were answered.** [emphasis in the
13 original]. Between the hours of 10:00 PM-11:00 PM, there were 1088 calls,
14 352 calls were answered and 792 calls were abandoned. A call is
15 considered an Abandoned call when a caller calls 911 and hangs up before
16 they are connected to the call taker, the protocol is that a call taker will call
17 the caller back. Due to the system crashing [and] the limited call taker staff,
18 those abandoned calls had to be canceled out and dumped by the vendor
19 in order to get the system back up and running.

20
21 We will take a closer look at this with State 911, BEMS [EMS], BFD [Boston
22 Fire], the vendors Comtech and Motorola CallWorks to determine if there is
23 an alternative for answering calls and to develop a strategy should the 911
24 NextGen system experience this type of problem in the future.

25 On July 5, 2020 at 12:01 PM, Hassan sent an email to Curry stating in relevant part:

26 Carmen can you tell me how many call takers we had working last night?
27 Also can you tell me how many we had above normal staffing for that time
28 frame? Lastly, if you can speculate why the numbers jumped so sharply
29 from 573 to 1900 between 9pm-10pm and 10pm-11pm and how we can
30 handle that volume in the future? Thank you.

31 Later that day at 3:53 p.m. Markunas sent an email to Hasson with copies to Curry, Andres
32 and O'Brien that noted in pertinent part:

33 Last night (July 4, 2020) set an all-time record for 911 calls to Boston Police
34 Operations call-takers. The Operations Division received a total of 4,519
35 incoming 911 calls last night between the hours of 8pm and 12 mid. This
36 is equivalent to 2 days of call volume in 4 hours! The Operations Division
37 was only able to answer 1,167 of these calls or 26%! The total amount of
38 calls received by Operations Division call-takers for the entire day
39 yesterday was 6,275. Of that total, Operations was able to answer only
40 2,829 or 45% of those calls! This type of service volume COULD NEVER
41 BE STAFFED FOR IN ORDER TO ADEQUATELY PROVIDE TIMELY 911

1 SERVICE! When running basic staff calculations on those call volume
2 numbers, Operations would have had to staff between 50 and 90 911 call-
3 takers in order to sensibly manage that type of call volume! Unrealistic to
4 say the least. Many of the calls were most likely repeat calls from the same
5 person/telephone number which generated the large number of
6 abandoned calls when each call got placed on "hold" or in "queue" due to
7 the high volume. ...

8
9 Outside of the unprecedented and unmanageable 911 call volume of last
10 evening, staffing for 911 call takers in the Operations Division is already
11 compromised and inadequate. In order to staff for "normal" summer call
12 volume it is necessary to supplement staffing with overtime shifts several
13 times per week. The current number of 911 call-takers regularly assigned
14 to each shift is inadequate in order to provide for reliable and safe 911
15 service for a growing city. ...

16
17 As for tonight, I have been in contact with senior management at Comtech
18 (911 Vendor) and they have assured me that they will be monitoring
19 Boston's call volumes throughout the night in order to preemptively deal
20 with any issues related to unmanageable numbers of abandoned 911 calls.

21 On July 5, 2020 at 4:15 PM, Curry responded to Hasson's earlier inquiry by stating in
22 relevant part:⁶⁷

23 Call taker staffing for July 4th first half was 11, minimum staffing for the first-
24 half is 11 and minimum staffing for the last half is 8. Supervisors and
25 overtime clerks were directed to hire 2 additional call takers (4pm-12mid)
26 Mandatory and to hire 2 additional call take[r]s voluntary OT. I spoke with
27 Lt. Kervin around 12:30 am regarding July 4th staffing for the first half.⁶⁸

⁶⁷ Curry provided copies of her email to Andres, Markunas, and Lisa O'Brien (O'Brien), the then civilian deputy director of the bureau of administration and technology and the chief financial officer.

⁶⁸ On cross-examination, Curry could not recall speaking with Kervin on July 5, 2020 at 12:35 a.m. On redirect examination, when shown her email, Curry stated that she must have contacted him at that time because she referred to doing so in her email. Although the Federation in its post-hearing brief contends that Curry spoke with Kervin on July 5, 2020 at 12:35 p.m. rather than at 12:35 a.m., Curry had testified that she had not spoken with Kervin during the day on July 5, 2020. A reading of Kervin's July 5, 2020 memo, which is reprinted above, shows that Curry contacted Kervin at some point on July 5, 2020 seeking information, and Kervin responded to her on that date. However, the exact time on July 5, 2020 that Curry contacted Kervin is not pertinent to the outcome of this case.

1 When I spoke with him, he stated he ordered 1 call taker for the first half
2 and was not able to hire others. I have requested he provide a staffing
3 report as to why others were not hired/ordered, once I receive this report I
4 will give more details about staffing last night.

5 Also, in a July 5, 2020 memo, Kervin responded to Curry's request for staffing information
6 by noting in pertinent part:

7 I respectfully report that on July 4, 2020, I was assigned as the Duty
8 Supervisor during the First-Half Tour in Operations. During the Day Tour,
9 there were eleven call takers working the 911 phones. Five of these
10 individuals had worked the previous Last Half shift and had reached the
11 maximum allotted hours in their Collective Bargaining Agreement. An
12 additional five call takers from the Day Shift were already committed to
13 working the First-Half shift. CEO Theresa Poindexter was the only
14 individual present in the Call Center eligible to be ordered and this was
15 done.

16
17 Officer John Conway assigned to overtime hiring duties during the tour
18 worked diligently, however, unsuccessfully in search of eligible personnel.

19 Additional Events in July 2020

20 *Update on the Evacuation Plan*

21 On July 6, 2020 at 12:33 p.m., Curry emailed Kervin asking him for a status update
22 about her June 9, 2020 request that he and DiGirolamo develop a written step-by-step
23 evaluation plan for the Operations Division, which she reminded him had a due date of
24 June 21, 2020. Approximately four hours later, Kervin responded that:

25 It is my understanding that Lt. DiGirolamo already submitted the plan. I
26 collaborated with Sergeant Monahan regarding past policies, directives and
27 actual experiences involving the evacuation of Operations. He in turn
28 shared that information with Lt. DiGirolamo who submitted the final product.

29 At hearing, Curry indicated that she was dissatisfied with Kervin's response as she had
30 assigned the task of developing a written step-by-step evacuation plan to DiGirolamo and
31 Kervin, not just DiGirolamo, and that Kervin had not worked on the assignment. However,
32 the record does not indicate that she informed Kervin of her dissatisfaction.

Update CJIS Audit/Missing Persons Recommendation

On July 6, 2020 at 12:45 p.m., Curry sent an email to Kervin inquiring about the status of her February 20, 2020 request that Kervin identify problems and make recommendations about the Support Unit that processes Missing Persons to prepare for an upcoming CJIS audit. Later that same day, Kervin responded to Curry at 5:45 p.m. by recommending that: a) employees, who are training on Missing Persons audits, also be trained on the BPD's incident reporting system, b) all back room personnel be able to utilize the incident reporting systems and be able to access and print reports, c) the BPD issue a department-wide memo reminding the officers in the field that a phone call to the Missing Person unit is absolutely essential when reporting a person missing, d) all trainers be proficient in training others on missing persons, and e) Missing Persons personnel continue to verify and to properly track case files by checking and refiling files on an interval of every sixty days.

July 24, 2020 Meeting

On July 24, 2020, Cruz held an approximately hour-long meeting with representatives from the BPPA, the Federation, and the BPDBS in the so-called Media Room, an auditorium on the first floor of BPD Headquarters to discuss the events of May 31, 2020. Cruz, Wilton, and Deputy Superintendent Kevin McGoldrick (McGoldrick), the then second-in-command of the Bureau of Field Services, attended on behalf of the BPD. Carroll and Kervin attended on behalf of the Federation, while Patrol Officer Jay Moccia, the elected union secretary, attended on behalf of the BPPA. Detective Martin O'Malley (O'Malley) and Sergeant-Detective Michael Talbot (Talbot) attended on behalf of the BPDBS representing the detectives and the detective superior officers units respectively.

1 Cruz and Wilton described O'Malley and Talbot as speaking the longest and being the
2 most critical at the meeting, O'Malley spoke for approximately fifteen to twenty minutes
3 describing the need for additional safety equipment including helmets for the detectives
4 who staff the public order protection (POP) squads that perform crowd control during civil
5 unrest. Talbot also spoke for approximately fifteen to twenty minutes and expressed
6 concerns about the workloads of sergeant detectives who, as part of criminal
7 investigations and subsequent criminal proceedings, needed to review numerous hours
8 of video footage from police officers' body worn cameras and from the video camera
9 crews that accompanied the POP squads. Talbot also advocated for the drug squad
10 detectives to have shields.

11 However, while Kervin may not have spoken as long as O'Malley or Talbot,⁶⁹ I
12 credit Talbot's testimony that Kervin was the most vocal of the union representatives about
13 the BPD's alleged lack of preparedness on May 31, 2020 and subsequent low morale
14 amongst police officers, with Talbot describing Kervin's comments about "piss poor
15 morale." Kervin contended that because of a lack of preparedness, there was an
16 insufficient number of police officers working that evening because the BPD had not
17 instituted a full call-up of police officers and that the police officers who worked had
18 insufficient protective gear. He also claimed that police officers' morale was low because
19 City leaders and the command staff had not publicly supported them after the events of

⁶⁹ Carroll described Kervin as speaking for a few minutes but did not indicate the specific number of minutes. Cruz described Kervin as speaking for three minutes, which seems too brief, while Talbot describe Kevin as speaking for fifteen to twenty minutes, which seems too long in comparison to Talbot and O'Malley. Therefore, I make no specific finding as to how long Kevin spoke other than it was less than O'Malley and Talbot.

1 May 31, 2020.⁷⁰ Although Kervin was respectful in his comments, Talbot described
2 McGoldrick as visibly offended by Kervin's remarks.⁷¹

3 McGoldrick, who spoke for approximately thirty minutes, noted that he had been
4 present as the events of May 31, 2020 unfolded and that the command staff, who were
5 there, which included Hasson, did as much as they could that day. McGoldrick also
6 disagreed with Kervin about whether the BPD had received advance intelligence warning
7 about possible violence that evening. McGoldrick expressed concerns about O'Malley's
8 and Talbot's requests for helmets and shields for their unit members because of the
9 possibility that those helmets and shields could be taken by violent protesters and used
10 as weapons. Finally, McGoldrick also unsuccessfully encouraged the unions to agree to
11 allow a GPS app to be added to unit members' department-issued cellphones.

12 *July 28, 2020 Step III Hearing on the Failure to Fill Vacancies Grievance*

13 On July 28, 2020, Hearing Officer Jason Boratko (Boratko) conducted a Step III
14 hearing on the Failure to Fill Vacancies Grievance at the City's Office of Labor Relations.
15 Carroll, Kervin, and Bryant attended on behalf of the Federation, while Cruz and Sutliff
16 attended on behalf of the BPD. Robert Boyle also attended as the City's labor counsel.

⁷⁰ Carroll similarly noted that Kervin spoke forcefully on the perceived lack of support for police officers. Carroll claimed that Kervin raised his voice, while Cruz and Wilton claimed that it was either O'Malley and/or Talbot that raised their voices, not Kervin. I need not decide whether Kervin raised his voice at the meeting because it is not pertinent to the outcome of the case as the City has not claimed that Kervin's conduct at the meeting was insubordinate.

⁷¹ Although Cruz noted that Kervin did not say anything offensive or disrespectful during the meeting and that at one point, Kervin stated that the Federation wanted to work with the command staff, I also credit Talbot's testimony that McGoldrick was visibly offended by certain of Kervin's other statements because of Talbot's longstanding personal and professional relationship with McGoldrick.

1 The Federation argued, in part, that the BPD was deliberately not filling vacant unit
2 positions until the police academy had finished training their next class. When the
3 Federation was asked what specific positions were left vacant, the Federation indicated
4 that a captain's position and a lieutenant's position in the Hackney Carriage unit had been
5 left vacant. The BPD argued that the grievance was not substantively arbitrable because
6 there was no express provision of the parties' collective bargaining agreement that
7 required the BPD to backfill positions at any set time.⁷²

8 *July 30, 2020 Step II Answer on the Unsafe Working Conditions Grievance*

9 On July 31, 2020, the BPD's Office of Labor Relations denied the unsafe working
10 conditions grievance at Step II of the contractual grievance procedure. The Federation
11 then filed the grievance at Step III of the contractual grievance-arbitration procedure and
12 ultimately to arbitration.⁷³ Although the BPDBS also filed a grievance challenging unsafe
13 working conditions concerning the events of May 31, 2020, the Federation and the City
14 stipulated that the BPDBS did not submit the grievance to arbitration.

15 *Kervin's Transfer*

16 On August 5, 2020, Cruz called Carroll to inform her that the BPD was going to
17 transfer Kervin.⁷⁴ Cruz made the phone call at the behest of what he described at hearing

⁷² On September 21, 2020, Boratko issued the Step III Answer denying the grievance.

⁷³ On October 26, 2020, the City's Office of Labor Relations conducted a Step III hearing on the Unsafe Working Conditions grievance, and the City subsequently denied the grievance. The Federation then submitted the grievance to arbitration.

⁷⁴ In the first couple of months of 2020, Hasson informed Cruz that he wanted to transfer Kervin. Cruz indicated at the hearing that Hasson told him that he wanted a lieutenant there full-time on the first shift. Also, Cruz and Hasson held meetings once or twice a week to discuss a variety of issues, including an upcoming promotional exam, and on two or three occasions, they discussed a possible transfer of Kervin. Cruz indicated that Curry was not present for his discussions with Hasson.

1 as Hasson or the Fourth Floor of Police Headquarters where the command staff was
2 located. Cruz previously had spoken approximately with Hasson about transferring
3 Kervin. Cruz also spoke with and received Gross's approval to transfer Kervin before he
4 contacted Carroll. During Cruz's call, Carroll asked what the reasons were for the
5 transfer, and Cruz responded that he would be sending a letter with the reasons. On
6 August 6, 2020, Cruz sent a letter to Carroll and Kervin stating in pertinent part:

7 The Department's Operations Division has become increasingly strained
8 due to the fact that two union officials are taking the equivalent of full-time
9 union release within the same work group on first-half-the busiest shift. The
10 Commissioner has determined that the efficient operational needs of the
11 Division require a full-time Lieutenant to work regular tours to promote
12 consistent supervision on each shift. Accordingly, the Commissioner has
13 determined that based on the operational and supervisory needs of the
14 Department, Lt. Timothy Kervin will be transferred to the Hackney Carriage
15 Unit, effective August 15, 2020. I am sure you are aware that the Hackney
16 Carriage Unit is also located at BPD Headquarters and we believe that this
17 will have no effect on the union's ability to represent its members.⁷⁵

18
19 This reassignment is based on the Commissioner's non-delegable
20 "authority to appoint, establish and organize the [Boston] police"
21 department. St. 1906, c. 291, §10 as appearing in St. 1962, c. 322, §1; City
22 of Boston v. Boston Police Superior Officers Federation, 466 Mass. 210,
23 214-15 (2013).

⁷⁵ Cruz indicated at the hearing that the BPD wanted to place Kervin on an administrative schedule in order not to disrupt his union duties and to treat him respectfully as a union vice-president.

1 Please feel free to contact me if you have any questions or concerns. Also, on August 6,
2 2020,⁷⁶ Curry sent a memo (August 6, 2020 memo)⁷⁷ to Hasson regarding Operation
3 Division Supervisor Staffing⁷⁸ that stated in pertinent part:

4 During my tenure as the Commander of the Operations Division numerous
5 issues have come to my attention but one that I believe requires immediate
6 attention and can improve the Divisions efficiency is the need of a full-time
7 lieutenant on the first-half shift. We have been without two (2) lieutenants
8 on a daily basis within Operations, as Lieutenant Kervin is excused from
9 duty for union activities with the Superior Officers Federation and Lieutenant
10 Curtis has been out injured for an extended period of time.

11
12 Lieutenant Curtis has recently been cleared to return to full duty, her first
13 day back is August 17, 2020,⁷⁹ this should improve my ability to have
14 directives and instructions carried out along to her subordinates. The
15 efficient operational needs of the Division require a full-time lieutenant and
16 consistent supervision on each shift. This is what is missing on the first-half
17 shift with the absence of Lieutenant Kervin. Having three (3) sergeants
18 makes it more challenging to delegate instructions as they are not in a
19 position to supervise and direct their peers of the same rank. This creates
20 an environment on the first-half shift that I would compare to a rudderless
21 ship drifting without direction. The first-half shift handles most of the
22 incoming 911 calls and usually the more serious violent crimes. In placing
23 a Lieutenant in this shift that reports for duty on a full time basis, I believe it
24 will improve the overall efficiency of the shift and give me a specific

⁷⁶ Although the memo was dated August 5, 2020, Curry's cover email to Hasson was dated August 6, 2020. Further, Curry confirmed at hearing that she sent the memo to Hasson on August 6, 2020.

⁷⁷ Curry consulted with Andres when she drafted the memo.

⁷⁸ From January to August 2020, Curry attended biweekly meetings with Hasson, O'Brien, and Andres although some of those meetings were postponed due to the pandemic. They discussed staffing issues as part of those meetings, which included Curry noting at several meetings that Kervin was not around very much and that she needed a permanent, full-time lieutenant on the first-half shift.

⁷⁹ On August 17, 2020, Curtis returned to work from nearly a year of medical leave and took over Kervin's former assignment as the lieutenant on the first-half shift, an assignment that Curtis had requested.

1 supervisor to ensure directives are implemented properly and in a timely
2 manner.⁸⁰

3 Thereafter, Carroll contacted both former Mayor Martin Walsh (Mayor Walsh) and
4 Gross to protest the transfer and contended that the City's decision to transfer Kervin, the
5 Federation vice-president, undermined her status as the first female president of a City
6 police union. Mayor Walsh told her that he would investigate the matter and subsequently
7 told her that Kervin was not doing his job. Gross first informed Carroll that he listened to
8 his commanders and in a subsequent conversation, stated that having the Federation
9 president and vice-president both on the first-half shift was "a lot of release time."

10 Hasson, who had retired several months before the hearing, did not testify in this
11 case. The City called O'Brien as a witness because she had worked closely with Hasson,
12 had an office next to his office, and met with him at least once and sometimes twice a day
13 from October of 2019 until his retirement.⁸¹ O'Brien indicated that Hasson did not have
14 any conversations with her about transferring Kervin before July 4, 2020, which included
15 any discussions about transferring Kervin at the biweekly meetings that she attended with
16 Hasson, Curry, and Andres. She then described how Hasson had informed her that

⁸⁰ At hearing, Curry contended that she did not recall why she wrote the August 6, 2020 memo. Despite her lack of recall, it is highly likely that she wrote the memo at the request of Hasson, because it is addressed to him. Further, she asserted that she had not requested and had not known that Kervin would be transferred but instead requested that a "full-time lieutenant," presumably a lieutenant not often on paid union leave, be assigned to the Operations Division. Even if Curry had not known prior to August 5, 2020 that Kervin was going to be transferred, it is probable that she knew on August 5, 2020 when Cruz notified Carroll and Kervin.

⁸¹ O'Brien acknowledged that she did not attend the weekly bureau chiefs' meeting with Hasson or his meetings with White or his successor Superintendent-in-Chief Gregory Long.

1 Kervin was going to be transferred⁸² because of the events of July 4, 2020, specifically
2 Kervin's failure to notify Comtech or his supervisors that the 911 call system had a
3 significant backlog of abandoned calls before he finished his shift, which prompted a
4 conversation that consistent supervision and leadership was needed in the Operations
5 Division. On cross-examination, O'Brien clarified her answer to indicate that Hasson had
6 informed her that Kervin's inaction on July 4, 2020 was not the "primary reason" for his
7 transfer but that it "started a conversation" as to what was needed in the Operations
8 Division. O'Brien emphasized that she was not part of the "formalization" of the transfer,
9 including any conversations that Hasson had with Gross or White. O'Brien also noted
10 that the need for supervision in the Operations Division, what she referred to as the need
11 for proactive rather than reactive supervision, had been an ongoing issue since she had
12 become the director of administration and technology and chief financial officer in 2015.
13 However, she also noted that she was unaware of any complaints about Kervin being
14 inconsistent in his supervision of the call-takers, dispatchers, and sergeants in the
15 Operations Division.

16 On August 14, 2020, the BPD's Office of the Police Commissioner issued
17 Personnel Order #PO-20-245 reassigning Kervin from Operations to the Hackney
18 Carriage Unit and reassigning Lieutenant Joseph Leeman from District A-7 to the
19 Operations Division. Also, on August 14, 2020, the Union filed Grievance #15-0591
20 challenging Kervin's transfer as retaliatory and discriminatory.⁸³ Although the City

⁸² O'Brien did not give an approximate date for her conversation with Hasson.

⁸³ On November 17, 2020, the City's Office of Labor Relations conducted a Step III hearing before Boratko on the grievance, and the City denied the grievance on January 14, 2021. An arbitration was not held on the grievance.

1 reassigned Kervin to the Hackney Carriage Unit,⁸⁴ he had not worked there as of the
2 dates of the hearing.⁸⁵

3 *Kervin's Performance of Operations Overtime*

4 On August 28, 2020, Cruz sent an email to Carroll stating in pertinent part:
5 Lt. Kervin and any other supervisor who was previously assigned to
6 Operations is allowed to do overtime in Operations, as long as they are still
7 certified to work in Operations. Please feel free to contact me if you have
8 any questions or concerns.

9 Supervisors retain their certification in the Operations Division by completing sixteen
10 hours of training per year. Kervin was certified to work in the Operations Division until
11 June 30, 2021 and worked overtime in the Operations Division between the date of his
12 transfer and June 30, 2021. Kervin's certification subsequently lapsed after June 30,
13 2021,⁸⁶ and he was no longer considered eligible to work overtime in the Operations
14 Division.

⁸⁴ The Hackney Carriage Unit consisted of a captain, lieutenant and sergeant, who worked Monday through Friday on the day shift, and one BPD vehicle was assigned to the unit. While assigned to the Hackney Carriage Unit, Kervin would continue to receive a specialist stipend but would not earn a shift differential. From the start of the pandemic until the dates of the hearing, no overtime opportunities arose at the Hackney/Carriage Unit.

⁸⁵ The record does not reveal the reason(s) why Kervin did not work at the Hackney Carriage Unit from August 15, 2020 through February 2, 2022, when the hearing concluded, except Carroll made a reference at hearing to Kervin being on paid union leave but she did not indicate the operative? dates of that leave. O'Brien also confirmed that the BPD did not backfill Kervin's position in the Hackney Carriage Unit during Kervin's absence from the position.

⁸⁶ At hearing, Curry acknowledged that she removed Kervin's name from the list of employees who were scheduled to undergo training to retain their certifications after June 30, 2021. She did not explain the reason(s) why she removed his name from the list.

Opinion

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

Protected Activity

In the months preceding his involuntary transfer, Kervin was an active Federation official regularly participating in concerted, protected activity. In his role as Federation vice-president, Kervin engaged in various union activities by representing the Federation at meetings with the City and by attending grievance hearings pertaining to Doe's placement on administrative leave, the Department's refusal to allow Farrell and King to work overtime in the Operations Division, the City's alleged exposure of unit members to unsafe working conditions during the civil unrest on May 31, 2020, and the City's alleged failure to fill vacant unit positions. See generally, Sheriff's Office of Plymouth County, 39 MLC 41, 55-56, MUP-06-4475 (September 10, 2012) (finding that union president engaged in concerted, protected activity when he filed grievances, participated in successor contract negotiations, and rejected various employer proposals to alter the

1 composition of the bargaining unit). Also, Kervin represented the Federation at the July
2 24, 2020 meeting with the City and other police unions regarding the events of May 31,
3 2020. Kervin criticized the Department's alleged lack of preparedness related to
4 insufficient staffing and protective gear and contended that the aftermath of the May 31,
5 2020 civil unrest led to low morale amongst the City's police officers. See Bristol County
6 Sheriff's Department, 26 MLC 105, 109, MUP-2100 (January 28, 2000) (complaining
7 about working conditions constitutes protected activity under Section 2 of the Law).

8 Employer Knowledge

9 The City was aware of Kervin's protected, concerted activities as Federation vice-
10 president. Kervin visibly engaged in Federation business in the presence of City
11 representatives throughout 2020 by attending grievance hearings and meetings with the
12 City to discuss matters implicating terms and conditions of employment for Federation
13 unit members.⁸⁷

14 The City at hearing failed to identify the specific individual or individuals
15 responsible for making the decision to transfer Kervin. Nonetheless, the City contends
16 that the same group of Department commanders were not aware of Kervin's concerted,
17 protected activities. Here, I need not have direct evidence of knowledge to draw a
18 reasonable inference of knowledge from circumstantial evidence. See Fowler v. Labor
19 Relations Commission, 56 Mass. App. Ct. 96 (2002) (using a totality of circumstances to
20 infer employer knowledge rather than requiring employee to produce direct evidence of
21 knowledge). Cruz, the Department's Director of its Office of Labor Relations, was actively

⁸⁷ In fact, Andres tracked Kervin's frequent use of paid union leave to attend grievance hearings and meetings and shared that data with Cruz, Hasson, and others.

involved in facilitating Kervin's involuntary transfer. In transferring Kervin, Cruz testified that he acted at the behest of Hasson or the Fourth Floor of BPD Headquarters where the command staff was located. Cruz attended numerous meetings where Kervin represented the Federation. Cruz was also present for Kervin's comments at the July 24, 2020 meeting regarding the events of May 31, 2020 and had requested previously that the Federation withdraw its grievance alleging that the Department had subjected Federation unit members to unsafe working conditions during the civil unrest. McGoldrick, a member of the command staff, was also present at the July 24, 2020 meeting and was visibly offended by Kervin's comments. The City, thus, was not only unquestionably aware of Kervin's activities generally, but also knew, at the command staff level of authority within the Department, of Kervin's critical comments made on July 24, 2020, only days prior to his involuntary transfer. Compare Massachusetts Department of Transportation, 44 MLC 1, 44-45, SUP-14-3576, SUP-14-3640 (July 31, 2017) (finding it reasonable to infer that interviewer who worked in human resources had knowledge of employee's prior grievances and the aftermath of those grievances).

Adverse Action

To show an adverse action for purposes of establishing a prima facie case under Section 10(a)(1) of the Law, a charging party must demonstrate that the conduct was an employment action of some sort that objectively and materially disadvantaged the charging party in some way. Yee v. Massachusetts State Police, 481 Mass. 290, 295-296 (2019). Material disadvantage arises when an objective aspect of the work environment is affected. See King v. City of Boston, 71 Mass. App. Ct. 460, 468 (2008). Because there

1 must be real harm, subjective feelings of disappointment and disillusionment will not
2 suffice. See MacCormack v. City of Boston Edison Co., 423 Mass. 652, 663-64 (1996).

3 The Commonwealth Employment Relations Board (CERB) has consistently
4 defined adverse action as an adverse personnel action, such as a suspension, discharge,
5 involuntary transfer or reduction in supervisory activity, City of Boston, 35 MLC 289, 291,
6 MUP-04-4077 (May 20, 2009) (citing City of Holyoke, 35 MLC 153, 156 (May 20, 2009));
7 see Boston City Hospital, 11 MLC 1065, 1072, MUP-4893 (July 25, 1984) (finding that
8 involuntary transfer to a less desirable position is an adverse action); Board of Higher
9 Education, 32 MLC 181, 184, SUP-02-4892 (June 21, 2006) (finding engineering
10 professor's assignment to teach all math courses and no engineering courses constituted
11 adverse action because of possible impact on professor's career).

12 Kervin's involuntary transfer from the first-half shift in the Operations Division to
13 the day shift in the Hackney Carriage Unit resulted in an actual and material disadvantage
14 to Kervin because it reduced his compensation. While assigned to the first-half shift in
15 the Operations Division, Kervin received a nine-percent pay differential. Upon
16 transferring to the Hackney Carriage Unit, Kervin no longer received the nine-percent pay
17 differential.

18 Kervin's transfer from the Operations Division to the Hackney Carriage Unit also
19 actually and materially disadvantaged Kervin by limiting his access to overtime
20 opportunities, which were offered first to sworn supervisors currently working in the
21 Operations Division. Prior to his transfer, Kervin frequently worked overtime in the
22 Operations Division, which was reflected in his classification as one of the BPD's highest
23 wage earners. Although Kervin worked overtime in the Operations Division from the date

1 of his transfer until June 30, 2021, he was only offered those opportunities when the
2 overtime list was exhausted. Further, the Hackney Carriage Unit had no overtime
3 opportunities from the period between Kervin's transfer and the dates of the hearing.

4 Animus

5 A charging party may proffer direct or indirect evidence of discrimination in support
6 of its claim. See Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2022),
7 aff'd sub nom., Town of Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005).
8 Direct evidence is evidence that, "if believed, results in an inescapable or at least highly
9 probable inference that a forbidden bias was present in the workplace." Wynn v. Wynn
10 P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 667 (2000)
11 (citing Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991)). Stray remarks
12 in the workplace, statements by people without the power to make employment decisions,
13 and statements made by decision-makers unrelated to the decisional process do not
14 suffice to satisfy a charging party's threshold burden. Id. at 667 (citing Price Waterhouse
15 v. Hopkins, 490 U.S. 226, 277 (1989)).

16 Here, the Federation contends that direct evidence of the City's unlawful motivation
17 exists because the City referenced Carroll's and Kervin's use of contractual release time
18 in the August 6, 2020 transfer letter. However, I not need decide whether direct evidence
19 of animus towards Kervin's protected activity exists, because, as more fully discussed
20 below, even if I apply the higher burden of proof set forth in Trustees of Forbes Library v.
21 Labor Relations Commission, 384 Mass. 559 (1981), I find that the Federation has met
22 its burden of establishing that, but for Kervin's concerted, protected activity, the City would
23 not have transferred him.

1 Absent direct evidence of unlawful motivation, unlawful motivation may be
2 established through circumstantial evidence and reasonable inferences drawn from that
3 evidence. Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4,
4 2001). Circumstantial factors may include: shifting and inconsistent reasons for an
5 employer's action, Everett Housing Authority, 13 MLC 1001, 1006, MUP-5656 (June 4,
6 1986); the insubstantiality of the reasons given for the adverse action, Commonwealth of
7 Massachusetts, 14 MLC 1743, 1749, SUP-3081 (May 9, 1988); the employer's
8 divergence from longstanding practices, Town of Mashpee, 36 MLC 163, 171, MUP-02-
9 3653 (April 15, 2010), and the timing of the adverse action in retaliation to the protected
10 activity, Town of Somerset, 15 MLC 1523, 1529, MUP-6404 (March 9, 1989). However,
11 timing alone is insufficient to find unlawful employer motivation. See City of Holyoke, 35
12 MLC 153, 157, MUP-05-4503 (January 9, 2009).

13 *Insubstantial and Shifting Reasons*

14 Although Gross knew of and approved Kervin's transfer, the City at hearing did not
15 name him as the decision-maker. In response to an inquiry from Carroll after the transfer
16 was announced, Gross told Carroll that Kervin was transferred because having Carroll
17 and Kervin both on the first-half shift was a lot of release time. However, when Carroll
18 bid on the first-half shift opening in early 2020, the City did not raise any concerns about
19 the fact that she and Kervin would be assigned to the first-half shift. Moreover, the City
20 assigned an additional sergeant full-time in Carroll's squad to cover her absence,
21 negating the impact of her use of release time on the Operations Division's supervisory
22 staffing.

1 In addition to addressing Carroll and Kervin's use of paid union leave on the first-
2 half shift, Cruz, in his August 8, 2020 letter, indicated that the City required a full-time
3 lieutenant to work regular tours to promote consistent supervision on each shift. Despite
4 that assertion, at the time of Kervin's transfer, the City had lacked a full-time lieutenant on
5 the last half-shift for approximately one year. Lieutenant Curtis has been on medical leave
6 from her assignment on the last-half shift since on or about the summer of 2019, and the
7 City had not assigned a full-time lieutenant to cover her absence.

8 Differing still from the reasons offered by Gross and Cruz, O'Brien indicated at
9 hearing that Hasson transferred Kervin, in part, because of the events of July 4, 2020.
10 Similarly, former Mayor Walsh told Carroll that Kervin was not doing his job. The record
11 does not show that the City notified Kervin of any dissatisfaction with his performance or
12 took any corrective action regarding the events of July 4, 2020. See Town of Plainville, 22
13 MLC 1337, 1356-1357, MUP-8517 (January 4, 1996) (noting that employer's failure to tell
14 employee of perceived performance problems undermined its contention that his
15 performance was the central motivating factor in its decision).

16 *Timing*

17 The City notified Carroll that Kervin was being transferred from the Operations
18 Division to the Hackney Carriage Unit on August 5, 2020, which was only twelve days
19 after Kervin criticized the City's response to the events of May 31, 2020 at the July 24,
20 2020 meeting. Also, less than a week prior to the announcement of Kervin's transfer, the
21 Federation pressed its grievance concerning supervisory vacancies, including the
22 Hackney Carriage Unit lieutenant position to which Kervin subsequently was transferred,
23 at a Step III grievance hearing attended by Kervin. See City of Worcester, 41 MLC 144,

1 MUP-12-2131 (finding that hearing officer correctly inferred unlawful motivation, in part,
2 from the closeness in timing between the protected activities occurring six weeks and four
3 weeks prior to an adverse action).

4 The shifting and insubstantial reasons that the City gave as the grounds for
5 Kervin's transfer, coupled with the close timing of the involuntary transfer to Kervin's
6 concerted, protected activity supports an inference that the City's decision to transfer
7 Kervin was motivated by animus towards his protected activity. See Everett Housing
8 Authority, 13 MLC at 1006-1007 (inferring animus when shifting and inconsistent reasons
9 were coupled with timing). Thus, the Federation has established the four elements of its
10 prima facie case.

11 Employer's Burden of Production

12 Under the three-part Trustees of Forbes Library analysis, once a charging party
13 establishes a prima facie case of retaliation, it is the employer's burden to produce a
14 legitimate, non-discriminatory reason for taking the adverse action. The employer's
15 burden to produce a legitimate, non-discriminatory reason for taking the adverse action
16 is more than simply stating an unsubstantiated allegation. Commonwealth of
17 Massachusetts, 25 MLC at 46.

18 The City contends that it transferred Kervin from the Operations Division because
19 it needed a full-time lieutenant assigned to the first-half shift in the Operations Division,
20 its busiest shift, to promote Departmental efficiency and consistent supervision. The facts
21 before me show that Kervin frequently took union release time as Federation vice-
22 president and was, at times, absent from his regularly scheduled first-half shift in the
23 Operations Division. By May 2020, Andres had tracked Kevin's use of release time and

1 circulated that information to Hasson and Cruz, among others, to demonstrate his need
2 for a full-time lieutenant to be assigned to the first-half shift. Andres described how there
3 was no point of contact on the first-half shift to make sure that his orders were carried out
4 when Kervin was on paid union leave, resulting in a lack of consistent supervision. Andres
5 even inquired of the Department's Office of Labor Relations about whether a full-time
6 lieutenant could be assigned to the first-half shift to fill-in for Kervin. Also, Hasson told
7 Cruz in early 2020 that he wanted a lieutenant in the Operations Division full-time on the
8 first-half shift, and on two or three subsequent occasions he discussed with Cruz the
9 possibility of transferring Kervin. Also, from January to August 2020, Curry attended
10 biweekly meetings with Hasson, O'Brien, and Andres in which they discussed staffing
11 issues in the Operations Division, and Curry noted several times that she needed a full-
12 time lieutenant on the first-half shift.

13 Thus, the City has met its burden of production because it presented a reason for
14 the transfer of Kervin and facts to support that reason.⁸⁸

15 "But For" Analysis

16 Once an employer produces evidence of a legitimate, non-discriminatory reason
17 for taking the adverse action, the case becomes one of "mixed motives." Under the

⁸⁸ The Federation asks me to draw an adverse inference that the City lacked a legitimate, non-discriminatory reason for Kervin's transfer because the City failed to call Hasson, Gross, or White as witnesses at hearing. An adverse inference may be appropriate when a witness is accessible to a party and could be expected to testify on the party's behalf. See Quincy School Committee, 27 MLC 83, 91. MUP-1986 (December 29, 2000). However, the application of the adverse inference rule is a matter of discretion for the factfinder. Id. The record does not show that Hasson, Gross, and White were accessible to the City as witnesses. Hasson, Gross, and White all left the City's employ months before the hearing commenced. Thus, I decline to draw an adverse inference that the City lacked a legitimate, non-discriminatory reason for Kervin's transfer.

1 Trustees of Forbes Library analysis, the CERB considers whether the employer would
2 have taken the adverse action but for the employee's protected activities. Suffolk County
3 Sheriff's Department, 27 MLC at 160; Quincy School Committee, 27 MLC at 92. The
4 charging party bears the burden of proving that, but for the protected activity, the employer
5 would not have taken the adverse action. Athol-Royalston Regional School Committee,
6 28 MLC 204, 214, MUP-2279 (January 14, 2002); Town of Athol, 25 MLC 208, 211, MUP-
7 1448 (June 11, 1999).

8 The City correctly asserts that its police department, as a paramilitary organization,
9 can reassign sworn personnel based on operational needs pursuant to the Boston Police
10 Commissioner's right of assignment (right of assignment). See Boston v. Boston Police
11 Superior Officers Fedn., 66 Mass. 210 (2013). Pursuant to that right of assignment, the
12 City lawfully could have transferred Kervin to address its concerns that his frequent
13 absences from the first-half shift were affecting the efficiency and consistency of
14 supervision on that shift. However, the statutory prohibition against discrimination for
15 engaging in concerted, protected activity supersedes the right of assignment. See Town
16 of Framingham v. Framingham Police Officers Union, 93 Mass. App. Ct. 537, 546, n.11
17 (2018) (citing Blue Hills Regional Dist. Sch. Comm. v. Flight, 383 Mass. 642, 644 (1981)
18 (finding that doctrine of non-delegability must generally give way to constitutional and
19 statutory prohibitions against invidious discrimination). For the reasons discussed below,
20 the City would not have transferred Kervin in August of 2020 but for his protected activity
21 and thus, the City's right of assignment does not trump Kervin's statutory protections.

22 Although Kervin had served as Federation vice-president, frequently utilizing paid
23 union leave since July 2019, the City maintained his assignment on the first-half shift in

1 the Operations Division even though Hasson had previously mentioned the possibility of
2 transferring Kervin to Cruz in early 2020 and on two or three subsequent occasions. Cruz
3 also had made requests for a full-time lieutenant several times. However, despite
4 considering a possible transfer for Kervin, the City took no affirmative action for months.
5 Instead, the City transferred Kervin only after Kervin was outspoken at the July 24, 2020
6 meeting and criticized the Department's response to the high-profile May 31, 2020 civil
7 unrest during which police officers were met with violence against them. Both McGoldrick
8 and Hasson had been present on the ground while the civil unrest unfolded, and
9 McGoldrick was visibly offended by Kervin's remarks at the July 24, 2020 meeting. Also,
10 the City announced Kervin's transfer approximately one week after the BPD denied at
11 Step II the unsafe working conditions grievance, which also pertained to the events of
12 May 31, 2020.

13 The City then transferred Kervin to a vacant lieutenant position in the Hackney
14 Carriage Unit which was, in part, the subject of an ongoing Federation grievance
15 regarding unfilled supervisory positions, for which a Step III hearing took place
16 approximately ten days before the transfer. The Hackney Carriage Unit provided few, if
17 any, opportunities for overtime, a significant loss to Kervin who was a high wage earner,
18 in part, because of the large amounts of overtime that he worked in the Operations
19 Division.

20 Also, despite citing the need for a full-time lieutenant on each shift in the
21 Operations Division for operational efficiency as a reason for transferring Kervin, the City
22 did not assign a lieutenant to cover for the absence of Lieutenant Curtis on the last half
23 shift while she was on a lengthy medical leave beginning in or about the summer of 2019.

1 In early 2020, the City transferred several Federation unit members from the Operations
2 Division to address existing supervisory concerns but did not seek to reassign Kervin at
3 that time despite his recurring absences for Federation activities.

4 Although indicating that Carroll's and Kervin's use of paid union time on the first-
5 half shift strained the Operations Division, the City did not raise any concerns about the
6 fact that Carroll and Kervin would both be assigned to the first-half shift when Carroll bid
7 into the first-half shift in early 2020. Additionally, despite the City's claims of strain on the
8 first half shift due to Carroll's and Kervin's use of paid union time on the first-half shift,
9 Carroll's assignment to the first-half shift did not begin until June 2020, at most nine or
10 ten weeks before Kervin's transfer. Moreover, the City assigned an additional sergeant
11 full-time to Carroll's squad to cover her absence. Also, after Kervin's transfer, the City did
12 not utilize Kervin in the Hackney Carriage Unit, which undermines any claim that the City
13 undertook Kervin's transfer to address a staffing need in the Hackney Carriage Unit.
14 Kervin did not work in the Hackney Carriage Unit between the date of his transfer and the
15 dates of the hearing, and the City did not backfill Kervin's position in the Hackney Carriage
16 Unit.

17 Additionally, the City took no corrective action towards Kervin for any performance-
18 related issue involving the Operations Division, including any action related to the events
19 of July 4, 2020. Curry did not express dissatisfaction regarding Kervin's performance to
20 him or otherwise take corrective action against him. O'Brien was unaware of any
21 complaints about Kervin being inconsistent in his supervision of the call-takers,
22 dispatchers, and sergeants in the Operations Division. It is reasonable to infer that if
23 Kervin's performance issues were severe enough to warrant his transfer, the City would

1 have apprised him of deficiencies in his conduct. Indeed, the City permitted Kervin to
2 continue working overtime in Operations after reassignment until his certifications expired
3 in June 2021, undermining any contention that the City had serious concerns about his
4 performance.

5 Conclusion

6 Based on the record and for the reasons stated above, I conclude that the City
7 violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by discriminating
8 against Kervin for engaging in concerted, protected activities when it transferred him from
9 the Operations Division to the Hackney Carriage Unit.⁸⁹

10 ORDER

11 WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the
12 City shall:

13
14 I. Cease and desist from:

- 15
16 a) Retaliating against Kervin for engaging in concerted, protected activity.
17
18 b) In any like manner, interfering with, restraining and coercing its employees in any
19 right guaranteed under the Law.
20

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

- 22
23 a) Offer immediately to reinstate Kervin to the position of lieutenant on the first-half
24 shift in the Operations Division, and, if accepted, rescind Kervin's transfer to the
25 position of lieutenant in the Hackney Carriage Unit.
26
27 b) Make Kervin whole for all economic losses that he suffered as a result of the City's
28 unlawful activity, including lost overtime opportunities in the Operations Division for
29 the period from August 15, 2020 through June 30, 2021, when Kervin's VESTA and
30 APCO certifications lapsed, plus interest on all sums owed at the rate specified in
31 M.G.L.c.231, Section 6I, compounded quarterly.
32

⁸⁹ Having found a violation of the Law on the foregoing basis, I need not decide the Federation's admittedly alternative pleading that the City's actions also constituted an independent violation of Section 10(a)(1) of the Law as the remedy would be duplicative.

- 1 c) Post immediately in all conspicuous places where members of the Federation's
2 bargaining unit usually congregate or where notices are usually posted, including
3 electronically, if the City customarily communicates with these unit members via
4 intranet or email and display for a period thirty (30) days thereafter, signed copies
5 of the attached Notice to Employees.
6
7 d) Notify the DLR in writing of steps taken to comply with this decision with ten (10)
8 days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MARGARET M. SULLIVAN
HEARING OFFICER

APPEAL RIGHTS

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