

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

In the Matter of:

CITY OF BOSTON

and

SALARIED EMPLOYEES OF
NORTH AMERICA, LOCAL 9158

Case No. MUP-22-9172

Date issued: June 24, 2026

CERB Members Participating:

Lan T. Kantany, Chair
Kelly B. Strong, CERB Member
Victoria B. Caldwell, CERB Member

Appearances:

Tanya Dennis, Esq. - Representing the City of Boston

Jillian M. Bertrand, Esq. - Representing the Salaried Employees of
North America, Local 9158

CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISION

SUMMARY

1 The City of Boston (City) has appealed a Department of Labor Relations (DLR)
2 Hearing Officer decision. The City disputes the Hearing Officer's finding that the City
3 violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law
4 or Chapter 150E) by retaliating against Lawrence Pennucci (Pennucci) when it denied
5 him overtime opportunities after he pursued a promotional bypass grievance. The City
6 asserts that there was insufficient evidence that it was unlawfully motivated and
7 challenges the remedy ordered.

1 After reviewing the hearing record, including the Hearing Officer's decision and the
2 parties' supplementary statements, the Commonwealth Employment Relations Board
3 (CERB) affirms the Hearing Officer's decision. We further conclude that the remedy is
4 appropriate.

5 STATEMENT OF THE CASE
6

7 On March 14, 2022, the Salaried Employees of North America, Local 9158 (Union
8 or SENA) filed a charge of prohibited practice with the DLR, alleging that the City had
9 violated Sections 10(a)(3) and, independently, 10(a)(1) of the Law by reducing Pennucci's
10 overtime opportunities in retaliation for his protected activity. A DLR Investigator
11 conducted an investigation of the charge on May 27, 2022. Following the investigation, a
12 DLR Investigator issued a Complaint of Prohibited Practice and Amended Complaint of
13 Prohibited Practice on August 8, 2022, and a Second Amended Complaint on August 15,
14 2022 (collectively referred to as the Complaint).¹ The City filed an Answer on August 22,
15 2022.

16 On September 13, 2023, a DLR Hearing Officer conducted a hearing on the
17 Complaint, at which both parties had the opportunity to be heard, examine and cross-
18 examine witnesses, and introduce evidence. The parties filed post-hearing briefs on or
19 about December 15, 2023. On May 12, 2025, the Hearing Officer issued a decision
20 concluding that the City violated the Law as alleged in the Complaint.² At hearing and in

¹ The Investigator did not consider the Union's alternative argument that the City's conduct independently violated Section 10(a)(1) of the Law, and therefore no complaint was issued with respect to that allegation, and it was not at issue at the hearing or in this appeal.

² The Hearing Officer's decision can be found at 51 MLC 207.

1 its post-hearing brief, the City challenged the timeliness of the Union's charge, alleging
2 that Pennucci was aware that the City had reduced his overtime opportunities in or about
3 2020, yet the Union did not file the Charge until March 2022. The Hearing Officer
4 determined that the Charge was timely filed, because the Union was not aware of the
5 reduction until November 2021, and because the City's conduct constitutes a continuing
6 violation. The Hearing Officer also found that the City retaliated against Pennucci in
7 violation of Section 10(a)(3) of the Law by reducing his overtime opportunities. The City
8 subsequently requested that the CERB review the decision pursuant to Section 11(e) of
9 the Law and 456 CMR 13.19, and the Union responded in opposition. The City challenges
10 the Hearing Officer's factual and legal conclusions, particularly that she erred in finding
11 that there was sufficient evidence of unlawful motivation. The City also opposed the
12 Hearing Officer's remedy. The City did not appeal the Hearing Officer's conclusion that
13 the Charge was timely filed.

14 BACKGROUND³

15
16 The Union is the exclusive bargaining representative for a bargaining unit of middle
17 managers in the City, including those working in the City's Central Fleet Management
18 Division (Division). Pennucci began his employment with the City in 2002, and since 2010,
19 has worked for the Division as a Principal Administrative Assistant, also referred to as
20 Fleet Inventory Manager, which is a position in SENA's bargaining unit. Prior to the Fleet
21 Inventory Manager position, he served as a repair person within the Division. William

³ Our findings stated herein are based on the Hearing Officer's findings of facts and stipulated facts. We adopt those findings, except where noted, and summarize the relevant portions and supplemented as necessary with additional information from the record. We reserve some facts for later discussion in our Opinion.

1 Coughlin (Coughlin) has served as the Director of Fleet Maintenance since July 2015 and
2 acted as an agent of the City. Coughlin is Pennucci's direct supervisor.

3 The Division performs vehicle maintenance, surplus vehicle management, and
4 weather-related operational support for the City's fleet of non-public safety vehicles,
5 including vehicles used during snow events. The fleet of vehicles and equipment within
6 the Division's work includes transportation, parks department, other subdivisions of public
7 works, and the senior shuttle.

8 As Fleet Inventory Manager, Pennucci is responsible for the financial side of the
9 Division, including budget reporting. He deals with approximately 40 vendors for outside
10 repairs, which are needed when equipment repairs cannot be performed by the Division's
11 technicians. He also maintains an inventory of the vehicles, which includes registering
12 and decommissioning vehicles. Pennucci also deals with the technicians on a day-to-day
13 basis, oftentimes providing direction on repairs in order to keep that work within the
14 Division.

15 The Promotional Bypass Grievance

16
17 In May 2019, Coughlin appointed Logistics Specialist Matthew Bradley (Bradley)
18 to the vacant position of Superintendent of Automotive Maintenance (Superintendent)⁴, a
19 position in SENA's bargaining unit, on a temporary out-of-grade basis.⁵ In September
20 2019, Pennucci and Bradley, among others, applied for the permanent Superintendent
21 position. In November 2019, Coughlin permanently appointed Bradley to the position.

⁴ This position is also known as "Assistant Superintendent of Operations."

⁵ This vacancy was for one of two positions holding the title of Superintendent. Scott Alther (Alther) held the other position.

1 On November 26, 2019, the Union filed a grievance on Pennucci's behalf alleging
2 that Pennucci was bypassed for promotion for the Superintendent position. After
3 Bradley's permanent appointment, but before the grievance was filed, Pennucci told
4 Coughlin that he was considering pursuing a grievance to challenge the bypass. Coughlin
5 responded⁶ that if Pennucci filed the grievance, Coughlin would not help him with a
6 compensation grade appeal.⁷ The grievance was heard at Step 1 on December 6, 2019,
7 and at Step 2 on April 21, 2020. On May 12, 2020, SENA submitted the grievance to
8 arbitration. Pennucci, Coughlin, and Bradley testified at the arbitration that was held on
9 March 17, 2021.

10 In July 2021, the Arbitrator issued an award in favor of Pennucci and the Union.
11 The Arbitrator found that Bradley did not meet the minimum required qualifications for the
12 Superintendent position and that Pennucci was the only candidate who did. The Arbitrator
13 concluded that Coughlin violated the parties' CBA when Coughlin selected Bradley and
14 bypassed Pennucci. The Arbitrator determined that Coughlin's decision to select Bradley
15 was improperly influenced by his personal relationship with Bradley. He also noted
16 procedural irregularities which included giving Bradley the interview questions in advance
17 and posting and closing the position while Pennucci was on a prescheduled vacation
18 despite the vacancy having occurred four months prior. The Arbitrator ordered the City to

⁶ Pennucci testified as to Coughlin's response. Even though Coughlin testified, the City did not present any testimony contradicting Pennucci's testimony in this regard. We find that the Hearing Officer properly credited Pennucci's testimony.

⁷ Article 33 of the parties' CBA states that a bargaining unit employee may request a compensation upgrade. The process requires the City's Office of Human Resources to gather information from an applicant's supervisor regarding the content of the employee's application.

1 vacate the position and rerun the process. After the parties jointly sought clarification, the
2 Arbitrator issued a revised award on July 28, 2021, stating that only Pennucci could be
3 considered for the rerun because Bradley had been unqualified for the position at the time
4 of the original posting. The City thereafter filed a Superior Court action to vacate the
5 award, but the parties filed a joint stipulation of dismissal on September 19, 2022,
6 rendering the Arbitrator's award final and binding. At the time of the DLR hearing on
7 September 13, 2023, however, Bradley inexplicably remained in the Superintendent
8 position.

9 Overtime in the Division

10
11 Given the nature of the Division's work, employees are typically needed on an
12 overtime basis to manage operations due to inclement weather events. To ensure
13 sufficient staffing, the Division maintains a yearly "Snow Call-In List" encompassing
14 approximately 36 employees across two set shifts, and four employees with no
15 designated shift. The Call-In List is used for emergency/inclement weather-related events
16 and snow overtime.

17 Employees may also request overtime, particularly if they are in the middle of an
18 urgent task, and such requests are normally made verbally to Coughlin. Typically,
19 overtime assignments must be authorized in advance.

20 Coughlin has final discretion over who receives overtime, how many employees
21 are called in, and when they are scheduled to perform the overtime assignment. Because
22 of the economic uncertainty created by the onset of the COVID-19 pandemic in March
23 2020, Coughlin reduced the Division's overtime work to reduce costs and spending
24 between 2020 and 2021. Coughlin determined that overtime work would be limited to only

1 those tasks deemed an essential function. These overtime changes affected all
2 employees in the Division.

3 The pandemic also caused the City to undergo operational changes. The Division
4 implemented staggered shifts to reduce the number of employees physically present in
5 the workplace and allowed employees to alternate between remote and on-site work.
6 Supply chain disruptions caused shortages in vehicle parts and delays in vehicle repairs
7 which slowed overall vehicle maintenance and limited overtime availability. A backlog of
8 surplus vehicles to be excised at auction also grew during the onset of the pandemic.⁸

9 Seven Division employees, other than Pennucci, reportedly earned the following
10 amounts in overtime between 2017 and 2022:⁹

- 11 • Alther: \$68,390 in 2017, \$83,001 in 2018, \$66,231 in 2019, \$56,892 in 2020,
12 \$72,863 in 2021, and \$101,312 in 2022.

⁸ The Hearing Officer found that “[i]n or around July 2021, the City returned to pre-pandemic work environments in which social distancing protocols, remote work, and other similar requirements were removed, and overtime work would be available as the need arose.” The City argued that there was no evidence to support this finding. We agree that there is no evidence of when pandemic-era protocols were lifted in the City, and to what extent. We have therefore removed this finding from the Background and do not rely on it in rendering our Opinion.

⁹ The amounts listed obtained from the Union’s Exhibit 1 marked as “CP 1 - Overtime Earnings of Relevant Central Fleet EE’s 2017-2022,” which is a spreadsheet. The figures are rounded to the nearest dollar. As the Hearing Officer noted, the parties focused on three employees’ overtime earnings at the hearing, Bradley, Alther, and Pardo, but Pennucci testified that he gathered the overtime earnings for eight Division employees because they were persons who had the same type of overtime he had previously been given. We have listed the earnings of all Division employees he listed, except Maurice Smith (Smith), who retired in or about May 2019. As such, Smith’s overtime earnings are listed only up to 2019 and are therefore incomplete for the relevant period of time. Accordingly, we do not consider his overtime earnings.

- 1 • Robert Pardo (Pardo): \$49,984 in 2017, \$84,016 in 2018; \$46,784 in 2019;
2 \$55,015 in 2020; \$42,035 in 2021, and \$57,290 in 2022.¹⁰
- 3
- 4 • Bradley: \$30,584 in 2017, \$24,639 in 2018, \$20,134 in 2019, \$6,663 in 2020,
5 \$10,045 in 2021, and \$8,313 in 2022.
- 6
- 7 • James Monaghan (Monaghan): \$32,014 in 2017, \$24,058 in 2018, \$21,981 in
8 2019, \$20,558 in 2020, \$28,523 in 2021, and \$31,962 in 2022.
- 9
- 10 • Victor Monteiro (Monteiro): \$32,836 in 2017, \$50,778 in 2018, \$41,540 in 2019,
11 \$37,526 in 2020, \$43,980 in 2021, and \$60,673 in 2022.
- 12
- 13 • Paul Musto (Musto): \$43,942 in 2017, \$43,402 in 2018, \$28,177.48 in 2019,
14 \$18,478 in 2020, \$25,675 in 2021, and \$41,502 in 2022.¹¹
- 15
- 16 • Hector Ortiz (Ortiz): \$23,732 in 2017, \$28,630 in 2018, \$28,404 in 2019,
17 \$9,095.73 in 2020, \$23,208 in 2021, and \$25,426 in 2022.¹²
- 18

19 The overall overtime earnings for the seven employees and Pennucci amount to:

20 \$306,398 for 2017, \$385,538 for 2018, \$280,586 for 2019, \$207,598 for 2020, \$247,011
21 for 2021, and \$329,667 for 2022.¹³

22 Pennucci's Overtime

23 Prior to 2020, Pennucci regularly worked overtime in three principal categories: 1)
24 surplus vehicle work; 2) emergency support as a designated emergency operations
25 personnel (EOP); and 3) non-emergency support during the winter months when snow

¹⁰ Pardo is a Logistics Specialist in the Communications Shop within the Division. This position is within the AFSCME bargaining unit. The Communications Shop is responsible for installing accessories such as two-way radios, GPS, lettering, and other accessories to vehicles.

¹¹ Musto is a general foreman, which is a position within the AFSCME bargaining unit.

¹² Monaghan, Monteiro, and Ortiz are foremen, which is a position within the AFSCME bargaining unit.

¹³ These totals are added from the employees' overtime earnings listed in the Union's Exhibit 1, are rounded to the nearest dollar, and do not include Smith's earnings for any of the years.

1 was ongoing or anticipated (non-emergency snow overtime). These three overtime
2 categories are further explained below.

3 Beginning in 2020, Pennucci noticed that his overtime opportunities began to
4 decrease for both snow-related and surplus vehicle overtime. The Union learned about
5 the City's reduction to Pennucci's overtime opportunities in or around November 2021,
6 while involved in the grievance process and related litigation. The record does not contain
7 any additional detail regarding how the Union became aware of the overtime reduction.

8 Pennucci's annual overtime earnings between 2017 to 2022 were reported as
9 follows: \$24,917 in 2017, \$47,013 in 2018, \$27,324 in 2019, \$3,369 in 2020, \$683 in
10 2021, and \$3,187 in 2022. Through the date of the hearing on September 13, 2023, he
11 had earned no overtime in 2023.¹⁴

12 *Surplus Vehicle Overtime*

13 Pennucci's surplus vehicle work involved preparing surplus/decommissioned
14 vehicles for sale by controlling inventory, taking photographs, preparing vehicle title and
15 sale documents, and other related logistics. Pennucci typically performed his surplus
16 vehicle work on overtime on Saturdays. At the end of 2019 or early 2020, Coughlin began
17 moving surplus work to the Communications Shop to reduce Pennucci's surplus

¹⁴ The City argued on review that the Hearing Officer improperly found that Pennucci earned no overtime in 2023 and that her finding was speculative, premature, and unwarranted, where the year had not concluded. We disagree. Although the year had not yet ended, Pennucci testified that he earned \$0 in overtime up to the time of the hearing on September 13, 2023, and the Hearing Officer was permitted to, and did, credit that testimony. Although the Hearing Officer's Findings of Fact did not specifically state that the \$0 amount for 2023 was only up to September 13, her Opinion section makes it clear that this was the time frame she was referring to for 2023.

1 overtime.¹⁵ In July 2020, Coughlin directed Pennucci to stop performing surplus work on
2 overtime. By email on March 11, 2021, Coughlin transferred significant portions of the
3 surplus work to the Communications Shop so that Pardo and others could perform surplus
4 work during their regular shifts. No surplus work was performed by any employees on
5 overtime after these reassignments.

6 *Emergency Overtime*

7 The Mayor or other entities may declare an emergency due to inclement weather
8 such as hurricanes and snowstorms. Non-EOPs are not required to come into work during
9 a declared emergency. EOPs, however, are required to come into work during these
10 declared emergencies. Pennucci was and has been designated an EOP and is therefore
11 required to come into work when such an emergency is declared. He receives overtime
12 when he is required to come in after his regular work hours. The Union does not contend
13 that Pennucci's emergency overtime was reduced, as Pennucci was required to come
14 into work when an emergency was declared, and therefore Coughlin had no control over
15 when this overtime occurred. Pennucci's duties for emergency support, whether on
16 overtime or not, and non-emergency snow overtime, are the same. Those duties are
17 further described below.

18 *Non-emergency Snow Overtime*

¹⁵ Pennucci testified that "end of 2019 going into 2020," the surplus work on overtime went away for the most part and some of the work was reassigned. Coughlin's testimony was consistent with this. He testified that a person or entity told him to reduce costs and the only area in which he determined he could do that was with respect to Pennucci's surplus overtime. Coughlin testified that the conversation with the person or entity occurred in 2019 or 2020, and he told Pennucci at the end of 2019 or 2020.

1 The largest source of Pennucci's overtime was non-emergency snow overtime.
2 Snow overtime included pre-treating the roads, such as salting the roads in anticipation
3 of freezing weather. Prior to 2019, Pennucci would support this non-emergency snow
4 work on overtime by taking care of the fuel systems, including the fuel fobs, and resetting
5 them if needed, calling vendors if a truck broke down and needed a tow or other repair
6 work. If he was not occupied by these tasks, he would perform his normal duties. Pardo's
7 duties during snow overtime were similar. When Pardo was called in for snow overtime,
8 Pardo would remain in his office and if someone was unable to get fuel, they would ask
9 Pardo for assistance. He redirected them to someone else if it was a fuel fob issue or
10 assisted them if it was a "CANceiver."¹⁶ He would otherwise perform his normal duties if
11 he was not busy.

12 The City's 2021-2022 Snow Call-In List for snow overtime identifies two set
13 schedules and a group of employees not assigned to a particular shift. The first shift is
14 3:30 p.m.-11:30 p.m. and second shift is 11:00 p.m.-7:00 a.m. Alther, Bradley, Coughlin,
15 and Pennucci are not designated to a particular shift, but have preferences that were
16 honored, when possible. Pennucci and Alther preferred the first shift, and Bradley
17 preferred the second shift. Alther is responsible for making phone calls to employees on
18 the Snow Call-In List, based on Coughlin's designations.¹⁷

¹⁶ The record does not define CANceiver.

¹⁷ Coughlin testified that he had the final decision as to who comes in for overtime and how many people come in. With respect to the 2021-2022 Snow Call-In List, Coughlin went over the list with Alther to create it.

1 Beginning in the winter of 2020, Pennucci was no longer called for non-emergency
2 snow overtime and, after 2020, the only snow-related overtime he performed occurred
3 when the Mayor declared an emergency. Although Pennucci had consistently performed
4 these non-emergency snow overtime tasks in the past, Pennucci was effectively removed
5 from the Snow Call-In List at this time.¹⁸ For the most part, Pennucci would have accepted
6 any snow overtime that he was offered as it was the largest source of his overtime pay.¹⁹
7 On occasion, he would refuse overtime if he had a prescheduled event, like a doctor's
8 appointment.

¹⁸ We reject the City's argument that the Hearing Officer erred in finding that Pennucci was removed from the snow overtime list. The City's arguments mischaracterize the Hearing Officer's decision. The Hearing Officer did not find that Pennucci's name was literally redlined or omitted from the list. She found that Pennucci was effectively removed from the non-mandatory snow overtime rotation because, notwithstanding his nominal inclusion on the list, he stopped receiving calls for that work.

Pennucci testified that the Call-In List was used for emergency/inclement weather-related events and overtime. Similarly, Coughlin testified that the Call-In List was used for snow and inclement weather-related events. However, later, Coughlin testified that there was a separate list for "snow prep", and implied that Pennucci was not designated on that list – that Pennucci would only come in to perform snow support work during an emergency. Although the Hearing Officer did not specifically refer to it, this testimony supports her finding that Pennucci was effectively removed from being called in for snow overtime and that he was only called in as an EOP. In addition, we see no basis for disturbing the Hearing Officer's rationale and decision to credit Pennucci's testimony that he was not contacted or offered overtime shifts, over Coughlin's testimony that Pennucci turned down overtime opportunities. As further explained in our Opinion section, for the most part, the CERB will not disturb a hearing officer's credibility determinations.

¹⁹ We disagree with the Hearing Officer's finding that Pennucci testified that he would have accepted *any* overtime that he was offered. Rather, his testimony indicated a general willingness to accept overtime, which was supported by the amount of overtime he performed in previous years. However, he testified that at times, if he had an event such as a pre-scheduled doctor's appointment, he might refuse the overtime. Although we amend this finding, we agree with the Hearing Officer's determination that Pennucci's few instances of refusing overtime is insufficient to change her finding that Pennucci was effectively removed from the Snow Call-In List.

1 OPINION²⁰

2
3 A public employer that retaliates or discriminates against an employee for
4 engaging in activity protected by Section 2 of the Law violates Section 10(a)(3) of the
5 Law. M.G.L. c. 150E, §10(a)(3). The CERB traditionally applies a three-step burden-
6 shifting analysis to Section 10(a)(3) retaliation allegations. City of Newton v.
7 Commonwealth Employment Relations Board, 496 Mass. 82, 90-91 (2025); Trustees of
8 Forbes Library v. Labor Relations Commission, 384 Mass. 556, 559 (1981). First, the
9 CERB determines whether the charging party has established a prima facie case of
10 discrimination. If the charging party meets its initial burden, the burden then shifts to the
11 employer to produce lawful reasons for its actions and produce evidence that the reason
12 actually motivated the adverse action. City of Newton, 494 Mass. at 90-91. See also Town
13 of Brookfield, 28 MLC 320, 327, MUP-2538 (May 1, 2002), aff'd sub nom. Town of
14 Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005). If the employer meets
15 this burden of production, the burden shifts back to the charging party who must then
16 prove that “but for” the protected activity, the employer would not have taken the adverse
17 action. Id.

18 To establish a prima facie case of discrimination, a charging party must produce
19 evidence to support each of the following elements: 1) the employee engaged in
20 concerted activity protected by Section 2 of the Law; 2) the employer knew of the
21 concerted, protected activity; 3) the employer took adverse action against the employee;
22 and 4) the employer’s conduct was motivated by a desire to penalize or discourage the
23 protected activity. Town of Carver, 35 MLC 29, 48, MUP-03-3384 (June 30, 2008).

²⁰ Neither party contests the CERB’s jurisdiction in this matter.

1 On review, it is not disputed that the Union met the first three elements of the prima
2 facie case. Pennucci engaged in protected activity when he filed and pursued the
3 promotional bypass grievance, and the City knew of that activity because Coughlin and
4 the City were directly involved in the grievance, arbitration, and related litigation. Further,
5 it is undisputed and well-established that the loss of overtime pay is a material
6 disadvantage and therefore an adverse employment action. City of Boston, 46 MLC 191,
7 198, MUP-17-6211, MUP-18-6679 (March 31, 2020). The City challenges the Hearing
8 Officer's determination with respect to the remaining element of the prima facie case, that
9 its action was unlawfully motivated.

10 The City also argues that even assuming the Hearing Officer properly found
11 unlawful motivation, she incorrectly determined at the second stage of the burden-shifting
12 analysis, that the City did not meet its burden of producing lawful reasons for reducing
13 Pennucci's snow overtime and did not produce credible evidence that the reason actually
14 motivated the adverse action. Further, the City asserts that the Hearing Officer, who had
15 determined that the City met its burden at the second stage of the burden-shifting
16 framework with respect to the surplus overtime, then incorrectly determined that but-for
17 Pennucci's protected, concerted activity, the City would not have reduced his surplus
18 overtime.

19 For the reasons set forth below, we affirm the Hearing Officer's determinations with
20 respect to each of these elements.

21 Unlawful Motivation
22

1 A charging party can prove unlawful motivation to satisfy the fourth prong of its
2 prima facie case with indirect or circumstantial evidence of discrimination.²¹ Town of
3 Brookfield, 28 MLC 320 at 327-28. Several factors can show unlawful motivation, such
4 as: (1) the timing of the alleged discriminatory act in relation to the protected activity; (2)
5 the triviality of reasons given by the employer; (3) shifting or inconsistent reasons given
6 by the employer; (4) disparate treatment; (5) an employer's deviation from past practices;
7 or (6) expressions of animus or hostility towards a union or the protected activity. City of
8 Holyoke, 35 MLC 153, 156-57, MUP-05-4503 (January 9, 2009); Town of Carver, 35 MLC
9 at 48.

10 The Hearing Officer relied on three primary factors in finding circumstantial
11 evidence of the City's unlawful motivation: 1) the disparate decrease in Pennucci's
12 overtime opportunities; 2) Coughlin's statement demonstrating animus towards Pennucci
13 for pursuing the grievance; and 3) the City's unwillingness to comply with the arbitration
14 award. The City challenged the Hearing Officer's reliance on each of these factors.

15 Many of the City's challenges are based on the Hearing Officer's credibility
16 determinations. In that respect, we note that in reviewing the City's request for review and
17 challenges to the Hearing Officer's factual findings, we are guided by the well-established
18 principle that the hearing officer who heard the witnesses in an agency proceeding must

²¹ A charging party may also satisfy the fourth prong of the prima facie case by proffering direct evidence of unlawful motivation. Town of Carver, 35 MLC at 48. Direct evidence is evidence that, "if believed, results in an inescapable, or at least a highly probable inference that a forbidden bias was present in the workplace." Id., quoting Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 665 (2000). Where the Hearing Officer did not determine whether there was direct evidence of unlawful motive and the Union does not seek review of this, we focus our analysis on the circumstantial evidence in this matter.

1 assess credibility when there is a material conflict in the testimony. Morris v. Board of
2 Registration in Medicine, 405 Mass. 103, 109 (1989). Questions of credibility arise when
3 there are conflicting versions of material events. Morris, 405 Mass. at 109. The CERB is
4 required to give substantial deference to a hearing officer's factual findings "when the
5 subsidiary findings of a hearing officer rest on the hearing officer's 'resolution of credibility
6 questions'." United Water & Sewer Workers v. Labor Relations Commission, 28 Mass.
7 App. Ct. 359, 359 (1990), citing Morris, 405 Mass. at 103; Vinal v. Contributory Retirement
8 Appeal Board, 13 Mass. App. Ct. 85 (1982). We will not disturb a hearing officer's
9 credibility determinations absent a showing, by a clear preponderance of all relevant
10 evidence, that these determinations are incorrect. City of Somerville, 23 MLC 11, 12 n.8,
11 MUP-8450 (June 6, 1996). With this standard in mind, we address the City's challenges
12 to each of these factors.

13 Disparate Decrease in Snow Overtime Opportunities

14 The Hearing Officer concluded that although the onset of the COVID-19 pandemic
15 in March 2020 resulted in an overall decrease in overtime that year for all employees, it
16 was only Pennucci's overtime opportunities that did not increase in the following years
17 (2021-2023). The Hearing Officer determined that, where Pennucci consistently accepted
18 and performed snow overtime work since at least 2017, the disparity in the continued
19 decrease in his overtime opportunities, coupled with the fact that Pennucci was the sole
20 employee who engaged in the promotional bypass grievance process, is circumstantial
21 evidence of unlawful motivation. We do not disturb the Hearing Officer's credibility
22 determination that Pennucci was not offered overtime as it is supported by the record,

1 notwithstanding the City's assertion that he refused snow overtime. See Supra and
2 Footnotes 18 & 19.

3 The City argues that the Hearing Officer improperly found disparate treatment
4 because the other employees were not similarly situated to Pennucci. We disagree. The
5 Hearing Officer was not required to identify a perfectly identical comparator in every
6 respect. The proper comparators are persons similarly situated "in all relevant aspects."
7 Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 129–30 (1997). The record
8 showed that snow overtime continued to be offered to seven other employees within the
9 Division who performed similar snow overtime duties as Pennucci, and that after he filed
10 the grievance his overtime opportunities diminished while those of the other seven
11 employees did not.

12 Although the City argued that Pardo was not similarly situated to Pennucci, Pardo
13 described his snow overtime duties as being substantially similar to Pennucci's in that he
14 was primarily in his office and assisted employees on an as-needed basis, such as when
15 they had issues with refueling, and otherwise performed his regular work duties.
16 Notwithstanding Pardo's similar snow overtime duties, Pardo's overtime opportunities did
17 not decrease as Pennucci's did.

18 Although the City argues that the other employees are not similarly situated
19 because they have direct reports, whereas Pennucci does not, there is no evidence in the
20 record that demonstrates this is a material difference that would make it improper to
21 compare Pennucci to the other employees. The lack of direct reports had no discernible
22 effect on Pennucci's snow overtime being reduced substantially more than others in 2020
23 and thereafter. While the City also argues that Pennucci's duties are administrative in

1 nature, whereas the duties of others are not, Pardo testified that he worked in his office
2 performing similar duties during snow overtime, like Pennucci. We conclude that in all
3 relevant aspects, the seven employees who Pennucci testified performed snow overtime
4 duties like he did are proper comparators.²²

5 In sum, there is no evidence in the record to support the City's explanation for why
6 Pennucci had substantial overtime before he engaged in protected, concerted activity,
7 and why those opportunities remained low during and after the COVID-19 pandemic for
8 Pennucci in particular, but not for the other comparable employees. The CERB has
9 previously determined that an employer's failure at hearing and on appeal to explain a
10 disparity could itself constitute circumstantial evidence of improper motivation.
11 Massachusetts Department of Transportation, 43 MLC, 65 67, SUP-14-3576, SUP-14-
12 3640 (H.O. September 8, 2016), aff'd, 44 MLC 1, 3 (July 31, 2017). "When a party has
13 relevant evidence within his control which he fails to produce, that failure gives rise to an
14 inference that the evidence is unfavorable to him." Id. (quoting Town of Mashpee, 36 MLC
15 163, 172, MUP-02-3653 (April 15, 2010)).

16 The Hearing Officer found that Pennucci's overtime opportunities rapidly
17 decreased alongside each step in the grievance and arbitration process between 2019
18 and 2022, culminating in Pennucci earning \$0 in overtime at the time of the DLR hearing
19 in 2023, despite data reflecting years of earning a significant amount of overtime pay.
20 Pennucci's overtime after 2019 consisted only of emergency overtime that the City could

²² To the extent that the City implies that the only proper comparators are fellow SENA bargaining unit members, there is no evidence to demonstrate that the differences between AFSCME bargaining unit membership and SENA bargaining unit membership would cause the dramatic decrease in overtime that Pennucci suffered.

1 not avoid offering him. This conclusion is supported by the evidence. Although we do not
2 have other employees' overtime earnings in 2023, Pennucci's overtime earnings in 2023,
3 he testified, were none as of the hearing date. The Hearing Officer did not err, as the City
4 alleges, by considering Pennucci's lack of overtime earnings in 2023.

5 The City contends that the Hearing Officer erred in finding that only Pennucci failed
6 to see an increase in overtime in the post-pandemic years. The City asserts that
7 Pennucci's overtime increased fivefold from \$683 in 2021 to \$3,187 in 2022. The City
8 points out that Bradley, in contrast, experienced a decline in overtime earnings during the
9 same period, from \$10,045 in 2021 to \$8,313 in 2022. The City's selection of these years
10 and numbers is misleading. While Bradley's overtime did decrease in 2022 compared to
11 2021, his overtime was still substantially higher than Pennucci's in 2020 through 2022,
12 the time in which Pennucci had been engaged in protected, concerted activity. Although
13 Pennucci's overtime in 2022 increased in comparison to his 2021 overtime, when viewing
14 Pennucci's previous years of overtime, where he had not engaged in protected, concerted
15 activity and there was no pandemic, his overtime for 2021 and 2022 remained
16 substantially lower, while other employees' overtime continued to increase.

17 The City also argues that the Hearing Officer erred in concluding that Coughlin
18 was responsible for excluding Pennucci from snow-related overtime opportunities
19 because there was no evidence that Coughlin directed such action. The City asserts that
20 the evidence demonstrates that Alther maintains the Call-In List and calls individuals for
21 overtime, which precludes any inference that Coughlin restricted Pennucci's overtime
22 opportunities in retaliation for Pennucci's protected, concerted activity. We disagree.
23 Coughlin testified that he has final say in overtime assignments. In addition, he created

1 the 2021-2022 Snow Call-In List with Alther, and designates who is appropriate to perform
2 certain overtime work. Coughlin acknowledged that Pennucci could support snow
3 operations when he was called in on an emergency basis but inexplicably determined
4 that Pennucci could not perform the same duties supporting the snow operations at other
5 times. See Supra Footnote 18. Further, Coughlin testified that he recalled a time when
6 Pennucci refused an overnight overtime opportunity the previous winter, and that he
7 concluded from there on that Pennucci did not want to work overnight shifts. This
8 evidence plainly shows that Coughlin was involved in the minutiae of overtime
9 assignments.²³ Based on this evidence in the record, even in the absence of testimony
10 that Coughlin directed Alther not to call Pennucci, the Hearing Officer reasonably and
11 properly concluded that Coughlin's designations trickled down to Alther's determinations
12 as to who to call for snow-related overtime opportunities.

13 Coughlin's Statement Opposing the Grievance

14 In concluding that the City was unlawfully motivated, the Hearing Officer also
15 relied, in part, on Coughlin's statement in or about November 2019 that if Pennucci
16 pursued a grievance challenging Coughlin's appointment of Bradley to the
17 Superintendent position, Coughlin would not support any compensation upgrade that
18 Pennucci may later seek. The City argues that this statement did not support the Hearing

²³ As the Hearing Officer noted, the City's records regarding attendance and overtime distribution were not comprehensive or formal. Coughlin's testimony indicates that Alther would call individuals in for overtime, but also that a timekeeper keeps some records of overtime offered. For instance, a Time Report for December 11, 2020, indicates "R" next to Pennucci's name which Coughlin testified stands for "Refusal," and that Pennucci refused overtime on that date, even though "R" is not listed as a code. Coughlin also testified that Bradley was asked to fill the shift but could not because he was sick, yet "S" - the code for "Sick" - was not listed next to Bradley's name.

1 Officer's findings that the City harbored an unlawful motive because it was not
2 contemporaneous with any adverse action, was not repeated, was not corroborated by
3 any witness, and was never tied to any specific subsequent overtime decisions.

4 First, we reject the City's argument that the Hearing Officer erred because the
5 statement was not corroborated by any witness. As we previously stated, we will not
6 disturb a hearing officer's credibility determinations absent a showing, by a clear
7 preponderance of all relevant evidence, that these determinations are incorrect. City of
8 Somerville, 23 MLC at 12, n.8. Here, the Hearing Officer credited Pennucci's testimony
9 that Coughlin made this statement. Although there were no corroborating witnesses at
10 the hearing, Coughlin testified and had an opportunity to rebut Pennucci's testimony as
11 to their conversation and Pennucci's recollection of Coughlin's statement. Coughlin did
12 not do so. Thus, the Hearing Officer properly credited and relied on this statement even
13 without corroborating testimony.

14 Second, we reject the City's claim that Coughlin's November 2019 statement
15 cannot be used as evidence of unlawful motivation because it was too remote in time
16 from the 2022 and 2023 overtime assignments. The City's argument is predicated on its
17 assertion that the reduction in overtime assignments began in 2022 and 2023.²⁴ This
18 assertion is incorrect. The evidence demonstrate the Coughlin began decreasing
19 Pennucci's overtime at the end of 2019, a few months after Coughlin made the statement,
20 and shortly after the Union filed Pennucci's bypass grievance on November 26, 2019.

²⁴ It is unclear why the City has focused on the years 2022 and 2023 only. The City did not argue that the allegations in the Complaint are untimely in its request for review to the CERB, as it did in its post-hearing brief to the Hearing Officer. Therefore, we do not construe the City's focus on 2022 and 2023, as the Union does, to be reiterating its timeliness arguments, and do not address the City's arguments as such.

1 Coughlin began moving the surplus duties to other employees to reduce Pennucci's
2 surplus overtime in late 2019 or early 2020 as well, which was at or about the same time
3 the grievance was filed. In addition, many of Pennucci's surplus duties were transferred
4 on or about March 11, 2021, just days before the arbitration hearing on the grievance. As
5 the Hearing Officer found, Coughlin's statement shows his hostility toward Pennucci's
6 contemplated grievance, and Coughlin's willingness to take adverse actions against
7 Pennucci in response to Pennucci's protected, concerted activity. See Southern
8 Worcester County Regional Vocational School District Committee, 5 MLC 1525, 1543,
9 MUP-2201 et al. (December 28, 1978), aff'd sub nom. Southern Worcester County
10 Regional Vocational School District Committee v. Labor Relations Commission, 386
11 Mass. 414 (1982) (the Court affirmed the Labor Relations Commission's (LRC) finding
12 that there was evidence of anti-union statements sufficient to establish unlawful motive
13 where the employer threatened employees with economic reprisals if they engaged in
14 protected, concerted activity); Town of Andover, 17 MLC 1475, 1484, MUP-6443
15 (February 6, 1991) (employer perception that employee's union activity caused "friction"
16 and denied him a promotion because he was not a "team player" is evidence of unlawful
17 animus). The City's reduction to Pennucci's overtime began shortly after Coughlin's
18 statement and continued through the DLR hearing in 2023. Under these circumstances,
19 the Hearing Officer properly considered Coughlin's warning as probative of his animus
20 when he made decisions with respect to Pennucci's overtime opportunities.

21 City's Refusal to Comply with Arbitration Award

22 The Hearing Officer also found that the City's intentional and persistent refusal to
23 comply with binding legal orders was further circumstantial evidence of unlawful

1 motivation, where Bradley remained in the Superintendent position at the time of the DLR
2 hearing in 2023. The City argues that filing an appeal and seeking clarification of an
3 arbitration award is protected legal conduct, and that the City's use of available legal
4 remedies should not be used as evidence of retaliation. We note that under the state's
5 anti-discrimination laws, the Supreme Judicial Court has found that an employer's lawsuit
6 can be considered a retaliatory act if it is "objectively baseless" and also "subjectively
7 motivated by the litigant's desire to use the governmental process – as opposed to its
8 outcome – to influence or harm the target of the litigation." Psy-Ed Corp. v. Klein, 459
9 Mass. 697, 709 (2011); Slive & Hanna, Inc. v. Massachusetts Comm'n Against
10 Discrimination, 100 Mass. App. Ct. 432, 437 (2021). However, even though we may do
11 so, we do not need to determine whether, in this case, the City's use of legal remedies is
12 evidence of unlawful motive. We find that the Union met its burden of proving that there
13 is evidence is unlawful motive without considering this factor.

14 Because we find that the Union established a prima facie case, including that the
15 Union presented sufficient evidence to establish that the City's reduction in Pennucci's
16 overtime was motivated by a desire to penalize or discourage his protected, concerted
17 activity, we now turn to the second stage of the burden-shifting analysis.

18 The City's Legitimate Reasons

19
20 Here, the Hearing Officer found that the City met its burden at the second stage of
21 the burden-shifting analysis with respect to Pennucci's surplus overtime, but not with the
22 snow overtime. With respect to the surplus overtime, the Hearing Officer reasoned that
23 the City had legitimate business reasons for cutting back on overtime due to the COVID-
24 19 pandemic and, as part of its broader effort to cut costs, reassigned the duties to the

1 Communications Shop for operational efficiency, where the duties could be performed
2 during regular workday hours.

3 With respect to the snow overtime, the Hearing Officer considered the City's
4 asserted reasons for the reduced snow overtime, that snow overtime was assigned on an
5 as-needed basis and Pennucci was not needed as compared to other employees due to
6 COVID-era operational constraints. The Hearing Officer determined that the City did not
7 provide supporting evidence of its justifications. The City argues that the Hearing Officer
8 erred by inconsistently evaluating the City's COVID-19 justifications and accepting them
9 for the surplus overtime, but not for the snow overtime.

10 The Hearing Officer did not ignore this evidence, nor was she inconsistent in her
11 findings. She recognized that the pandemic affected operations generally and that overall
12 overtime decreased in 2020. However, the City's rationale with respect to the snow
13 overtime decreasing was different than with the surplus overtime, in that the City
14 explained that Pennucci was *uniquely* not needed and that is why his snow overtime
15 earnings had diminished compared to other employees. In that respect, the City's
16 production of evidence on the snow overtime was lacking. The City's production consisted
17 largely of Coughlin's generalized testimony. It did not produce contemporaneous
18 directives stating that Pennucci, because of his position, should no longer be called for
19 non-mandatory snow overtime; it did not produce records showing that weather
20 conditions in 2020 through 2022 materially eliminated the need for the kind of support
21 overtime Pennucci had historically performed; and it did not produce records showing that
22 Pennucci was routinely called and declined overtime opportunities. The Hearing Officer
23 reasonably noted that the City followed an established call-in list for weather-related

1 events that produced consistent overtime opportunities for all employees, but it was only
2 when Pennucci engaged in protected concerted activities that Pennucci experienced a
3 sustained loss in overtime opportunities. Because the City failed to provide credible
4 evidence that the COVID-19 pandemic or Pennucci's duties in particular actually caused
5 the reduction in Pennucci's non-mandatory snow overtime, the Hearing Officer correctly
6 found that the City did not meet its burden of production on this aspect of the case.

7 The Hearing Officer's conclusion is consistent with Trustees of Forbes Library, 384
8 Mass. at 565-66, School Committee of Boston v. Labor Relations Commission, 40 Mass.
9 App. Ct. 327, 335 (1996), and City of Newton, 496 Mass. at 90-91, all of which require
10 more than the articulation of a nondiscriminatory reason. The City must produce
11 supporting facts indicating that the proffered reason was actually a motive in the decision.
12 School Committee of Boston, 40 Mass. App. Ct. at 335. On review, the City does not point
13 to evidence in the record that meets this burden of production with respect to the snow
14 overtime. Thus, we agree with the Hearing Officer that it has not met its burden at the
15 second stage of the burden shifting framework with respect to the snow overtime.

16 An employer's failure to meet its burden at the second stage of the burden shifting
17 analysis leads to a conclusion that the employer violated Section 10(a)(3) and,
18 derivatively, Section 10(a)(1) of the Law by its conduct. See City of Newton, 496 Mass.
19 at 90-91; Boston School Committee, 40 Mass. App. Ct. at 335-336; Massachusetts
20 Department of Transportation, 44 MLC 1, 4, SUP-14-3576, SUP-14-3460 (July 1, 2017).
21 As such, the Hearing Officer properly determined that the City violated the Law as alleged
22 with respect to reducing Pennucci's snow overtime as it has failed to dispel the
23 presumption of discrimination established by the Union's prima facie case.

1 But-For Analysis

2 As we stated above, with respect to surplus overtime, the Hearing Officer accepted
3 that the City produced some legitimate, non-discriminatory evidence that the pandemic
4 disrupted operations and that the City later reassigned substantial portions of the surplus
5 work to the Communications Shop to be performed on straight time for operational
6 efficiency. We agree with this finding. The question therefore becomes whether the
7 Hearing Officer correctly concluded that the Union proved that the City would not have
8 eliminated Pennucci's surplus overtime but for his protected activity.

9 We agree with the Hearing Officer's conclusion. The evidence demonstrates that
10 Coughlin began moving the surplus duties to the Communication Shop at the end of 2019
11 or sometime in 2020, at the same time as Pennucci initiated his bypass grievance, and
12 that the majority of the surplus duties were transferred from Pennucci to the
13 Communications Shop on or about March 11, 2021, just days before the arbitration
14 hearing on March 17, 2021. Coughlin testified that the purpose of the transfer was to
15 eliminate overtime, the elimination of which, Coughlin acknowledged, affected Pennucci's
16 surplus overtime. Coughlin explained that he was told by an unspecified person or entity
17 to reduce costs in or about end of 2019 or 2020, and targeted surplus overtime because
18 when he drove in on Saturdays, he saw Pennucci rearranging the cars and did not believe
19 the overtime was necessary. He asserted that it would be operationally more efficient for
20 the Communications Shop to take pictures and perform the duties during the day.
21 Coughlin's unspecific testimony about a directive to reduce overtime, and his decisions
22 to target Pennucci's surplus overtime, even though he never had before, to comply with
23 this directive is suspiciously timed with Pennucci's protected concerted activity.

1 Further, the Hearing Officer reasonably relied on the record evidence that the
2 typical surplus workload was backlogged due to the COVID-19 pandemic restrictions.
3 Such a backlog would have resulted in more surplus duties needing to be completed,
4 requiring more time and employees to perform those duties. Notwithstanding this backlog,
5 Pennucci remained barred from performing this work on overtime, work he had
6 consistently done since at least 2017. As we noted in footnote 8 of our decision, we do
7 not find any evidence in the record that the City ended the COVID-19 restrictions in July
8 2021. Thus, we do not factor this into our reasoning as the Hearing Officer did. However,
9 the record evidence demonstrates that there was a COVID-19 pandemic related backlog,
10 yet instead of increasing Pennucci's overtime to address this backlog, Coughlin
11 specifically targeted Pennucci's surplus overtime for elimination and transferred many of
12 the duties to Pardo and others in the Communications Shop to accomplish this at
13 precisely the same times Pennucci engaged in protected, concerted activity.

14 We note that Pardo's overtime earnings increased particularly in 2020 compared
15 to 2017 and 2019, the same time when the surplus duties started to be transferred to him
16 in the Communications Shop. Pardo's 2022 earnings spiked to an all-time high, with the
17 exception of his 2018 overtime earnings which were the result of installing GPS in all City
18 vehicles at that time. Therefore, while the evidence demonstrates that no employees
19 worked the surplus duties on overtime, the City did not actually reduce overtime costs
20 because Pardo, who performed the surplus work on straight time, needed more overtime
21 to perform his other work. In addition, although the overall overtime earnings, based on
22 the eight Division employees listed (see footnote 9), were reduced in 2020 during the

1 onset of the pandemic, by 2022, the overtime earnings overall in the Division increased
2 to \$329,667 total, one of the highest years for overtime earnings.

3 As such, we conclude that but for Pennucci's protected, concerted activity, the City
4 would not have eliminated Pennucci's surplus overtime.

5 The Remedy
6

7 When a hearing officer or the CERB concludes that a party has violated the Law,
8 it orders that party to take certain actions designed to restore the situation as nearly as
9 possible to that which would have existed but for the unfair labor practice. Commonwealth
10 of Mass, 41 MLC 186, 187, SUP-12-1829 (January 16, 2015). Here, the Hearing Officer
11 ordered that the City restore Pennucci to the snow and surplus overtime assignments.
12 The City argues that the Hearing Officer's remedy is speculative because overtime is
13 variable and difficult to calculate. We disagree. Once the CERB finds that an employer
14 unlawfully deprived an employee of overtime opportunities, make-whole relief is an
15 appropriate remedy even though the precise amount of lost overtime must be determined
16 in a later compliance proceeding if the parties cannot agree. In this regard, the cases
17 cited by the City, in footnote 1 of its brief on request for review, are inapplicable because
18 they are not CERB or DLR cases where damages can be resolved at a later compliance
19 hearing. The CERB has long recognized that uncertainty in quantifying the economic
20 harm does not defeat a remedial order. See Town of Burlington, 35 MLC 18, 27, MUP-
21 04-4157 (June 30, 2008).²⁵

²⁵ The parties may find the LRC's supplementary decision in Newton School Committee,
8 MLC 1538, 1556-57, MUP-2501 (November 16, 1981), aff'd sub nom. School
Committee of Newton v. Labor Relations Commission, 388 Mass. 577 (1983), useful in
this regard.

1 The City also argues that the Hearing Officer's remedy lacks a factual basis
2 because Pennucci was never removed from the snow overtime list and continued to be
3 eligible for snow overtime. That claim is belied by our findings above that he was
4 *effectively* removed when he stopped receiving nonmandatory overtime assignments.²⁶

5 The City also contends that the remedy encroaches on management rights by
6 mandating that it create overtime opportunities that are no longer available or necessary.
7 We do not find any merit to that argument. A remedy that encroaches on management
8 rights, even one that is traditionally nondelegable, has been found to be permissible in
9 order to redress unlawful anti-union discrimination and retaliation for concerted activities
10 protected by the Law. See Southern Worcester County Regional Vocational School
11 District v. Labor Relations Commission, 386 Mass. 414, 423 (1982) (upholding the
12 remedy to reinstate a teacher even if the reinstatement results in tenure, which is typically
13 a nondelegable school committee authority); Department of State Police v.
14 Massachusetts Organization of State Engineers and Scientists, 456 Mass. 450, 459-460
15 (2010) (holding that while an arbitrator could not reinstate a police officer as it would
16 intrude on the employer's nondelegable management authority, the DLR could do so to
17 remedy labor practices prohibited under the Law). See also Town of Framingham v.
18 Framingham Police Officers Union, 93 Mass. App. Ct. 537, 546, n. 11 (2018) (stating that
19 doctrine of nondelegation generally must give way to the constitutional and statutory
20 prohibitions on invidious discrimination). Where we have found that the City reduced or

²⁶ To dispel any confusion over the meaning of restoring Pennucci to the overtime rotation, we have added to the Hearing Officer's remedy that the City must "assign him overtime in a manner consistent with comparable employees as it had assigned prior to Pennucci engaging in protected, concerted activity."

1 eliminated Pennucci's overtime in retaliation for his concerted activity protected by the
2 Law, we do not find that the Hearing Officer erred in ordering restoration of those overtime
3 opportunities.

4 The record here supports a make-whole order given that Pennucci had a
5 documented history of substantial overtime before the retaliation began, the snow
6 overtime continued to be worked by others after Pennucci's opportunities collapsed, and
7 the retaliation affected a defined source of Pennucci's compensation. The Hearing
8 Officer's order, restoring the status quo ante, directing a make-whole remedy with
9 interest, requiring notice posting, and reserving the amount of backpay for a compliance
10 hearing, if necessary, is therefore appropriate.

11 CONCLUSION

12
13 For all of the foregoing reasons, we affirm the Hearing Officer's decision that the
14 City retaliated against Pennucci for engaging in concerted, protected activity in violation
15 of Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law. We also conclude that
16 the remedy ordered is appropriate. Based on these findings, we issue the following Order.

17 ORDER

18
19 WHEREFORE, based on the foregoing, it is hereby ordered that the City shall:

20
21 1. Cease and desist from:

- 22
23 a. Retaliating against Lawrence Pennucci for engaging in concerted protected
24 activity;
25
26 b. Interfering with, restraining, or coercing employees in the exercise of rights
27 guaranteed by the Law;
28

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

- 30
31 a. Restore the status quo ante and immediately restore Pennucci to the overtime
32 rotation previously established by the City and assign him overtime in a manner

1 consistent with comparable employees as it had assigned prior to Pennucci
2 engaging in protected, concerted activity;
3

4 b. Make Pennucci whole for the monetary harm he suffered as a result of the City's
5 unlawful conduct, with interest compounded quarterly at the rate specified in G.L.
6 c. 231, § 6I;
7

8 c. Post immediately in all conspicuous places where members of the Union's
9 bargaining unit usually congregate, or where notices are usually posted, including
10 electronically, if the City customarily communicates with these unit members via
11 intranet or email, signed copies of the attached Notice to Employees and maintain
12 them for a period of thirty (30) days thereafter;
13

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



LAN T. KANTANY, CHAIR



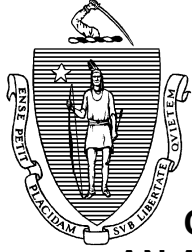
KELLY B. STRONG, MEMBER



VICTORIA B. CALDWELL, MEMBER

APPEAL RIGHTS

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



NOTICE TO EMPLOYEES

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

In Case No. MUP-22-9172, the Commonwealth Employment Relations Board has determined that the City of Boston (City) violated Sections 10(a)(3) and, derivatively 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by retaliating against Lawrence Pennucci (Pennucci) for engaging in concerted, protected activities. The City posts this Notice to Employees in compliance with the Commonwealth Employment Relations Board's orders.

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

WE WILL NOT retaliate against Pennucci for engaging in concerted, protected activities.

WE WILL immediately restore him to the overtime rotation previously established by the City, assign him overtime in a manner consistent with comparable employees as it had assigned prior to Pennucci engaging in protected, concerted activity, and cease excluding him from snow and inclement weather-related overtime opportunities on a retaliatory basis.

WE WILL make Pennucci whole for the monetary harm he suffered as a result of the City's unlawful conduct, with interest compounded quarterly at the rate specified in G.L. c. 231, § 6I.

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

For the City of Boston

Date

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

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