COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of CITY OF BOSTON and SALARIED EMPLOYEES OF NORTH AMERICA, LOCAL 9158	Case No.: MUP-22-9172 Date issued: May 12, 2025

Hearing Officer:

Holly L. Accica, Esq.

Appearances:

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

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the City of Boston (City) violated Section 10(a)(3) and derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by denying Lawrence Pennucci (Pennucci), a bargaining unit employee, overtime opportunities in retaliation for engaging in concerted, protected activity as defined by Section 2 of the Law. For the reasons described below, I find that the City violated the Law as alleged.

STATEMENT OF THE CASE

On March 14, 2022, the Salaried Employees of North America, Local 9158 (SENA or Union) filed a Charge of Prohibited Practice (Charge) with the Department of Labor

Relations (DLR) alleging that the City violated Section 10(a)(3) and derivatively, Section 10(a)(1) of the Law. On May 27, 2022, a DLR Investigator investigated the Charge. On August 8, and as amended on August 15, 2022, the Investigator issued a Complaint of Prohibited Practice (Complaint) alleging that the City violated Section 10(a)(3) and derivatively, Section 10(a)(1) of the Law by retaliating against an employee when it denied him regularly scheduled overtime opportunities. On August 22, 2022, the City filed its Answer.

I conducted a hearing on September 13, 2023, at which time both parties had an opportunity to be heard, to call witnesses, and to introduce evidence. The parties submitted their post-hearing briefs on or about December 15, 2023. Upon review of the entire record, including my observation of the demeanor of the witnesses, I make the following findings of fact and render the following opinion.

STIPULATED FACTS

1. The City is a public employer within the meaning of Section 1 of the Law.

2. SENA is an employee organization within the meaning of Section 1 of the Law.

3. SENA is the exclusive bargaining representative for a bargaining unit of middle managers in the City, including in the City's Central Fleet Division.

4. Since 2010, Lawrence Pennucci (Pennucci) has held the position of Principal Administrative Assistant, a position in the SENA bargaining unit.

5. At all relevant times, William Coughlin (Coughlin) was the City's Fleet Division Director and acted as an agent of the City.

6. In May 2019, Coughlin appointed Logistics Specialist Matthew Bradley (Bradley) to the position of Superintendent of Automotive Maintenance, a SENA bargaining unit position, on a temporary out-of-grade basis.

7. On or about September 2019, Pennucci and Bradley, among others, applied for the permanent position of Superintendent of Automotive Maintenance.

8. On or about November 2019, Coughlin permanently appointed Bradley as Superintendent of Automotive Maintenance.

9. On November 26, 2019, SENA and Pennucci grieved Coughlin's permanent appointment of Bradley to Superintendent of Automotive Maintenance as a promotional bypass.

10. On May 12, 2020, SENA demanded arbitration of the promotional bypass grievance.

11. On August 4, 2021, the City filed a complaint in Superior Court to vacate the arbitration award of the promotional bypass grievance.

12. On September 19, 2022, the parties filed a joint stipulation of dismissal in the Superior Court action.

13. The promotional bypass grievance was heard at Step 1 on December 6, 2019, and at Step 2 on April 21, 2020.

FINDINGS OF FACT[1]

Since 2010, Pennucci was employed by the City as a Fleet Inventory Manager and Principal Administrative Assistant in the City's Central Fleet Division (Division) and was a member of SENA's bargaining unit. At all relevant times, Coughlin was responsible for overseeing the Division, determined overtime needs for the Division, and was an agent of the City. Prior to 2020, Pennucci was regularly scheduled for overtime shifts, including non-emergency snow events, and administrative processing of surplus vehicles.

The Division performs vehicle maintenance, surplus vehicle management, and emergency response preparations for the City's entire fleet of non-public safety vehicles, including the vehicles used for snow removal. Employees perform work on overtime for weather-related emergencies declared by the Mayor; weather event preparation (non-

[1] The DLR's jurisdiction in this matter is uncontested.

emergency snow overtime);[2] surplus vehicle preparation and administrative tasks; and other operational needs including marathons and public events. Given the nature of the Division's work, additional employees are typically needed to manage operations during inclement weather events. To ensure sufficient staffing, the Division maintains a "Snow Call-In List" encompassing approximately thirty-six employees across two set shifts, and four employees with no designated shift.[3] Superintendent Scott Alther (Alther) is responsible for making the phone calls to the employees on the Snow Call-In List, based on Coughlin's designations. The work performed as part of the Snow Call-In List is only performed on an overtime basis and is hereinafter referred to as "snow overtime."

Employees may also request overtime, particularly if they are in the middle of an urgent task, and such requests are normally made verbally to Coughlin. Typically, overtime assignments must be authorized in advance, and Coughlin has final discretion over who receives overtime, how many employees are called in, and when.

Pennucci's Overtime

Historically, Pennucci performed the following work on approved overtime shifts: 1) preparing surplus/decommissioned vehicles for sale by controlling inventory, taking photos, preparing vehicle title and sale documents, and other related logistics (surplus overtime); and 2) non-emergency and emergency snow support, vehicle preparation, and

[2] Although all types of weather events are covered by the Division, the instant dispute only involves snow related events. Emergency weather events require mandatory overtime and are not within the scope of the Complaint.

[3] The City's Snow Call-In List for snow overtime identifies two set schedules and a group of employees not assigned to a particular shift. The first shift is 3:30 p.m.-11:30 p.m. and second shift is 11:00 p.m.-7:00 a.m. Alther, Bradley, Coughlin, and Pennucci are not designated to a particular shift, but have preferences that were honored, when possible. Pennucci and Alther preferred the first shift, and Bradley preferred the second shift.

other related tasks during winter months (snow overtime). Pennucci's annual overtime earnings were reported as follows: $24,917 in 2017; $47,013 in 2018; $27,324 in 2019; $3,369 in 2020; $683 in 2021; $3,187 in 2022; and $0 in 2023.[4]

Beginning in 2020, Pennucci noticed that his overtime opportunities began to decrease for both snow-related and surplus vehicle overtime. In July 2020, Coughlin advised Pennucci to stop performing surplus vehicle duties altogether. Pennucci typically performed surplus work on Saturday overtime shifts and did not request to stop. These tasks were later reassigned to the Communications Shop, another department within the Division.[5] The surplus duties were placed under the control of Robert Pardo (Pardo), a Logistics Specialist, who was expected to complete this work during his regular shift.

Beginning in the winter months of 2020, Pennucci was effectively removed from the Snow Call-In List as he did not receive any calls to appear for snow overtime work, despite consistently performing these tasks in the past.[6] Pennucci would have accepted

[4] These amounts are rounded to the nearest dollar value.

[5] The Communications Shop is largely responsible for maintaining vehicle equipment and managing the vehicle decommissioning process.

[6] There was conflicting testimony between Coughlin and Pennucci on the question of whether the City offered overtime to Pennucci during the winter of 2020. The City claims that Pennucci turned down overtime opportunities, whereas Pennucci asserts he was not contacted or offered overtime shifts. I find Pennucci's testimony to be more credible based on the historical data of earned overtime pay. Given the significant amount of overtime worked in 2017-2019, amounting to an annual average of $30,000 in overtime pay, it is more reasonable to believe that Pennucci would continue seeking to maintain this income. Given that 2020 resulted in reduced opportunities, it is more plausible that an employee would want to make up for the lost wages by accepting overtime shifts once those opportunities arose. Also, the Division did not maintain comprehensive or formal records of overtime refusals, and Coughlin relied primarily on memory and informal notes. The rapid and consistent decline in Pennucci's overtime earnings leads me to find that the City failed to offer overtime to Pennucci.

any snow overtime that he was offered during that time period,[7] as this was the largest source of his overtime pay. Since 2020, Pennucci's snow overtime was strictly limited to emergency situations declared by the Mayor. In these instances, as emergency personnel, Pennucci was required to report and/or be held over beyond his regular shift.

The Union learned of the ongoing reduction to Pennucci's overtime opportunities in or around November 2021, while involved in the promotional bypass grievance process and related litigation described below. The record does not contain any additional detail regarding how the Union became aware of the overtime reduction. Although Pennucci was aware of the reduction in overtime since 2020, there is no record evidence that the Union knew of the overtime reduction prior to November of 2021.

Cost-Cutting and Operational Changes

The COVID-19 pandemic conditions resulted in certain city-wide operational changes. The Division implemented staggered shifts to reduce the number of employees physically present in the workplace and allowed employees to alternate between remote and on-site work. These changes reduced the need for certain overtime activities, particularly non-emergency work such as snow preparations and surplus vehicle management. Additionally, supply chain disruptions caused shortages in vehicle parts

[7] Pennucci testified that he would have accepted any overtime that he was offered, and I credit his testimony for the reasons previously described. Supra, n. 6.

The City offered an attendance sheet dated February 5, 2021, in which a handwritten "R" is next to Pennucci's name. While the list of time codes on the attendance sheet includes other indicators such as "P" for personal, or "H" for holiday, it does not include "R." However, the City maintained "R" stood for "refusal." Even if this assertion is true, and Pennucci did refuse to accept an overtime shift on February 5, 2021, a single instance of refusing does not change my finding that Pennucci was effectively removed from the Snow Call-In List by not receiving calls from Alther in line with previous overtime reports.

and delays in vehicle repairs which slowed overall vehicle maintenance and limited overtime availability. This also resulted in a backlog of surplus vehicles to be excised at auction. In order to consolidate some of the surplus work and minimize unnecessary overtime, tasks related to surplus vehicles were reassigned to the Communications Shop. The work reassigned to the Communications Shop would no longer be performed on overtime shifts by any employee after this reassignment.

Because of the economic uncertainty created by the pandemic, Coughlin reduced the Division's overtime work in an effort to reduce costs and spending between 2020 and 2021. Coughlin determined that overtime work would be limited to only those tasks deemed to be an essential function, and these changes affected all employees in the Division. In 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.

Of the other nine Division employee salaries provided, the following amounts were reportedly earned on overtime: Bradley earned $20,134 in 2019; $6,663 in 2020; $10,045 in 2021, and $8,313 in 2022. Alther earned $66,231 in 2019; $56,892 in 2020; $72,863 in 2021, and $101,312 in 2022. Pardo earned $46,784 in 2019; $55,015 in 2020; $42,035 in 2021, and $57,290 in 2022.[8]

[8] The amounts listed are rounded to the nearest dollar. All comparisons are based on the dollar amount of earned overtime pay alone.

The particular employees discussed here are limited to those names raised during the Hearing. As previously stated, Bradley and Alter both hold the job title of Superintendent in the Division, which is a Grade-10 position. Pennucci is in a Grade-8 position. Pardo, the Logistics Specialist, is in a different bargaining unit represented by AFSCME.

Pennucci's Grievance and Arbitration

In May 2019, one of the two Superintendent of Automotive Maintenance (Superintendent) positions became vacant, and Coughlin temporarily appointed Bradley to fill the position out-of-grade. In September 2019, the City posted the permanent vacancy. Pennucci and Bradley applied to the September 2019 job posting. Despite Pennucci having seniority over Bradley and meeting the entrance requirements, Coughlin selected Bradley as the Superintendent.

In late 2019, Pennucci and Coughlin discussed the Superintendent promotion after Bradley was selected for the position. When Pennucci learned he was not selected for the Superintendent position, he stated to Coughlin that he may pursue a grievance for the promotional bypass. In response,[9] Coughlin advised Pennucci that doing so would result in Coughlin not assisting Pennucci in any salary appeals pursuant to the applicable provision of the collective bargaining agreement (CBA) between the City and SENA.[10] On November 26, 2019, SENA filed a grievance on Pennucci's behalf, contesting the promotional bypass, which specifically named Coughlin. SENA submitted this grievance to arbitration on May 12, 2020.

In July 2021, the Arbitrator issued an award in favor of Pennucci. The Arbitrator determined that Pennucci was the only candidate who met the minimum entrance requirements for the Superintendent position, and that Coughlin violated the parties' CBA

[9] Neither the City, nor Coughlin, denied that Coughlin made this statement to Pennucci. The exact date was not offered, although the facts imply that Coughlin made this statement to Pennucci in or around October 2019.

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

when Coughlin selected Bradley and bypassed Pennucci. The decision cited favoritism, improper influence due to Coughlin's personal relationship with Bradley, and procedural irregularities, such as giving Bradley the interview questions in advance. The Arbitrator ordered the vacancy to be re-posted and only Pennucci to be reconsidered, as Bradley lacked the minimum qualifications. Though the decision was initially challenged in Superior Court, the City withdrew its appeal in September 2022, rendering the award final and binding. Nonetheless, Bradley remained in the Superintendent position at the time of the DLR Hearing in September 2023.

OPINION

The Parties' Arguments

SENA alleged that the City continuously retaliated against Pennucci for engaging in protected activity. It argued specifically that Pennucci's filing and pursuit of a grievance challenging the City's decision to bypass him for a promotional opportunity constituted protected activity under the Law. SENA claimed that following this protected activity, Pennucci experienced a substantial and sustained reduction in his overtime earnings, and that this reduction was not incidental or circumstantial, but rather a direct and retaliatory response to the protected activity.

SENA further argued that the City, through Coughlin, deliberately removed Pennucci from overtime opportunities that he had historically received and reassigned these tasks to other employees, including those who were less senior or less qualified. SENA asserted that this change in treatment constitutes an adverse action under the Law, as it materially disadvantaged Pennucci in terms of compensation, future earning potential, and professional status within the Division. The City's justifications—that the

reduction was due to the COVID-19 pandemic,[11] budget constraints, or operational changes are, according to SENA, pretextual and unsupported by the evidence. While the COVID-19 pandemic may have initially reduced overtime availability for all employees, other Division employees' overtime earnings returned to near pre-pandemic levels by 2021-2022, whereas Pennucci's did not.

Conversely, the City denied that it engaged in any unlawful conduct alleged by the Union. As an initial matter, the City argued that the Union's Charge was untimely pursuant to 456 CMR 15.04. The City claimed that the alleged adverse action (Pennucci's reduction in overtime) began in 2020, yet the Union did not file its Charge until March 2022. The City claimed that both Pennucci and the Union were on notice of the reduction in overtime earnings by the end of 2020 and failed to act within the statutory six-month limitations period. Finally, the City argued that the Union did not demonstrate good cause to excuse the late filing, nor had it established that the alleged conduct constituted a continuing violation under the applicable legal standards and should therefore be dismissed.

Next, the City argued that even assuming the Charge is timely, the Union has failed to meet its burden of establishing a prima facie case of retaliation. The City did not dispute that Pennucci engaged in protected activity when he filed the promotional bypass grievance, nor that relevant City officials were aware of the grievance. However, the City contends that there is no evidence of any adverse action taken against Pennucci because overtime work is not guaranteed, is issued only on an as-needed basis, and is subject to managerial discretion. A reduction in overtime earnings, particularly during the COVID-

[11] I have taken judicial notice of the COVID-19 pandemic and have only included such facts regarding social distancing protocols, emergency orders, etc. as are necessary for this decision.

19 pandemic, does not constitute a material disadvantage under the Law, absent proof that the reduction altered Pennucci's job grade, salary, or essential terms and conditions of employment.

Moreover, the City asserted that its decisions concerning overtime distribution were made for legitimate business reasons. During the COVID-19 pandemic, the Central Fleet Division implemented staggered shifts, social distancing protocols, and other measures that reduced the availability of non-essential overtime across the board. In particular, the City eliminated overtime for surplus vehicle processing as part of a broader cost-cutting effort and reassigned those duties to the Communications Shop for operational efficiency. These changes were not directed specifically at Pennucci and affected multiple employees within the Division. The City notes that Pennucci also declined certain overtime opportunities due to his shift preference and personal commitments, further undermining his claim of exclusion. Other than referencing the COVID-19 pandemic and related protocols, the City did not assert any other operational reasons for the reduction to Pennucci's snow overtime opportunities.

Finally, the City argued that there is no direct or circumstantial evidence of unlawful motivation. Coughlin's decisions were based on business necessity and departmental efficiency, not anti-union animus. The temporal gap between the protected activity (promotional bypass grievance) and the alleged adverse action (reduced overtime) weakens any inference of retaliatory motive. Additionally, the City contends that the Union has failed to demonstrate disparate treatment or deviation from past practices sufficient to infer discrimination. In short, the City asserted that the reduction in Pennucci's overtime

was the result of neutral operational changes, not retaliation, and that the Complaint should be dismissed.

Timeliness

Section 15.04 of the DLR's Regulations, 456 CMR 15.04, states that "Except for good cause shown, no charge shall be entertained by the [DLR] based upon any prohibited practice occurring more than six months prior to the filing of a charge with the DLR." Absent good cause, the six-month period of limitations starts running when the charging party knew or should have known of the alleged violation. Miller v. Labor Relations Commission, 33 Mass. App. Ct. 404, 408 (1991).

Here, the City conflates Pennucci's knowledge of the decrease in overtime opportunities with Union knowledge. Notice of a violation will only be imputed to a union when a union executive officer with authority to bargain is first made aware of the prohibited practice. See, Cf., Town of Ludlow, 17 MLC 1191, 1200, MUP-7040 (August 3, 1990) (bargaining unit member's knowledge of employer's planned health insurance plan changes not imputed to union where unit member did not represent union and was not high-ranking union officer).

Pennucci is not a union executive officer, and the City does not purport him to be. Rather, the City asserts that Pennucci's knowledge is the relevant date for the timeliness determination. I disagree with the City's assertion, as does the relevant case law, that the tolling should begin at the time Pennucci became aware of the situation in or around 2020, as only the Union's knowledge of Pennucci's overtime reduction is relevant in this context. Because the Union, the Charging Party in this case, learned of the overtime reduction in

November 2021 and filed its Charge in March 2022, the filing date falls within the six-month period imposed by the DLR Regulations and is timely.

Additionally, I find that the City's conduct constitutes a continuing violation. It is clear that the reduction in Pennucci's overtime was ongoing between 2020 and 2023 and was not a discrete, one-time event. Here, as in Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001), the City had an ongoing obligation not to retaliate against employees, and its action had the effect of punishing Pennucci on a continual basis for engaging in concerted, protected activity. Contra, Boston Police Superior Officers Federation v. Labor Relations Commission, 410 Mass. 890, 893 (1991) (limitations period will not be tolled on a continuing violation theory if the alleged violation is discrete and finite).

Section 10(a)(3)

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 Worcester Regional Vocational School District v. Labor Relations Commission, 386 Mass. 414 (1982); School Committee of Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327 (1996). To establish a prima facie case of retaliation or discrimination, the charging party must show that: 1) the employee engaged in concerted activity protected by Section 2 of the Law; 2) the employer knew of the concerted, protected activity; 3) the employer took adverse action against the employee; and 4) the employer's action was motivated by a desire to penalize or discourage the protected activity. City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (January 9, 2009); Town of Carver, 35 MLC 29, 47, MUP-03-3094 (June 30, 2008); City of Boston, 35 MLC

289, 291, MUP-04-4077 (May 20, 2009); Town of Clinton, 12 MLC 1361, 1365, MUP-5659 (November 9, 1985).

The Prima Facie Case

Concerted, Protected Activity and Employer Knowledge

The Commonwealth Employment Relations Board (CERB or Board) has decided that an employee's activity is protected if it focuses on generally applicable terms and conditions of employment that impact the collective bargaining unit as a whole. City of Boston, 8 MLC 1872, 1875, MUP-3994 (February 25, 1982); Town of Shrewsbury, 5 MLC 1519, 1523, MUP-2999 (December 22, 1978). To be concerted, the evidence must demonstrate that the employee is acting with other employees, or on the authority of other employees, rather than acting out of self-interest. Town of Southborough, 21 MLC 1242, 1249, MUP-8521(August 29, 1994) (citing Meyers Industries, 268 NLRB 493, 115 LRRM 1025 (1984)). Compare Commonwealth of Massachusetts, 14 MLC 1743, 1747, SUP-3081 (May 19, 1988) (probationary employee's complaints with other employees about unhealthy working conditions constituted concerted activity) with Town of Athol, 25 MLC 208, 211, MUP-1448 (June 6, 1999) (employee's safety and work break complaints did not constitute concerted activity, because the employee was acting alone and without the authority of other employees). The CERB has long recognized that an employee's statement describing an intent to seek the union's assistance falls within the parameters of Section 2 of the Law. Quincy School Committee, 29 MLC 83, 91, MUP-1986 (December 29, 2000). The filing and processing of a grievance also constitutes concerted activity protected by Section 2 of the Law. Boston City Hospital, 11 MLC 1065, 1072, MUP-4893 (July 25, 1984).

Here, it is not disputed by the parties that the first two elements in this analysis are satisfied; first, that Pennucci was engaged in protected activity as defined by Section 2 of the Law when he filed and pursued his promotional bypass grievance, and second, that the City was aware of that activity by actively participating in that grievance and arbitration process, and the subsequent litigation of the arbitration award.

Adverse Action

The CERB has consistently defined adverse action as an adverse personnel action, such as a suspension, discharge, involuntary transfer or reduction in supervisory activity. City of Holyoke, 35 MLC at 156 (citing Town of Dracut, 25 MLC 131, 133, MUP-1397 (February 17, 1999)). Many management decisions, though possibly inconvenient or even undesirable, do not constitute adverse employment actions unless the charging party is materially disadvantaged in some way. See City of Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009) (citing MacCormack v. Boston Edison Co., 423 Mass. 652, 662 (1996)). The CERB has found that loss of overtime pay is an adverse employment action, City of Boston, 46 MLC 191, MUP-17-6211, MUP-18-6679 (March 31, 2020), and material disadvantage arises when objective aspects of the work environment are affected. King v. City of Boston, 71 Mass. App. Ct. 460 (2008).

The evidence establishes a significant and continual loss in Pennucci's overtime pay, especially when compared to other employees in the Division. I disagree with the City's contention that Pennucci is merely disappointed by the lack of overtime opportunities and that he was not materially disadvantaged by this action. Since at least 2017, Pennucci routinely and consistently performed overtime work with surplus vehicles

and during snow related events. I have determined that since 2020, Pennucci was excluded from, or not offered overtime, thus making this loss of overtime involuntary.

Objectively, the loss of overtime opportunities established clear financial harm to Pennucci. As such, I find that the significant loss in overtime opportunities materially disadvantaged Pennucci and constitutes an adverse action as defined by the relevant case law. Commonwealth of Massachusetts, 18 MLC 1302, SUP-3686 and 3687 (February 20, 1992) (citing Massachusetts Port Authority, 16 MLC 1024, MUP-2550 (June 6, 1989) ((CERB found that "… when we consider 'adverse impact,' specters such as loss of wages, *overtime*, recall benefits, layoffs, demotions, loss of bargaining unit positions, diminishment of hours or potential erosion of the bargaining unit are involved")) (emphasis added). Thus, I find that the Union met its burden of proof with respect to this element.

Unlawful Motivation

Unlawful motivation may be established through circumstantial, or indirect, evidence and reasonable inferences drawn from that evidence. City of Holyoke, 35 MLC at 156; Town of Carver, 35 MLC at 48 (citing Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2022), aff'd sub nom., Town of Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005)). Several factors may suggest unlawful motivation, including the timing of the alleged discriminatory act in relation to the protected activity, triviality of reasons given by the employer, disparate treatment, an employer's deviation from past practices, or expressions of animus or hostility towards a union or the protected activity. City of Holyoke, 35 MLC at 157. Timing alone is insufficient to support a finding of illegal employer motivation. Id. An employer's inconsistent or shifting reasons for taking

an adverse action can give rise to a reasonable inference of improper motivation. Town of Carver, 35 MLC at 48-49.

Initially, I have determined that the two types of overtime discussed in this case are separate and distinct: 1) surplus and 2) snow. Although I reach the same conclusion for each overtime category in finding that the Union established that the City's actions were unlawfully motivated, the facts necessitate separate analyses.

Snow Overtime

With respect to the Snow Call-In List, testimony showed that while Pennucci (among others) had certain time preferences and was not designated to a particular shift, Pennucci consistently accepted and performed snow overtime work since at least 2017. Many job duties and schedules were altered during the COVID-19 pandemic, and all employees experienced a decrease in overtime that year. Notably, however, it was only Pennucci who did not see his overtime opportunity increase in the post-pandemic years (2021-2023). This disparate treatment, coupled with the fact that Pennucci was the sole employee who engaged in the promotional bypass grievance process is circumstantial evidence of unlawful motivation. See Massachusetts Department of Transportation, 44 MLC 1, SUP-14-3576, SUP-14-3640 (July 31, 2017) quoting Trustees of Forbes Library, 384 Mass. at 566. Further, while Pennucci pursued the promotional bypass grievance, Pennucci's overtime opportunities rapidly decreased alongside each step in the grievance and arbitration process between 2019 and 2022. Ultimately, this resulted in Pennucci earning $0 in overtime at the time of the DLR Hearing, despite established data reflecting years of earning a significant amount of overtime pay.

Further, Pennucci provided credible, unrebutted testimony that when he notified Coughlin that he was contemplating pursuing a promotional bypass grievance, Coughlin warned Pennucci that if he did so, Coughlin would not support any future effort by Pennucci to advance his pay grade. Although not explicit, the permissible inference drawn from this statement, taken as circumstantial evidence, demonstrates Coughlin's willingness to take punitive action against Pennucci in response to Pennucci filing his grievance. It further shows that Coughlin was attempting to threaten and discourage Pennucci from engaging in protected activity and is evidence of anti-union animus. See Town of Andover, 17 MLC 1475, MUP-6443 (February 6, 1991) (CERB determined that whether consciously or not, statements made by an employer that discourage a bargaining unit employee from engaging in protected activity was valid evidence of unlawful motivation). See also Wynn & Wynn, 431 Mass 665, 667 (2000); Andover School Committee, 40 MLC 1, MUP-12-2294 (July 2, 2013) ("direct evidence, if believed, 'results in an inescapable, or at least a highly probable inference that a forbidden bias was present in the workplace'").

Finally, despite the lengthy grievance and arbitration proceedings, subsequent litigation, and DLR proceedings, Bradley remained in the Superintendent position at the time of the DLR Hearing in 2023. The City's intentional and persistent refusal to comply with binding legal orders is further circumstantial evidence of unlawful motivation. See Massachusetts Department of Transportation, 43 MLC 67 (H.O. September 8, 2016), aff'd 44 MLC 1 (July 31, 2017) SUP-14-3576, SUP-14-3640, (CERB affirmed Hearing Officer's decision involving permissible inferences from circumstantial evidence and concluding

that the employer was unlawfully motivated when it failed to promote a bargaining unit employee who participated in highly visible grievance and arbitration proceedings).

Surplus Overtime

For the reasons stated above, I similarly find that the City was unlawfully motivated when it removed Pennucci from performing surplus overtime duties. For years, on many Saturdays, Pennucci routinely performed surplus duties on overtime. When Coughlin reassigned these duties to Pardo in July 2020, he did not give Pennucci any explanation for the immediate and permanent cessation of this overtime work. The City later justified the cancellation of the surplus overtime citing to the COVID-19 pandemic restrictions. However, not only does the timing of the adverse action coinciding with the promotional bypass grievance process add support to the Union's assertions, Coughlin's 2019 statement that Pennucci should refrain from filing a grievance again shows Coughlin's willingness to take punitive action against Pennucci.[12] Based on these facts, the Union provided a sufficient basis to support a finding that the City's was unlawfully motivated when it permanently cancelled Pennucci's surplus overtime in July 2020.

A consideration of all of the evidence, including Coughlin's statements to Pennucci, the timing of the actions taken against Pennucci, and the continued disparate treatment between Pennucci and his colleagues, supports the Union's allegations that the City's actions were unlawfully motivated. I therefore find that the Union satisfied its burden in establishing a prima facie case of retaliation.

[12] As stated above, Coughlin was the authority for overtime approval and was also named in Pennucci's promotional bypass grievance. I previously determined that in assessing the conflicting testimony, I found Pennucci's statements to be more credible. Supra, n. 6.

The City's Reasons for Reducing Pennucci's Overtime

Once the charging party establishes its prima facie case, it is the employer's burden to produce a legitimate, non-discriminatory reason for taking the adverse action, and it must produce supporting evidence indicating that the proffered reason was actually a motive for the decision. Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981); Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001).

The employer's burden to produce a legitimate, non-discriminatory reason for taking the adverse action is more than simply stating an unsubstantiated allegation. Commonwealth of Massachusetts, 25 MLC 44, 46, SUP-4128 (August 24, 1998). The employer must state a lawful reason for its decision and produce supporting facts indicating that the lawful reason was actually a motive in the decision. Quincy School Committee, 27 MLC 83, 92, MUP-1986 (December 29, 2000); Trustees of Forbes Library, 384 Mass. at 566. If the employer can meet that intermediate burden, the burden shifts back to the charging party to prove that the employer would not have taken the adverse action "but for" the employee's protected activity. Id.; Town of Clinton, 12 MLC at 1364; Town of Carver, 35 MLC at 48; Bristol County, 26 MLC 105, MUP-2100 (January 28, 2000).

Surplus Overtime

The City asserted that it had legitimate business reasons for cutting back Pennucci's surplus work on overtime. During the COVID-19 pandemic, the Division implemented staggered shifts, social distancing protocols, and other measures that reduced the availability of non-essential overtime across the board. In particular, the City

eliminated overtime for surplus vehicle processing as part of a broader cost-cutting effort and reassigned those duties to the Communications Shop for operational efficiency. With respect to the surplus overtime, I find that the City satisfied its burden to produce credible evidence of a legitimate, non-retaliatory motivation for the reassignment of surplus duties as a result of the COVID-19 directives put in place in the summer of 2020.

Snow Overtime

However, the City did not satisfy its burden to produce credible evidence that it had a legitimate, non-discriminatory motive for removing Pennucci from the Snow Call-In List. The City maintained that despite the Union's assertion that Pennucci was treated differently than his coworkers in that his overtime was cut, while others continued to work their usual overtime, the situations and employees are incomparable. The City essentially claimed that overtime is offered on an as-needed basis, and Pennucci was simply not needed. However, the record is devoid of evidence to support the City's assertions and relies solely on Coughlin's testimony. The City produced no evidence of city-wide directives or communication between Coughlin and Division employees regarding snow overtime. The City failed to establish that at any time before or after Pennucci's protected activity, that Division employees were generally categorized or treated differently in terms of who received snow overtime opportunities, that weather-related events in 2019-2022 deviated from prior years, that Pennucci was offered and rejected his overtime shifts, or that the decrease Pennucci experienced was directly related to job classifications or varying necessity.

For years, the City followed an established call-in list for weather related events that produced consistent overtime opportunities for all employees – until Pennucci

commenced with the promotional bypass grievance. It was only during and after the protected activity that Pennucci experienced the loss of overtime opportunities and was the sole employee experiencing this ongoing loss. The City did not offer evidence to show that it had a legitimate, non-discriminatory motive for its unique and singular treatment of Pennucci with respect to the Snow Call-In List.

Because the City failed to meet its burden of production to demonstrate that it had legitimate, non-discriminatory motives when it removed Pennucci from the Snow Call-In List, the City has failed to dispel the presumption of discrimination established by the Union's prima facie case. Thus, I find that the City violated the Law as alleged with respect to the reduction in snow overtime. Massachusetts Department of Transportation, 44 MLC 1; SENA, Local 9158 and City of Boston, MUP-17-6211, MUP-18-6679 (March 31, 2020).

But-For and Surplus Overtime

Once an employer produces evidence of a legitimate, non-discriminatory reason for taking the adverse action, the case becomes one of "mixed motives." Under the Trustees of Forbes Library analysis, the CERB considers whether the employer would have taken the adverse action but for the employee's protected activities. Suffolk County Sheriff's Department, 27 MLC at 160; Quincy School Committee, 27 MLC at 92. The charging party bears the burden of proving that, but for the protected activity, the employer would not have taken the adverse action. Athol-Royalston Regional School Committee, 28 MLC 204, 214, MUP-2279 (January 14, 2002); Town of Athol, 25 MLC 208, 211, MUP-1448 (June 11, 1999).

Although the City argued that it transferred the surplus work that Pennucci performed on overtime as a cost-savings measure, the evidence shows that the City

would not have uniquely reduced Pennucci's surplus overtime but for his protected activity. The record reflected that the typical surplus workload was backlogged due to the COVID-19 pandemic restrictions. Such a backlog would have resulted in more surplus duties needing to be completed, requiring more time and employees to perform those duties. However, even after the COVID-19 restrictions were lifted in July 2021, Pennucci still remained barred from performing this work on overtime, as he had consistently done since at least 2017. Therefore, I find that based on a preponderance of the evidence, the City would not have taken this action against Pennucci but for his protected activity. Bristol County, 26 MLC at 109.

CONCLUSION

Based on the record and for the reasons stated above, I conclude that the City violated Section 10(a)(3), and derivatively, Section 10(a)(1) of the Law in the manner alleged in the Complaint.

REMEDY

Section 11 of the Law grants broad authority to fashion appropriate orders to remedy unlawful conduct. Labor Relations Commission v. City of Everett, 7 Mass. App. Ct. 826 (1979); Millis School Committee, 23 MLC 99, MUP-9038 (October 8, 1996). Since Pennucci suffered economic harm as a result of the loss of overtime opportunities, he is entitled to an economic remedy.[13] First, the City shall return Pennucci to the Snow Call-in List rotation and offer him any surplus overtime duties that it offers to other employees

[13] Because the record shows that other employees in the Division performed snow overtime after the City effectively removed Pennucci from the Snow Call-in List, the financial harm he suffered is not speculative.

in the Division. Second, the City must make Pennucci whole for the lost overtime wages resulting from the City's unlawful conduct.

I leave it to the parties to determine the amount of overtime opportunities and related wages that Pennucci was wrongfully denied. The parties should consider Pennucci's average overtime wages, compared with similarly situated employees who had comparable pay scale wages, and performed similar overtime work. If the parties are unable to agree, they may return to the DLR for a compliance hearing pursuant to 456 CMR 16.08. "Any uncertainty as to the precise amounts of backpay can be resolved, if necessary, through a compliance proceeding." Town of Burlington, 35 MLC 18, 27, MUP-04-4157 (June 30, 2008).

ORDER

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

1. Cease and desist from:
   a. Retaliating against Pennucci for engaging in concerted, protected activity.

   b. Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.

2. Take the following affirmative action that will effectuate the purposes of the Law:
   a. Restore the status quo ante and immediately restore Pennucci to the overtime rotation previously established by the City.

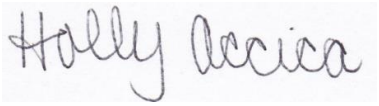
   b. Make Pennucci whole for the monetary harm he suffered as a result of the City's unlawful conduct, with interest compounded quarterly at the rate specified in G.L. c. 231, § 6I.

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

d. Notify the DLR in writing of the steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



HOLLY L. ACCICA, ESQ.
HEARING OFFICER

APPEAL RIGHTS

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

NOTICE TO EMPLOYEES
POSTED BY ORDER OF A HEARING OFFICER OF
THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A Hearing Officer of the Massachusetts Department of Labor Relations (DLR) has held in Case No. MUP-22-9172 that the City of Boston (City) violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) when it retaliated against Lawrence Pennucci for engaging in concerted, protected activity under Section 2 of the Law.

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

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

WE WILL NOT retaliate against employees for engaging in concerted, protected activity as defined by Section 2 of the Law.

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

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

- Restore the status quo ante and immediately restore Pennucci to the overtime rotation previously established by the City.
- 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. 231, § 6I.

_____ _____

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 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).