

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

MASSACHUSETTS DEPARTMENT OF
TRANSPORTATION

and

UNITED STEELWORKERS, LOCAL 5696

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Case No. SUP-14-3576
SUP-14-3640

Date Issued:

September 8, 2016

Hearing Officer:

Kerry Bonner, Esq.

Appearances:

James Norton, Esq.:

Representing Massachusetts
Department of Transportation

Alfred Gordon O'Connell, Esq.:

Representing United Steelworkers,
Local 5696

HEARING OFFICER'S DECISION

Summary

1 The issues in this case are whether the Massachusetts Department of
2 Transportation (Employer or MassDOT) violated Sections 10(a)(3), 10(a)(4), 10(a)(5)
3 and, derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter 150E (the
4 Law) by 1) retaliating against Peter Fimognari (Fimognari), Douglas Haskins (Haskins),
5 and Greg Campbell (Campbell) for their protected, concerted activity and 2) unilaterally

1 transferring bargaining unit work outside of the unit.¹ Based on the record and for the
2 reasons explained below, I conclude that the Employer 1) transferred unit work to non-
3 unit employees in violation of Section 10(a)(5) of the Law and 2) retaliated against
4 Fimognari and Haskins for their protected activity in violation of Section 10(a)(3) of the
5 Law. In addition, I find that the Employer did not retaliate against Campbell for his
6 protected activity, and did not retaliate against Haskins in violation of Section 10(a)(4) of
7 the Law.

Statement of the Case

8 On March 18 and April 15, 2014, the United Steelworkers, Local 5696 (Union) filed
9 two Charges of Prohibited Practice with the Department of Labor Relations (DLR) alleging
10 that the Employer had engaged in prohibited practices within the meaning of Sections
11 10(a)(1), 10(a)(3), 10(a)(4), and 10(a)(5) of the Law. The DLR docketed the charges as
12 SUP-14-3576 and SUP-14-3640. On December 17, 2014, a DLR investigator issued a
13 Consolidated Complaint of Prohibited Practice. The Employer filed its answer to the
14 complaint on December 26, 2014. On August 19, 2015, the Union filed a Motion to Amend
15 the Consolidated Complaint of Prohibited Practice. The Employer responded to the
16 motion on August 27, 2015. On September 1, 2015, the DLR investigator issued a ruling
17 on the motion and an Amended Consolidated Complaint of Prohibited Practice

¹ During the hearing, the Union withdrew its Section 10(a)(4) allegation pertaining to Fimognari, which is detailed in Count III of the complaint. It did not withdraw its Section 10(a)(4) allegation pertaining to Haskins.

(Complaint). The Employer orally answered the Complaint on the record of the hearing on September 22, 2015.

I conducted a hearing on September 22, October 13, and November 20, 2015, and January 7, 2016. The parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of hearing, the Union timely filed its brief on May 20, 2016. The Employer filed its brief on May 23, 2016, and requested that the Union assent to the late filing of the brief and that I accept it. The Union stated it had no position with regard to the late filing, and I subsequently accepted the brief. On the entire record, including my observation of the demeanor of witnesses, I make the following findings:

Stipulations of Fact

1. [MassDOT] is a public employer within the meaning of Section 1 of the Law.
2. [The Union] is an employee organization within the meaning of Section 1 of the Law.
3. The Union, through the Coalition of MassDOT Unions ("CMU"), as defined in the Master Labor Integration Agreement [MLIA], is the exclusive bargaining representative for certain of the employees of MassDOT in the title of Motor Equipment Mechanic IV (MEM IV).
4. At some point prior to May 2013, MassDOT created a new, non-unit Program Coordinator III (PC III) position with a draft description of that position detailing the duties and responsibilities.
5. The parties held a bargaining session relating to the new PC III position on May 16, 2013, at which time the Union stated that the duties and responsibilities for the PC III position already belonged to unit members, including [Fimognari] who was employed as an MEM IV.

- 1 6. On June 24, 2013, the parties met again to bargain over the PC III position. At
2 that meeting, the Union reiterated its concern that some of the duties that
3 MassDOT proposed for the position of PC III belonged to MEM IV bargaining unit
4 positions.
5
- 6 7. At some point in early August of 2013, MassDOT circulated an internal job posting
7 for the PC III position (August posting).
8
- 9 8. In or about March of 2013, MassDOT hired six employees to fill the non-unit PC III
10 positions. MassDOT did not hire unit members [Campbell, Fimognari, or Haskins]
11 who had applied for the PC III positions.²
12
- 13 9. Fimognari was present at both the May 16 and June 24, 2013 bargaining sessions
14 referenced in paragraphs 5 and 6 above.
15
- 16 10. On December 17, 2012, an arbitrator ruled that MassDOT did not have just cause
17 to demote Haskins from his position as MEM IV, and ordered MassDOT to
18 reinstate Haskins to his former position.
19
- 20 11. On April 23, 2013, the Union filed a complaint in Superior Court seeking
21 confirmation of the arbitrator's award referenced in paragraph 10 above.
22
- 23 12. On April 25, 2013, the Union filed a charge of prohibited practice against MassDOT
24 relating to Haskins.
25
- 26 13. MassDOT conducted interviews for the positions at issue on December 6, 2013
27 and January 15, 2014, interviewing Haskins for the District 1 position and
28 Fimognari for the District 2 position.
29
- 30 14. On or about December 6, 2013, the Union filed a grievance on behalf of unit
31 member Campbell over MassDOT's refusal to grant Campbell an interview for the
32 position in District 6. MassDOT alleged that Campbell had failed to file a timely
33 application for the position.
34
- 35 15. At some point between December 6, 2013 and January 15, 2014, the Union
36 withdrew the Campbell grievance in exchange for MassDOT granting his interview
37 for the PC III position in District 6. MassDOT interviewed Campbell on January
38 15, 2014.

² The March 2013 date appears to be an error, as MassDOT's letters that notified candidates of their non-selection were dated in April 2014.

Findings of Fact1 Creation of MassDOT

2 Effective July 1, 2009, An Act Modernizing the Transportation Systems of the
3 Commonwealth (Transportation Act) consolidated the Massachusetts Turnpike Authority
4 (Turnpike or MTA), the Massachusetts Highway Department (Mass Highway), and other
5 state agencies into MassDOT.³ On December 28, 2010, MassDOT entered into the MLIA,
6 which addresses collective bargaining and the implementation of an integrated work force
7 with the unions that represent MassDOT employees.

8 MEM IV and PC III Positions

9 Prior to the creation of MassDOT, the Turnpike employed Foremen of Motor
10 Equipment (Foremen), represented by the Union. Generally, the Foremen oversaw the
11 garages where Turnpike equipment was stored and repaired by mechanics. The garages
12 were referred to as M1 through M8, with M1 being the westernmost garage, and M8 the
13 easternmost.

14 Prior to the merger, Mass Highway was responsible for the state roads other than
15 the Turnpike, and was divided into Districts 1 – 6, with each district having more than one
16 garage where equipment was repaired.⁴ The garages were overseen by MEM IVs. The
17 Mass Highway districts also contained depots where motor equipment was stored.

³ The parties also referred to this consolidation as a “merger.”

⁴ District 1 only had one garage.

1 As part of the merger of the Turnpike and Mass Highway, MassDOT was divided
2 into six districts and six new bargaining units were created, represented by the eight
3 unions that had represented the previously existing bargaining units in each
4 organization.⁵

5 Also part of the merger was a three step reclassification process. First, the
6 Commonwealth's Personnel Administrator classified all the previous Turnpike positions
7 into state titles. The parties agreed in the MLIA that there would be then be another
8 classification step involving a committee review and an outside classification expert.
9 Lastly, the parties may submit to final and binding arbitration before a tripartite panel for
10 a decision on classification.

11 Currently, although the classification process is not complete, the Foremen who
12 worked at the Turnpike are classified as MEM IVs in Unit B of MassDOT, and are
13 represented by the Union.⁶ The Union has continued to maintain that the MEM IV
14 classification is not proper because the duties of the incumbents are more administrative
15 and supervisory in nature than the duties of an MEM IV.⁷ The Union has instead

⁵ As part of the merger, in certain bargaining units, employees of the newly-formed MassDOT continued to be represented by the unions that had represented them at the Turnpike and Mass Highway, resulting in different members of the same unit being represented by different unions depending on the organization with which they had previously been employed.

⁶ MassDOT MEM IVs who had previously worked for Mass Highway are also in Unit B, but are not represented by the Union. Rather, they are still represented by the union that represented them at Mass Highway.

⁷ Throughout this decision, I will refer to the former Turnpike Foremen as MEM IVs or Foremen.

1 suggested that former Foremen be classified as MEM Vs (a classification which does not
2 currently exist) or PC III.

3 *The Creation of the PC III and Bargaining Meetings*

4 On May 8, 2013, Maria Rota (Rota), Deputy Director of the Office of Labor
5 Relations and Employment Law, emailed Karen Bartholomew (Bartholomew), Union
6 President, and other MassDOT union officials stating:

7 MassDOT will be posting a new PC III position in each of the Highway
8 Districts to function as a Motor Equipment Coordinator. The duties of the
9 position will be to coordinate all garage and fleet administrative functions,
10 including reporting, inventory, programs, purchasing and budget.
11 MassDOT would like to meet with you on May 16, 2013 at 11:00 a.m. to
12 discuss issues related to the creation of this new position that may impact
13 your bargaining unit.
14

15 On May 16, 2013, representatives from MassDOT, including Rota; John Casey
16 (Casey), labor counsel; and Joan Makie (Makie), Manager of Human Resources
17 Operations and Services, met with various MassDOT union representatives,⁸ including
18 Bartholomew, Fimognari, and Alfred Gordon O'Connell (Gordon O'Connell), Union
19 counsel.⁹ At the meeting, Casey presented the union representatives with a draft of the
20 PC III Form 30 Position Description (Form 30), which would be a Unit D position.¹⁰

⁸ The evidence shows that at least four MassDOT unions were in attendance.

⁹ Bartholomew and Makie took notes of the meetings on May 16 and June 24, 2013, and I have relied on their notes, as well as testimony from those in attendance, to determine what occurred at the meetings.

¹⁰ In addition to PC III, the position is referred to on various documents as Motor Equipment Coordinator, District Fleet Coordinator, and District Equipment Coordinator.

1 MassDOT representatives explained that the districts had identified a need for this
2 position, which would coordinate between the garages and District Maintenance.
3 MassDOT further explained that there was a “missing link,” and that this position would
4 enhance communication. In response, Bartholomew stated that the majority of duties
5 listed in the draft Form 30 were Foremen duties. Bartholomew requested the District 3
6 organizational chart, which Casey agreed to provide.¹¹ Bartholomew also requested the
7 structure of each district, and Casey responded that it was not the same in each district.
8 Also during the meeting, Fimognari stated that he does all of the duties in Box 6 of the
9 Form 30, and asked what will he do now. Bartholomew stated that MassDOT cannot do
10 this without addressing what will happen to the Foremen. Casey explained that this would
11 be a District-wide job. Bartholomew also stated that the preferred qualifications were
12 unacceptable.¹²

13 On June 24, 2013, MassDOT and union representatives met a second time to
14 discuss the proposed PC III position.¹³ Bartholomew, Gordon O’Connell, and Fimognari
15 attended on behalf of the Union. Casey ran the meeting on behalf of the MassDOT

¹¹ I credit Casey’s testimony that he did eventually provide the Union with organizational charts, although he did not recall when he provided them.

¹² At both this meeting and the June 24, 2013 meeting described below, representatives of the other invited unions also asked questions and made comments, which I need not describe in detail because they are not relevant to this case. Further, I have only summarized the discussions that took place between the Union and MassDOT to highlight the relevant points, but have not included all questions, answers, or comments.

¹³ The evidence shows that representatives from at least three MassDOT unions were in attendance at this meeting.

1 representatives. Makie also attended on behalf of MassDOT, as did each district highway
2 director and the chief engineer for the highway department to answer questions from the
3 unions.

4 At this meeting, MassDOT provided a draft job posting for the PC III position, which
5 included additional preferred qualifications that were not part of the draft Form 30. The
6 posting did not include the following duty, which had been on the Form 30: "Monitor
7 District fuel sites to assure compliance with standards and regulations; assure proper
8 maintenance of fuel levels at servicing sites" because MassDOT agreed with the unions
9 that the PC III would not perform this duty. In addition, the posting added the duties,
10 "Coordinate and prioritize equipment repairs with input from the Highway Maintenance
11 Engineer or designee" and "Serve as a liaison for Statewide Operations." At the meeting,
12 Gordon O'Connell asked MassDOT to again look at the position description to ensure
13 that the PC III position would not be touching the equipment because that was a Union
14 duty, and Casey agreed to do so. Gordon O'Connell also asked that MassDOT identify
15 who was currently performing the duties and where they were being performed, and
16 asked for a "process to get us to agreement." MassDOT representatives explained that
17 nobody was currently performing the duties at a district-wide level. Casey acknowledged
18 that the Union was concerned that the PC III duties belonged to Union members, and

1 stated that MassDOT would go through the posting again and highlight the district-wide
2 quality of the position.¹⁴

3 *Written Descriptions of the Positions at Issue*

4 MassDOT posted the PC III position in or around August 2013.¹⁵ The posting for
5 the PC III position describes the following duties:¹⁶

- 6 1. Manage the assignment and rotation of district equipment and vehicles.
7
- 8 2. Coordinate, plan and administer a preventative maintenance and replacement
9 program to minimize cost and maximize use of district equipment and vehicles.
10
- 11 3. Utilize fleet management software (Fleetwave) to reduce costs and improve
12 efficiency.
13
- 14 4. Coordinate and set broad equipment priorities working with District Staff, HQ Fleet
15 and Operations staff.
16
- 17 5. Review purchase requests for new and replacement vehicles and equipment for
18 the district.
19
- 20 6. Maintain logs of equipment assignment and use.
21

¹⁴ At the meeting, Gordon O'Connell requested the study that was performed to create the title, but Casey credibly testified that there was no such study.

¹⁵ The posting includes revisions to the description of duties from the draft posting provided at the June 24 meeting to reflect MassDOT's contention that the position would perform duties on a district-wide basis. For example, the first duty was changed from, "Manage the assignment and rotation of equipment and vehicles" to "Manage the assignment and rotation of district equipment and vehicles" and the fifth duty was changed from "Review purchase order requests for new and replacement vehicles and equipment" to "Review purchase order requests for new and replacement vehicles and equipment for the district." There is no evidence that MassDOT notified the Union of these changes before posting the position.

¹⁶ The posting the parties entered into evidence was for District 1. Other than location, the PC III postings for the other five districts were identical.

- 1 7. Receive and process vehicle accident and damage reports.
- 2
- 3 8. Prepare cost analysis and periodic management and operational reports.
- 4
- 5 9. Working with garage staff, ensure that district equipment is inspected and
- 6 designated for auction and coordinate the reuse of parts where possible.
- 7
- 8 10. Perform supervisory role in snow and ice including field or garage foreman as
- 9 required.
- 10
- 11 11. Manage district inventory and budget for main store rooms and parts warehouse.
- 12
- 13 12. Coordinate and prioritize equipment repairs with input from the District
- 14 Maintenance Engineer or designee.
- 15
- 16 13. Manage fleet budget for the district.
- 17
- 18 14. Oversee multiple mechanic maintenance work locations and staff throughout
- 19 district.
- 20
- 21 15. Oversee the process, staff and inspection of equipment for auction.
- 22
- 23 16. Ensure compliance with departmental policies and directives regarding equipment
- 24 use.
- 25
- 26 17. Identify and coordinate district equipment training needs.
- 27
- 28 18. Manage assigned staff, including responsibility for, scheduling performance
- 29 management, discipline and authorization of overtime.
- 30
- 31 19. Serves as liaison between Districts and Statewide Operations.
- 32
- 33 20. Performing any other job related duties as assigned from time to time.
- 34

35 The PC III posting also includes "(A) at least four years of full-time, or equivalent
36 part-time, professional, administrative or managerial experience in business
37 administration, business management or public administration, the major duties of which
38 involved program management, program administration, program coordination, program

1 planning and/or program analysis, and (B) of which one year must have been in a
2 supervisory capacity..." as a minimum entrance requirement.

3 The position description for the MEM IV includes the following Detailed Statement
4 of Duties and Responsibilities:

- 5 1. In compliance with schedules of preventive maintenance, assures maintenance
6 tasks are performed at specific time or mileage intervals on motor equipment.
7
- 8 2. In conjunction with the Foreman of Maintenance assures that vehicles are repaired
9 in conformance with Authority standards.
10
- 11 3. Assigns specific daily tasks to mechanics in accordance with their skills and the
12 relative urgency of repairs.
13
- 14 4. Assures that inspection/repair equipment and tools are available and are in good
15 working order.
16
- 17 5. Assures that materials and parts are available in storerooms and initiates special
18 purchase requisitions for urgently needed special parts.
19
- 20 6. Maintains the budget and is responsible for a MassDOT issued purchasing card.
21
- 22 7. Assigns and instructs inexperienced mechanics in the proper and safe method of
23 operating specialized automotive tools and performing complex repair jobs.
24
- 25 8. Inspects the repair and maintenance of vehicles and engines during and upon
26 completion of the repair to assure that the work is performed efficiently, safely,
27 economically and to quality standards.
28
- 29 9. When necessary, arranges for the delivery and return of MassDOT vehicles
30 requiring major repair work from outside garages; inspects finished work to assure
31 it is to quality standards.
32
- 33 10. Assigns mechanics to perform emergency repairs to MassDOT vehicles on the
34 Turnpike and participates in repairing vehicles during emergencies.
35
- 36 11. Coordinates the annual state inspection of MassDOT vehicles in accordance with
37 Massachusetts regulations.
38

1 12. Coordinates the emissions inspection of MassDOT vehicles in accordance with
2 Massachusetts regulations and makes repairs, if necessary.

3
4 13. Maintains records and prepares reports on motor equipment and personnel with
5 the use of computers.

6
7 14. Using a computer, issues automated work orders and maintains inventory.

8
9 15. Directs mechanics in the maintenance of all work areas to assure that work areas
10 are clean and safe to avoid hazardous working conditions.

11
12 16. Performs other duties of a similar nature as may be required.

13
14 17. May manage snow and ice crews when necessary.

15
16 The Classification Specification for the Motor Equipment Mechanic Series provides
17 that the MEM IV is the third-level supervisory job in the series. In addition to the duties
18 that are common to all the levels in the series, the MEM IV also performs the following
19 duties:

20 1. Consult with vehicle or equipment operators, manufacturers, or dealers to obtain
21 information needed to diagnose and correct problems with malfunctioning engines
22 or related systems, such as super-chargers and turbo-chargers.

23
24 2. Inspect heavy equipment to select and locate causes of equipment breakdown.

25
26 3. Perform field inspections and evaluation of various types of vehicles and
27 equipment statewide and may recommend disposal of vehicles.

28
29 4. Research, develop, design, fabricate and oversee the manufacture of special
30 application components and their installation to improve the operation of existing
31 equipment.

32
33 5. Recommend adjustments to specifications for new vehicles and equipment.

34
35 6. Maintain inventory of parts and supplies by ordering the supplies, tools and
36 equipment required to expedite maintenance and repair work of motor vehicles
37 and equipment.

1 7. Direct and assign repair work to be performed.

2
3 8. Interview, test and evaluate applicants for employment and promotion, and
4 supervise training.

5
6 9. Responsible for implementation of the Preventative Maintenance program.

7
8 10. Inspect and certify equipment for operation.

9 Promotions to PC III

10 MassDOT representatives interviewed candidates for the PC III position in each of
11 the six districts. Prior to the interviews, MassDOT Human Resources (HR) screened the
12 applicants and forwarded the applications of those that met the minimum entrance
13 requirements to the districts for interviewing. Each interview was conducted by three
14 MassDOT representatives, generally one from HR and two from the respective district,
15 who posed 12 oral questions that were the same in each district. Additionally, candidates
16 were asked to provide written answers to two questions that were unique to each district.
17 The interviewers had an answer key, which set forth how the candidate was expected to
18 answer each question. Each interviewer independently scored each candidate's answers
19 using the following score key, with a total of 140 possible points:

20 10: Candidate answered question fully and completely

21 8: Candidate answered most of the questions

22 6: Candidate responded with most important points

23 4: Candidate missed important item(s) in the response

24 2: Candidate response was inadequate (missed several important factors
25 in the answer).

26
27 The interviewers were instructed by HR that they should score candidates based
28 on the answers given. After the interviews, the interview scores were tallied and the

selected candidates were offered the positions.¹⁷ MassDOT sent the candidates who were not selected a form letter with the reason(s) for the selection.¹⁸

The following are further details regarding the interview and selection process for the PC III position in Districts 1, 2, and 6.

District 1

Douglas Haskins

Haskins applied for the PC III position by letter and resume dated August 11, 2013.

His resume includes the following relevant experience:

Motor Equipment Foreman Class MEM IV 1980 - present

Massachusetts Turnpike Authority Maintenance Division, Lee, MA

- Started as a mechanic became a first class mechanic then senior mechanic and now promoted to motor equipment foreman class MEM IV
- Responsible for scheduling maintenance and repairs of approximately 300 pieces of equipment, and 6 mechanics and 2 welders. In charge of special parts ordering and inventory of parts and supplies
- Was responsible for annual major truck rebuilds consisting of hydraulic systems (sander bodies), lighting systems (sandblasting), wheels and brakes (painting), bed chains (road testing)

¹⁷ According to Makie, the candidate who received the highest score at the interview was selected for the job. David Belanger (Belanger), Operations and Maintenance Engineer, also testified that the highest scorer was selected for the PC III position in District 6. However, the three non-selection letters entered into evidence did not indicate that any of the selected candidates were chosen because of their interviews.

¹⁸ The form letter sent to Fimognari, Haskins, and Campbell includes the following potential reasons that a candidate was selected, of which the Employer could select one or more: 1. Better Able (Ability) to perform the job due to: more experience in the same or related work or demonstrated competence in the same or related work; job performance (including evaluations and disciplinary record); 2. Interview (an explanation must be provided if this section is checked); 3. Education and training (directly related to the duties of the vacant position); 4. More Seniority (Applicant from within the work unit selected); 5. Other.

- Was responsible for the maintenance and repair of 2 Ford 1 ton with plow and sander, 4 Ford snow fighters, 4 Oshkosh snow fighters, 2 international snow fighters, three 2 ¼ yard bucket loaders, and two 3 ¼ yard bucket loaders
- Did provide annual maintenance and seasonal preparation of tractors and mowers including oil and filter changes, replace drive belts, check and replace end bearings/rollers, check and repair lighting systems, and surface preparation and painting as required
- Did perform regularly scheduled maintenance and repair of all mowing equipment, gas powered chainsaws, gas powered weed-whackers, and diesel powered air compressors

Lead Mechanic**1979 – 1980***County Concrete Corporation, Dalton MA*

- Responsible for repair, maintenance and annual rebuild of 12 cement mixer trucks, and 1-2 ½ yard loader
- Managed all schedules for repairs and routing maintenance programs
- Responsible for batching plant facilities maintenance
- Supervised and provided work direction to 2 direct reports mechanics
- Provided routine written and oral work status reports to all levels of management
- Managed the procurement of parts and services with vendors

Mechanic*Maxymillian, Inc., Pittsfield MA***1977 – 1979**

- Responsible for repair and maintenance of construction equipment fleet
- Maintained all fleet service records
- Responsible for Massachusetts vehicle inspection compliance

Master Mechanic*H.V. Rabouin, Inc., Hancock MA***1976 – 1977**

- Responsible for maintenance and repair of 14 trailer trucks, 8 trailers (flat bed and boxes), 14 tanker trailers
- Managed all routine maintenance scheduling for above vehicle fleet
- Responsible for parts inventory control
- Managed procurement of parts/supplies with vendors

Christine Mountain (Mountain), HR Generalist, Stephen Webster (Webster),
District Facilities Engineer, and Brian DiOrio (DiOrio), District Operations Engineer,

1 interviewed Haskins on December 6, 2013.¹⁹ Mountain scored Haskins 86 out of 120
2 points,²⁰ DiOrio scored him 93 out of 140, and Webster scored him 100 out of 140.
3 Haskins received the second highest score out of the five candidates interviewed, with an
4 average score of 96.5. Stephen Kotski (Kotski) received the highest score, with an
5 average score of 106.5.

6 Haskins was notified by letter dated April 16, 2014 that Kotski was selected for the
7 position. The reason provided in the letter was: "Better Able (Ability) to perform the job
8 due to: More experience in the same or related work."

9 *Haskins' Protected Activity*

10 MassDOT demoted Haskins from his MEM IV position on December 15, 2011, which
11 the Union grieved and pursued to arbitration. In an arbitration award dated December
12 17, 2012, Arbitrator Tammy Brynie found that MassDOT did not have just cause to
13 demote Haskins and ordered him reinstated to his former position and made whole, with
14 the demotion reduced to a Letter of Reprimand. On April 23, 2013, the Union filed a
15 Complaint to Confirm Arbitration Award in superior court alleging that MassDOT failed or
16 refused to reinstate Haskins' supervisory duties. On April 25, 2013, the Union filed a
17 prohibited practice charge with the DLR alleging that MassDOT "has failed or refused to
18 return to bargaining unit employee Douglas Haskins all of the duties that it was required

¹⁹ DiOrio was the only member of the interview panel who testified at the hearing.

²⁰ Mountain's score sheet indicates that she did not score candidates on the two district internal questions, which explains the total point discrepancy.

1 to return to him pursuant to the award of a labor arbitrator and a subsequent agreement
2 between the parties related to the implementation of that award” in violation of Section
3 10(a)(3) and 10(a)(5) of the Law. On August 9, 2013, a DLR investigator issued a two
4 count complaint, alleging that MassDOT transferred unit work and repudiated an oral
5 agreement concerning Haskins’ supervisory duties, in violation of Section 10(a)(5) of the
6 Law. The investigator dismissed the Section 10(a)(3) allegation. The issues between
7 MassDOT and the Union were eventually resolved and MassDOT returned Haskins’
8 Foreman duties to him.

9 After Haskins returned to the Foreman position, Webster worked at the garage to
10 oversee motor equipment. On occasion during snow and ice overtime, Webster would
11 send Haskins home. Haskins grieved his lost overtime, and MassDOT paid Haskins all
12 the overtime that Webster had worked.²¹ At some point prior to the PC III interviews,
13 MassDOT transferred Webster from the garage.

14 DiOrio was not involved in the decision to demote Haskins, but he believed that
15 something should be done with regard to the incident that led to the demotion. DiOrio
16 was aware that Haskins grieved the demotion and was reinstated into the Foreman
17 position, but he was not aware of all the specific steps that led to this outcome. He also
18 knew that Haskins grieved the Webster overtime issue, and that MassDOT resolved the
19 grievance by paying Haskins the overtime that Webster had received. DiOrio was not

²¹ Although DiOrio explained MassDOT’s reasoning for the decision to send Haskins home during snow and ice overtime, I do not find this relevant to this case.

1 involved in the decision to resolve the overtime grievance, and only knew it was decided
2 by someone above him in the chain of command.

3 *Stephen Kotski*

4 Kotski applied for the PC III position on August 6, 2013. His resume lists the following
5 experience:

6 Darcey Construction 1991 – 1993²²

7 ATC Van Com 1997 – 1999 Company contracted to manage Berkshire Regional
8 Transit Authority

9
10 American Mobile 1999 – 2000 owner

11 County Concrete Corp. 2001 – 2008

12 MassDOT 2008 – present
13 District 1 Lenox

14
15 Mountain, Webster, and DiOrio interviewed Kotski. Mountain gave him 94 out of
16 120 points, DiOrio scored him 100 out of 140, and Webster gave him 109 out of 140
17 points.

²² Kotski testified that he did not recall what he was doing for employment between 1993 and 1997.

1 Although Kotski may have had occasional managerial and supervisory experience,
2 the evidence shows that it was not a main function of any of his positions.²³ His
3 experience at ATC Van Company, American Mobile, and County Concrete all included
4 some degree of motor vehicle repair, but his position at MassDOT did not.²⁴ DiOrio did
5 not know whether Kotski had supervisory responsibility in his position at MassDOT, but
6 was aware that he did not have responsibility for repair and maintenance of vehicles in
7 that position.

8 Prior to Kotski being promoted to the PC III position, he was a member of MOSES.
9 MOSES never filed any grievances or charges of prohibited practice on behalf of Kotski.

10 **District 2**

11 *Peter Fimognari*

12 Fimognari applied for the PC III position on August 6, 2013. His application
13 includes the following work experience:

²³ For example, Kotski testified that in his position as an Engineering Aide for MassDOT, he would occasionally have to address the issue of the contracting company's laborers falling off schedule, and on one project it was "unwritten" that the employees had to report to him. However, Kotski did not assign these individuals work, conduct their performance evaluations, or discipline them. In addition, Kotski's resume shows that he worked at Darcy Construction from 1997 – 1999; however, he testified that he worked there almost five years and that he "managed the people on the floor." Because of the inconsistency in dates, as well as Kotski's overall lack of memory regarding his prior work experience and education, I decline to find that Kotski had the requisite supervisory or managerial experience included in the PC III the job posting.

²⁴ Kotski gave a very long, detailed, and at times hard to follow description of his duties as an Engineering Aide at MassDOT, which generally involved monitoring, testing, and documenting the work done by contractors on road engineering projects.

1 1971 – 1974 Orr Cadillac, Springfield MA, Auto Body Tech
2 1974 – 1977 Fenton Ford, Enfield CT, Auto Body Tech
3 1977 – 1979 Enfield Ford, Enfield CT, Auto Body Tech
4 1979 – 1989 Enfield Ford, Enfield CT, Automotive Mechanic
5 1989 – 1990 Massachusetts Turnpike Authority, Mechanic/welder
6 1990 – 1998 Massachusetts Turnpike Authority, First Class Mechanic
7 1998 – 2003 Massachusetts Turnpike Authority, Senior Mechanic
8 2003 – 11/2009 Massachusetts Turnpike Authority, Foreman of Motor Equipment
9 11/2009 – Present, MassDOT Mechanic IV²⁵

10 Steve Doyle (Doyle), the second in charge of District 2, Robin Burke (Burke), an
11 HR representative, and Ken Wanar (Wanar), a civil engineer responsible for district
12 maintenance, conducted Fimognari's interview.²⁶ Doyle scored Fimognari 75 out of a
13 total of 140 points, Burke scored him 75 out of 140, and Wanar scored him 89 out of 140.
14 Fimognari received the fourth highest score out of the seven candidates interviewed, with
15 an average score of 74.33.

16 Fimognari was notified by letter dated April 1, 2014 that John Bieg had been
17 selected for the position. The reason checked in the letter for the selection was "Better
18 Able (Ability) to perform the job due to: More experience in the same or related work."

²⁵ Fimognari has since retired from MassDOT.

²⁶ Neither Doyle, Wanar, nor Burke testified at the hearing.

1 *Fimognari's Protected Activity*

2 Fimognari served as the chairman of Unit B of the Union from 2009 until his
3 retirement, and as trustee of the Union from 2006 until his retirement. As such, he
4 discussed problems with unit members, filed grievances and attended grievance
5 hearings,²⁷ acted as a witness at grievance arbitrations, and interacted with management
6 across the state, including HR. Fimognari was involved in the demotion grievance
7 involving Haskins, which included trying to get Haskins' former duties returned to him. In
8 addition, Fimognari was involved in the reclassification process for the MEM IV position,
9 and attended the bargaining sessions for the PC III position described above.

10 Fimognari reported to Wanar in his Foreman position, but did not have interactions
11 with him as a union officer.²⁸ Burke on occasion had discussed issues with Fimognari in
12 his role as a Union officer. Fimognari had no interactions with Doyle in his role as Union
13 officer, and there is no direct evidence of whether Doyle knew that Fimognari held union
14 offices.²⁹

²⁷ Fimognari estimated that he had been involved in approximately 100 grievances since the merger.

²⁸ Fimognari testified that he "would assume" that Wanar knew that he held a Union office because Wanar would have to be questioned about the grievances that Fimognari filed.

²⁹ Fimognari testified that Doyle reported to Al Stegeman (Stegeman), and Fimognari was on several labor-management committees with Stegeman.

1 *John Bieg*

2 John Bieg applied for the PC III position on August 7, 2013. His resume includes
3 the following work experience:

4 2005 – Present, Massachusetts Department of Transportation, District Two, Northampton
5 Motor Equipment Mechanic III

- 6 • District II Bridge Inspection Unit Mechanic III
- 7 • Maintaining all bridge inspection equipment including Inspector 50 under bridge
- 8 inspection machine, message boards, motor boats, and related motor vehicles
- 9 assigned to the Bridge Inspection Unit
- 10 • Coordinate and perform preventative maintenance programs on all equipment
- 11 assigned to the District Bridge Inspection Unit
- 12 • Manage equipment maintenance records
- 13 • Procure parts and supplies as needed to maintain equipment and vehicles
- 14 assigned to the District Bridge Inspection Unit
- 15 • Work closely as a liaison between the Assistant to the DOT State Bridge Inspection
- 16 Engineer in Boston and vendors to ensure prompt and proper payment of invoices
- 17 • Provide input to the Assistant to the DOT State Bridge Inspection Engineer as to
- 18 specifications for heavy duty equipment and vehicles used by MassDOT Bridge
- 19 Inspection Units
- 20 • Perform vehicle inspections on state vehicles for yearly inspection stickers for the
- 21 District. Both commercial and non-commercial inspections
- 22 • Operating Inspector 50 both ground and bucket operation as needed
- 23 • Work snow and ice in District II

24
25 1989 – 2005, Western Mass. Light/Truck and Auto Repair, Holyoke MA
26 Owner and President

- 27 • Responsible for all aspects of scheduling, and overseeing repairs on light and
- 28 medium duty trucks and automobiles
- 29 • Responsible for all purchasing of parts and equipment
- 30 • Managed all financial and maintenance records
- 31 • Responsible for building maintenance
- 32 • Responsible for diagnosing mechanical and electrical problems
- 33 • Welding and fabricating
- 34 • Coordinate and implement preventative maintenance programs for clients

35
36 1978 – 1989 Holyoke Street Railway Company, Holyoke MA
37 Superintendent of Maintenance
38

1 Worked with Registry of Motor Vehicles Inspectors on School Bus Safety Inspections also
2 with New York State DOT Inspections on Charter Coach Inspections

3
4 1982 – 1989 Company's Purchasing Agent, responsible for purchasing parts, vehicles,
5 and equipment

6
7 1980 – 1982 Maintenance manager overseeing production of eight mechanics, with
8 heavy-duty gas and diesel buses, with emphasis on preventative maintenance

9
10 Doyle, Wanar, and Burke also conducted Bieg's interview. Wanar scored Bieg 89
11 out of 140 points on his interview. Doyle gave him 94 points, and Burke gave him 102
12 points. Bieg received the highest score of all the candidates interviewed, with an average
13 score of 95.

14 When Bieg first came to Mass Highway in 2005, he was assigned to the District 2
15 garage in Northampton, where he repaired "any and all state equipment."³⁰ In 2010 or
16 2011, he moved to bridge inspection, where he was responsible for servicing 15-20 bridge
17 inspection vehicles and equipment. While in the bridge inspection unit, Bieg was an
18 AFSCME Council 93 unit member, but did not hold any office or position within the union,
19 nor did the union ever file a grievance or prohibited practice charge on his behalf.

20 **District 6**

21 *Greg Campbell*

22 Campbell began working for the Turnpike in 1980 as a Motor Equipment Mechanic,
23 with a break in service from 1985 – 1987. In 1987, he returned as a Motor Equipment
24 Mechanic, and became a Foreman in 1993 at the Weston garage, where up to six people

³⁰ Bieg worked for Mass Highway until the merger into MassDOT, at which point he became a MassDOT employee.

1 reported to him. In 1995, he was transferred to the South Boston garage as a Foreman,
2 where he remained until the merger in 2009. Before the merger, eleven mechanics, a
3 welder, two storekeepers, and parts runner reported to him.

4 Campbell applied for the PC III position through MassDOT's online application
5 system. He initially was not granted an interview because MassDOT did not receive his
6 application.³¹ In response, the Union filed a grievance on or about December 6, 2013.
7 As a result, MassDOT agreed to interview Campbell and did so on January 15, 2014.

8 Belanger; Catherine Archis, Assistant Operations Engineer; and Kedisha Goddard
9 (Goddard), HR representative, interviewed Campbell. Belanger gave him 117 out of 140
10 points³² and Archis gave him 97 out of 140 points. Goddard gave him 84 out of 120 points
11 on the 12 written questions.³³ Campbell received the lowest score of the four candidates
12 interviewed.

³¹ Although Belanger testified that Campbell told him that he did not apply for the position, and that he also heard that Campbell did not hit "send" when he applied online, Campbell testified that he did apply. Casey testified that MassDOT was having some technical issues at the time and was not receiving all online applications. Based on the testimony, I conclude that MassDOT did not receive an application from Campbell, however, the reason is not relevant to my analysis. Further, I do not credit the Union's interpretation of Belanger's testimony as implicitly accusing Campbell of lying about applying.

³² Belanger credibly testified that one reason he gave Campbell low scores on two of the questions was because he was looking for someone with Excel knowledge because it is a "big Excel spreadsheet position."

³³ The parties did not enter Goddard's score for Campbell on the two oral questions into evidence.

Belanger did not know why Campbell was granted an interview after his application was not received, and did not know that a grievance had been filed on his behalf. There is no evidence that Archis or Goddard were aware of the grievance.

Campbell was notified by letter dated April 18, 2014 that Ronald Gear (Gear) was selected for the position. The reason checked in the letter was: Better Able (Ability) to perform the job due to: More experience in the same or related work.

Ronald Gear

Gear applied for the PC III position on August 14, 2013. His resume details the following employment history, in relevant part:

Highway Maintenance Foreman IV/Motor Equipment Coordinator

Feb 2013 to Present, MassDOT

- Successfully inventoried all equipment currently assigned to District 6 utilizing the Fleetwave management system to verify.
- Successfully procured nearly \$3 million of new heavy equipment for the District.
- Developed and coordinated a new preventative maintenance program to minimize repair cost.
- Procured a new computer based diagnostic system to help our repair shop diagnose and repair our complicated snow & ice fleet.
- Manage and coordinate the assignment and use of district equipment.
- Developed and coordinate new repair procedures for heavy vehicles.
- Designate older vehicles for auction.
- Manage and coordinate the development and implementation of new employee training programs.
- Work with part vendors to ensure parts meet proper specs.
- Establish a capital equipment budget for plan for vehicle replacement.
- Establish a cost/benefit analysis to determine repair/replacement requirements.
- Work with component suppliers and maintenance staff to develop vehicle retrofit program.
- Oversee the repair work of local vendors to ensure all regulations are followed.
- Manage equipment maintenance records and cost analysis for repairs.
- Familiar with computer software such as Microsoft excel and word.
- Familiar with Fleet management software.

- Familiar with work order software (Maximo).
- Provide leadership as we transition to computer based snow and ice systems.

Highway Maintenance Foreman IV

December 6, 2006 to January 22, 2013 MassDOT³⁴

- Plan, direct and supervise the day to day activities of 45 maintenance workers, 3 Incident Response Operators and 3 Mechanics assigned to the night shift at M8.
- Create maintenance tasks and ensure they are performed properly and safely.
- Properly layout and implement an efficient system to put out 25 to 30 highway lane, and ramp closures for contract and maintenance work.
- Ensure that maintenance staff are properly trained on equipment use and safety.
- Inspects maintenance work in progress and to completion to ensure it is performed efficiently and safely.
- Track time of subordinates, approves time off requests and keeps accurate records.
- Administers disciplinary procedures as necessary.
- Supervise employee call in procedures for snow and ice events.
- Coordinated the deployment of 65 maintenance staff members and 40 or more snow fighting vehicles during snow storms.
- Supervise motor vehicle cleanup efforts.
- Supervise hazmat/fuel spill cleanup.
- Prepare daily work reports.
- Administered and coordinated MassDOT's drug and alcohol program.

Foreman of Special Projects

December 5, 2003 to December 5, 2006 Mass Pike, Weston, Mass.

- Supervised the day to day work of a Bridge, Roadway and building repair crew.
- Estimated labor hours, material amounts and time to completion of bridge repair.
- Developed specifications for equipment tool purchase.
- Developed and coordinated a training program for proper construction techniques.
- Tracked employee time and attendance.

Senior Maintenance Clerk/Business Management Specialist

March 1997 to January 2000 Mass Pike

- Recorded employee time and attendance on Kronos time keeper system.
- Tracked snow and ice materials, equipment and employee hours during snow storms.
- Wrote reports on property damage, auto accidents and employee Industrial Accidents.

³⁴ Prior to the merger in 2009, Gear worked in this position for Mass Highway.

- 1 • Called in employees for overtime opportunities and snow and ice events.

2
3 Archis scored Gear 138 out of 140 points on his interview, and Belanger scored
4 him 137 out of 140. Goddard scored him 112 out of 120 points on the 12 written
5 questions.

6 Gear began working for Mass Highway as a Highway Maintenance Foreman IV in
7 2006. In early 2013, Gear took on an additional role as a Motor Equipment Coordinator
8 because Walter Heller (Heller), the District 6 Highway Director, wanted to create a vehicle
9 capital purchase plan and Belanger did not have the time or resources to handle such a
10 project himself. Belanger selected Gear for the position.³⁵ While Gear was in this
11 position, he was asked to inventory all the equipment assigned to District 6.³⁶ Gear
12 eventually returned to his Foreman functions after the Union filed a grievance on behalf
13 of another unit member objecting to Gear's assignment to the position.³⁷

³⁵ Belanger testified that he "got pressure" from Heller to put Gear into the position. On cross-examination, Belanger admitted that Eddie McCarthy (McCarthy), the area supervisor, told him that Gear only got the position because he knows state senator Therese Murray. Although I credit Belanger's testimony that Heller pressured him to select Gear for the position, I do not credit the assertion that Gear got the position because of Senator Murray, as Belanger did not know how or why McCarthy would know this. Belanger also testified that they wanted someone with experience in the real world with the equipment, rather than only experience in the garage, because someone with real world experience can best say in which equipment they are comfortable working.

³⁶ Casey credibly testified that while Heller was figuring out exactly what the PC III position would entail, Heller assigned some of the duties to Gear, who was acting in an "infant version" of the position.

³⁷ According to Belanger, before Gear was removed from the position, he did "fine" in it, and that "the main thing was that [they] needed spreadsheets."

1 MEM IV and PC III Duties

2 The Union argues that the new PC IIIs in the districts have taken over certain duties
3 of the MEM IVs. The following is a summary of the evidence presented regarding how
4 the duties are handled at certain garages in Districts 1, 2, 3, and 6.³⁸

5 **District 1 – Lee Garage**

6 The following duties are at issue in the Lee garage in District 1.

- 7 • *Scheduling and Prioritizing Repairs:* Previously, Haskins would take all calls for
8 needed repairs and preventative maintenance from area foremen, schedule all the
9 work, and keep track of all repairs. Now, Kotski takes the calls for needed repairs
10 and maintenance, and advises Haskins about what needs to be done. At times,
11 Kotski will tell Haskins that the priority for work needs to change from what Haskins
12 has scheduled.³⁹
13
14 • *Ordering Parts:* Haskins continues to order the parts needed to maintain the
15 equipment as he did before Kotski became the PC III.⁴⁰
16
17 • *Outside Repairs:* Prior to Kotski becoming the PC III, Haskins would decide when
18 equipment would be contracted out for repairs. Now, Kotski makes the decision.
19
20 • *Tracking Repairs:* Haskins knew all the repairs that were being done by memory
21 and by maintenance tickets given to him by area foremen prior to Kotski becoming
22 the PC III. However, there is no evidence regarding how this has changed since
23 Kotski became the PC III.

³⁸ Although other duties were discussed by the witnesses at the hearing, I am focusing my analysis on the duties the Union identified in its post-hearing brief as having been transferred from unit members to the PC IIIs.

³⁹ DiOrio testified that various other people were responsible for determining the order of repairs after the merger. However, I credit Haskins on this issue as he has firsthand knowledge of his duties at the garage, and his testimony on this issue is consistent with the other Foremen's testimony that they were each responsible for scheduling and prioritizing repairs.

⁴⁰ Although Haskins testified that he has seen purchase order requests from Kotski, he does not know how or what he has ordered.

- 1
- 2 • *Repair/Auction:* Prior to the PC III position, Haskins did not have a role in
- 3 determining if equipment would be repaired or go to auction. Rather, he only
- 4 informed Charles Labbee (Labbee), the Supervisor of Motor Equipment, if the
- 5 equipment failed a safety inspection and the cost of the repair, and then Labbee
- 6 would make the decision. Haskins now provides this information to Kotski.
- 7
- 8 • *Procurement:* Prior to Kotski becoming the PC III, Haskins would give input on
- 9 what equipment was needed. Now, Kotski works with DiOrio and others to
- 10 prioritize needs and put a list together to “present up the chain,” and Haskins has
- 11 no role in making recommendations.
- 12
- 13 • *Snow and Ice:* Haskins has always needed approval before scheduling mechanics
- 14 for overtime to get ready for snow and ice season. He now gets such approval
- 15 from Kotski.
- 16

17 **District 2 – Chicopee Garage**

18 In the District 2 Chicopee garage, where Fimognari worked as an MEM IV prior to
19 his retirement, the following duties are at issue in this case.

- 20 • *Accident Reports:* Prior to Bieg becoming the PC III, accident reports would go to
- 21 Fimognari, who would then send them to Boston⁴¹ and coordinate appraisals.
- 22 Now, Bieg receives and sends out the reports. Fimognari still coordinates the
- 23 appraisals.
- 24
- 25 • *Fleet Management:* Prior to the PC III position, Fimognari would maintain logs of
- 26 the equipment and who was assigned to use it, and report on mileage. Now, Bieg
- 27 tracks who is assigned to use each vehicle and receives monthly mileage sheets
- 28 from the drivers.⁴²
- 29

⁴¹ Witnesses referred to Boston and Weston, sometimes interchangeably, as the locations where certain central administrative functions were performed.

⁴² Fimognari previously prepared reports detailing the condition of equipment, including which equipment was ready for snow and ice season. After the PC III was hired, he was told that the district office is now handling this, but Fimognari does not know who specifically prepares such reports.

- 1 • *Equipment Replacement:* As an MEM IV, Fimognari would tell Labbee which
2 equipment needed to be replaced after considering the cost to fix it or make it
3 usable. He would also decide if there was another use for a vehicle taken out of
4 service or whether it should go to auction. Now, Bieg talks to the Foremen and the
5 people using the equipment for recommendations on which equipment to turn in
6 as part of a "team effort." Bieg then makes recommendations to Wanar about
7 purchasing.
8
- 9 • *Scheduling and Prioritizing Repairs:* Both before and after Bieg became the PC
10 III, Fimognari was responsible for scheduling and prioritizing all motor equipment
11 repairs. On two or three occasions, Bieg has told Fimognari that he needed
12 something done right away.
13
- 14 • *Policies:* Before and after the PC III position, Fimognari inspected vehicles after
15 they came back to the garage to make sure they were clean and undamaged in
16 compliance with MassDOT policy.
17
- 18 • *Training:* Fimognari previously identified training needs and assigned staff to
19 training, but he no longer does this. Rather, Bieg coordinates the time and place
20 for training with the manufacturer of the equipment.⁴³
21
- 22 • *Coordinating with Other Garages and Statewide Liaison:* Fimognari continued to
23 communicate with other garages after the PC III position, and he also continued to
24 have discussions with Labbee about the equipment. There is no evidence that, at
25 any point, he specifically coordinated anything with other garages or acted as a
26 statewide liaison.

⁴³ Although Fimognari testified that he assumed he would still assign training, Bieg testified that if the garage gets new equipment, he coordinates the training with the manufacturer.

District 3 – Auburn Garage

Kevin St. Jean (St. Jean) is the PC III in District 3, which includes three garages in Auburn, Weston, and Millbury. Prior to this, he was the MEM IV in Auburn, and a member of the Union.⁴⁴ The duties at issue in District 3 at the Auburn garage are as follows.⁴⁵

- *Procurement/Auction:* When St. Jean was an MEM IV, he would make recommendations to his supervisor regarding which equipment should be replaced. Now, as PC III, he makes the determination on his own 80% of the time, but may ask the Foremen about the condition of the equipment.
- *Training:* As an MEM IV, St. Jean would initiate training by vendors. Now, the Foremen will come to him to request training and he will coordinate it.
- *Accident Reports:* As a PC III, St. Jean now completes the necessary paperwork for accident reports that he used to do as an MEM IV.
- *Transponders:* As a PC III, St. Jean handles issues regarding transponders in the vehicles, such as sending a non-functioning transponder back. St. Jean used to handle this as an MEM IV.
- *Overtime Reports:* St. Jean has completed weekly garage overtime reports both as an MEM IV, and now as a PC III.

⁴⁴ The Union does not challenge the selection of St. Jean for the PC III position. At the hearing, MassDOT called St. Jean as a witness.

⁴⁵ Although the Union argues that St. Jean now “oversees the proper functioning of the garages whereas the garage foremen used to do that on their own,” I do not find this to be a duty separate from the specific duties to follow. In addition, because St. Jean only worked as the MEM IV at the Auburn garage, I do not consider his testimony about his own MEM IV duties as evidence of what occurred at the Weston and Millbury garages, just as I do not consider the testimony of Fimognari, Haskins or Campbell as evidence of what occurred at the other garages in their respective districts.

District 6 – South Boston and Charlestown Garages

The following duties are at issue in District 6 at the garage in South Boston, and the satellite garage in Charlestown.⁴⁶

- *Auction:* Before the PC III position, Campbell would assess the vehicles and make recommendations on what to purchase, keep, and auction. Currently, Campbell still makes recommendations, although Gear has created and implemented a spreadsheet system where Gear evaluates a number of factors and decides whether to repair or auction the vehicle.
- *Ordering Parts:* Prior to Gear becoming the PC III, Campbell would need approval from Labbee for purchase orders for parts over \$500. Now, he is required to get this approval from Gear. Campbell continues to make the determination of what is needed for general preventative maintenance and the storekeeper ensures that the proper equipment is ordered. Gear does not have responsibility for general parts ordering. Although Gear has purchased certain equipment, such as lifts and tire machines, there is no evidence that Campbell previously was responsible for purchasing such equipment.
- *Overtime Schedules:* Prior to 2013, Campbell scheduled the mechanics for overtime. For a time after Gear became the PC III, he attempted to change the overtime that Campbell scheduled. However, Gear was ordered to restore the overtime to Campbell's schedule.⁴⁷
- *Scheduling and Prioritizing:* Before Gear became the PC III, Campbell would decide which mechanics would repair which vehicle. Now that Gear is the PC III, he at times tells Campbell that something needs to be fixed right away.⁴⁸

⁴⁶ Campbell works at the South Boston garage, and at the satellite maintenance facility in Charlestown.

⁴⁷ According to Campbell, "higher ups" ordered Gear to restore the prior overtime schedule.

⁴⁸ Although Campbell testified that Gear does not do this as often as he did at one time, the evidence shows that he still does it.

- *Evaluations:* Before Gear became the PC III, Campbell conducted the evaluations of the mechanics. Now, Gear evaluates them.⁴⁹

Opinion

Section 10(a)(3) and 10(a)(4) – Unlawful Retaliation

The Union alleges that the Employer violated Sections 10(a)(3) and 10(a)(4) of the Law by failing to promote Fimognari, Campbell, and Haskins to the PC III positions to which each applied.⁵⁰ Since unlawful retaliation is the essence of a charge under Sections 10(a)(3) and 10(a)(4), similar elements of proof apply to both types of cases. Commonwealth of Massachusetts, 6 MLC 1397, 1400, SUP-2190 (August 27, 1979). To establish a prima facie case of a violation under Section 10(a)(3), a 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 conduct was motivated by a desire to penalize or discourage the protected activity. Town of Carver, 35 MLC 29, 47, MUP-03-3894 (June 30, 2008) (citing Quincy School Committee, 27 MLC 83, 92, MUP-1986 (December 29, 2000)); Commonwealth of Massachusetts, 25 MLC 44, SUP-4128 (August 24, 1998). To satisfy the first prong of a Section 10(a)(4) case specifically, the

⁴⁹ It is not clear from the testimony whether Campbell still has the authority to initiate discipline, other than termination, against the mechanics since Gear has begun in the PC III position.

⁵⁰ The Section 10(a)(4) allegation involves Haskins only.

1 union must establish that the employee signed or filed an affidavit, petition or complaint
2 or gave information or testimony as part of a DLR proceeding. Id.

3 Once the charging party has established a prima facie case, the employer may
4 rebut it by producing evidence that the action was motivated by a legitimate reason.
5 Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001).
6 Finally, if the employer produces one or more lawful reasons for taking the adverse action
7 against the employee, the charging party must establish that "but for" the protected
8 activity, the employer would not have taken the adverse action. Id.

9 The Employer does not dispute that Fimognari, Campbell, and Haskins each
10 engaged in protected, concerted activity. The Employer does dispute that the failure to
11 promote each of them was not an adverse action because "they got everything they were
12 entitled to get through the promotion process." This argument is without merit, as the
13 failure to promote is an adverse action. See Town of Andover, 14 MLC 1571, 1582, MUP-
14 6443 (H.O. March 3, 1998), aff'd. 17 MLC 1475 (February 6, 1991). Therefore, the focus
15 of my inquiry will be on the remaining elements of a prima facie case of retaliation, i.e.,
16 employer knowledge and improper motivation.

17 **Peter Fimognari**

18 First, the Union has established that the Employer knew about Fimognari's
19 protected activity because Fimognari credibly testified that he had had interactions with
20 Burke, who was on his interview committee as the HR representative, in his role as a
21 Union officer. Moreover, the Employer undoubtedly was aware of Fimognari's role as a

1 Union officer, as he has engaged in various visible Union activities over several years,
2 including attending classification meetings, filing grievances and attending grievance
3 hearings, acting as a witness at grievance arbitrations, bargaining for the PC III position,
4 and interacting with management across the state. Fimognari was also involved in the
5 demotion grievance involving Haskins. See, Fowler v. Labor Relations Commission, 56
6 Mass. App. Ct. 96 (2002) (an inference of knowledge may be based on circumstantial
7 evidence, such as the employer's general knowledge of its employees' union activities).⁵¹

8 To support a claim of unlawful motivation, the last element of the Union's prima
9 facie case, a charging party may proffer direct or indirect evidence of
10 discrimination. Lawrence School Committee, 33 MLC 90, 97, MUP-02-3631 (December
11 13, 2006) (citing Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002),
12 aff'd sub nom. Town of Brookfield v. Labor Relations Commission, 443 Mass. 315
13 (2005)). Direct evidence is evidence that, "if believed, results in an inescapable, or at
14 least a highly probable inference that a forbidden bias was present in the workplace."
15 Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass.
16 655, 667 (2000) (quoting Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300
17 (1991)).

18 Unlawful motivation also may be established through circumstantial, or indirect,
19 evidence and reasonable inferences drawn from that evidence. Town of Carver, 35 MLC

⁵¹ In addition, in its post-hearing brief, MassDOT does not dispute that the interview committee members were aware of Fimognari's role and activities as a union officer.

1 at 48 (citing Town of Brookfield, 28 MLC at 327-328). Several factors may suggest
2 unlawful motivation, including: the timing of the alleged discriminatory act in relation to
3 the protected activity; triviality of reasons, or shifting and inconsistent reasons, given by
4 the employer; disparate treatment; an employer's deviation from past practices; or
5 expressions of animus or hostility towards a union or the protected activity. Town of
6 Carver, 35 MLC at 48 (citing Melrose School Committee, 33 MLC 61, 69, MUP-02-3549
7 (September 27, 2006)); Lawrence School Committee, 33 MLC 90, MUP-02-3631
8 (December 13, 2006); Cape Cod Regional Technical High School District Committee, 28
9 MLC 332, 335, MUP-2541 (May 15, 2002).

10 The Union has established improper motivation through indirect evidence.
11 Although Employer witnesses testified that the candidates who had the highest interview
12 scores were chosen for the PC III positions, the reason given to Fimognari for Bieg's
13 selection was "Better Able (Ability) to perform the job due to: More experience in the
14 same or related work." Further, despite the fact that the non-selection form included
15 "Interview" as a reason, and allowed for more than one reason to be selected, MassDOT
16 did not select it as a reason. These inconsistent reasons for Fimognari's non-selection
17 lead me to conclude that the Employer was improperly motivated.

18 Because the Union met its prima facie case of discrimination with regard to
19 Fimognari, the Employer may rebut the presumption with evidence of a legitimate reason
20 for not selecting Fimognari for the promotion. The Employer's burden to produce
21 legitimate, non-discriminatory reasons for taking the adverse action is more than simply

1 stating unsubstantiated allegations. School Committee of Boston v. Labor Relations
2 Commission, 40 Mass. App. Ct. 327, 335 (1996); Commonwealth of Massachusetts, 25
3 MLC 44, 46, SUP-4128 (August 24, 1998). The employer must produce supporting facts
4 indicating that the proffered reason was actually a motive in the decision. Trustees of
5 Forbes Library, 384 Mass. 559, 566 (1981); School Committee of Boston v. Labor
6 Relations Commission, 40 Mass. App. Ct. at 335. Although the Employer has produced
7 evidence that the interviewers did score Fimognari lower than Bieg, it has not established
8 that they had valid and non-discriminatory reasons for doing so.

9 The Employer contends that it chose Bieg for the position because he had the
10 highest interview score. However, because no members of the interview committee
11 testified, there was no evidence about why they scored Bieg higher than Fimognari.⁵²
12 Further, no Employer witnesses testified about why different reasons were given on the
13 non-selection form and at this hearing as to why Bieg was selected for the position. There
14 was also no testimony about why they concluded that Bieg had more experience in the
15 same or related work, as indicated on the non-selection form, and I am unable to reach
16 the same conclusion when comparing Fimognari's and Bieg's experience. The evidence
17 shows that Fimognari had worked as a Foreman for a Mass Turnpike, and then a

⁵² The parties provided the interviewers' notes for each candidate (some of which were unreadable), which summarize the candidate's answers, as well as model answers to the interview questions. However, these are not sufficient for me to determine whether one candidate's answers were validly scored higher than another candidate's answers without any further explanation, such as testimony from the interviewers. Further, the Employer did not make any arguments in its post-hearing brief addressing why certain answers deserved a higher score than others.

1 MassDOT, garage for many years, which is the position that performs some similar duties
2 to the PC III (as discussed in more detail in the transfer of unit work section below). Both
3 Fimognari and Bieg have had several years of motor vehicle repair experience. But
4 Fimognari has had significantly more, and more recent, managerial and supervisory
5 experience.⁵³ For these reasons, I find that the Employer has not met its burden to
6 establish that it had a legitimate reason for its decision to score Bieg higher than
7 Fimognari and select Bieg for the position, and that it violated the Law when it failed to
8 fairly consider Fimognari for the PC III position in retaliation for his protected, concerted
9 activity.⁵⁴

10 **Greg Campbell**

11 With regard to the Section 10(a)(3) allegations related to Campbell, the Union has
12 not established that the Employer knew of Campbell's protected activity of filing a
13 grievance over not receiving an interview for the PC III position. Specifically, Belanger
14 did not know why Campbell was granted an interview after his application was not

⁵³ Fimognari managed the garage and supervised the mechanics working at the garage since he began working as a Foreman in 2003. Bieg did not have managerial or supervisory experience during his employment at Mass Highway or MassDOT until he became the PC III. While at Western Mass. Light/Truck and Auto Repair from 1989 – 2005, he “on occasion” would have students work for him, and his resume indicates that while he was the Maintenance Manager for Holyoke Street Railway Company from 1980 – 1982, he oversaw eight mechanics.

⁵⁴ As explained further in the remedy section, I cannot determine who would have received the promotion had MassDOT not discriminated against Fimognari because two other applicants received higher scores. Therefore, MassDOT's violation was not failing to promote Fimognari, but failing to fairly consider him for the position.

1 received, and did not know that a grievance had been filed on his behalf. Further, there
2 is no evidence that Archis or Goddard were aware of the grievance. The Union argues
3 that Belanger admitted that "he thought it was unusual that Campbell would get an
4 interview so late and displayed an obvious animus toward having had to interview
5 Campbell at all, making comments that Campbell had somehow lied about his application
6 in order to get the interview." Even if this were accurate, it does not evidence any
7 knowledge that Campbell engaged in protected activity.⁵⁵ Unlike Haskins' situation
8 described below, there is no evidence that anyone on the interview committee knew about
9 Campbell's protected activity from whom I could infer that the other members would have
10 learned of it. Further, Campbell engaged in one discrete protected action that was quickly
11 resolved, which is very different from the extensive protected activity of Fimognari and
12 Haskins. I therefore also cannot conclude that anyone on the interview committee would
13 have general knowledge of Campbell's protected activity. Accordingly, because the

⁵⁵ I do not find the Union's argument accurate, as I explained earlier that Belanger did not imply that Campbell lied about his application.

1 Union has not established employer knowledge, there is no prima facie case of
2 discrimination as it relates to Campbell and I dismiss this portion of the Complaint.⁵⁶

3 **Douglas Haskins**

4 Here, the Union established that MassDOT knew about Haskins' protected activity
5 based on the fact that DiOrio knew that Haskins grieved his demotion, got his job back,
6 and that it was a long process. He also knew that Haskins grieved the Webster overtime
7 issue, and that MassDOT paid Haskins the overtime to resolve the grievance. Webster
8 would also have known about these activities based on the fact that MassDOT assigned
9 him to oversee the garage after Haskins was returned to the Foreman position as a result
10 of his successful grievance and arbitration, and that Webster was the subject of Haskins'
11 overtime grievance.⁵⁷ Although there is no direct evidence as to whether Mountain knew
12 of Haskins' protected activity, I disagree with the Employer's contention that the Union

⁵⁶ The Union also contends that Gear had "been all-but preselected" for the position because Heller had made it clear to Belanger that he should hire Gear for the earlier version of the position. According to the Union, Belanger was aware that Heller had a strong preference for Gear, and thus scored him higher than Campbell. I agree with this assessment of the situation. Therefore, even if the Union had established Employer knowledge and improper motivation, I would have determined that this was a legitimate, non-discriminatory reason that the Employer selected Gear over Campbell, in addition to the fact that Gear already had experience in the actual position, i.e., the "infant" version of the position, which Campbell did not have. Although such a selection may have potentially violated the parties' contractual promotion procedures, it does not violate the Law, especially since Heller's preference for Gear existed prior to Campbell's protected activity. Also, there is no evidence that would persuade me that "but for" Campbell's protected activity (had the interviewers had knowledge of it), the Employer would have promoted Campbell or scored him higher.

⁵⁷ Moreover, in its brief, MassDOT admits that DiOrio and Webster "probably knew about Mr. Haskins demotion, grievance and arbitration."

1 has to prove that all three members of the interview committee knew about it. Where the
2 evidence shows that at least two members of the interview committee were aware of
3 Haskins' protected activity, I conclude that they shared this knowledge with Mountain.
4 See, Fowler v. Labor Relations Commission, 56 Mass. App. Ct. 96 (2002) (Board free to
5 draw inference of knowledge based on circumstantial evidence).⁵⁸

6 The Union has also established that MassDOT was improperly motivated in its
7 decision to not select Haskins for the promotion based on its inconsistent reasons for the
8 selection. Similar to the situation with Fimognari, MassDOT's letter to Haskins included
9 "Better Able (Ability) to perform the job due to: More experience in the same or related
10 work" as its reason for selecting Kotski for the position. It also did not include "Interview"
11 as a reason, despite MassDOT's contention that the highest-scoring candidates were
12 selected for the position.

13 Because the Union established a prima facie case of discrimination with regard to
14 Haskins, the Employer may rebut the presumption with evidence of a legitimate reason
15 for not selecting Haskins for the promotion. MassDOT contends that Kotski was selected
16 because he received the highest interview score. However, no witnesses explained why

⁵⁸ With regard to the Section 10(a)(4) allegation, there is no evidence that any of the interview committee members were aware of Haskins' protected activity at the DLR specifically. Rather, DiOrio testified that he knew that Haskins grieved the demotion and was reinstated, but was not aware of all the steps. I therefore dismiss the Section 10(a)(4) allegation specific to Haskins.

1 Kotski's scores were higher than Haskins' scores.⁵⁹ Nor did any witness explain why
2 Haskins' non-selection letter indicated that Kotski was selected only because he was
3 better able to perform the job due to more related experience, or how they reached this
4 conclusion. Similar to Fimognari's situation, Haskins had extensive experience as a
5 Foreman performing certain duties that are similar to the duties of the PC III position.
6 There is no evidence that Kotski had comparable experience. The evidence also shows
7 that Haskins had more relevant experience in motor equipment repair than Kotski, and
8 that he met the required supervisory minimum entrance requirement, where Kotski did
9 not. For these reasons, I conclude that MassDOT has not established or satisfied its
10 burden to produce credible evidence that it had a legitimate reason for its decision.
11 Therefore, it violated Section 10(a)(3) of the Law when it failed to fairly consider Haskins
12 for the PC III position, and selected Kotski instead of Haskins for the position, in retaliation
13 for his protected, concerted activity.

14 Section 10(a)(5) – Transfer of Unit Work

15 The Law requires a public employer to give the exclusive collective bargaining
16 representative of its employees prior notice and an opportunity to bargain before
17 transferring bargaining unit work to non-bargaining unit personnel. Commonwealth of
18 Massachusetts v. Labor Relations Commission, 60 Mass. App. Ct. 831 (2004). To

⁵⁹ Although DiOrio testified, he did not address the rationale behind his scoring of Haskins and Kotski. And as I noted with regard to Fimognari's interview, MassDOT did not make any arguments in its brief to explain why Kotski's answers deserved a higher score than Haskins' answers.

1 determine whether an employer has unlawfully transferred bargaining unit work, the
2 Board considers the following factors: 1) whether the employer transferred bargaining unit
3 work to non-unit personnel; 2) whether the transfer of unit work to non-unit employees
4 has an adverse impact on individual employees or the unit itself; and 3) whether the
5 employer gave the bargaining representative prior notice and an opportunity to bargain
6 over the decision to transfer the work. Id. at 833. In situations where the work is
7 considered shared work that is traditionally performed by both bargaining unit and non-
8 bargaining unit personnel, the Board has held that the work in question will not be
9 recognized as exclusively bargaining unit work. City of Quincy/Quincy City Hospital, 15
10 MLC 1239, MUP-6490 (November 9, 1988). In these shared work situations, there is no
11 obligation to bargain over every incidental variation in job assignments between unit and
12 non-unit personnel. Rather, bargaining must occur only in situations where there is a
13 calculated displacement of bargaining unit work. City of Boston, 10 MLC 1539, 1541,
14 MUP-4967 (April 24, 1984).

15 **Transfer**

16 The Union must first establish that the Employer transferred unit work to non-unit
17 personnel. The evidence shows that there is inconsistency as to which duties have been

1 transferred from the Foremen to the PC III in each of the garages at issue here.

2 Therefore, I will analyze them separately.⁶⁰

3 *District 1 – Lee Garage*

4 In its brief, the Union alleges that Kotski took over the duties listed below from
5 Haskins. I find as follows:

- 6 • **Taking incoming calls to prioritize the repair of equipment and scheduling**
7 **repair work.**
8

9 Previously, Haskins would take all calls for needed repairs, schedule all the work,
10 and keep track of all repairs. Now, Kotski takes the calls for needed repairs and advises
11 Haskins about what needs to be done. At times, Kotski will tell Haskins that the priority
12 for the work needs to change from what Haskins has scheduled. This constitutes a
13 transfer of work.

- 14 • **Encroaching on the ordering of parts.**

15 Haskins continues to order the parts needed to maintain the equipment as he did
16 before Kotski became the PC III. Although Haskins has seen purchase order requests
17 from Kotski, he does not know how or what he has ordered. This is not sufficient evidence
18 to establish that this duty has been transferred to Kotski.

⁶⁰ The Union did not specifically argue that the alleged transfer of unit work in Districts 1, 2, 3, and 6 was consistent, or that it represented a transfer of work that also occurred at other MassDOT garages. Therefore, I am only making a determination on the garages in Districts 1, 2, 3, and 6 for which witnesses testified to the practices. See, e.g., Commonwealth of Massachusetts, 27 MLC 52, SUP-4091 (November 21, 2000), aff'd sub nom. Commonwealth v. Labor Relations Commission, 60 Mass. App. Ct. 831 (2004) (Board considered whether there was a transfer of unit work only at certain departmental facilities).

1 • **Making decisions about outside repairs.**

2 Prior to Kotski becoming the PC III, Haskins would decide when equipment would
3 be contracted out for repairs. Now, Kotski makes the decision. I find this to be a transfer.

4 • **Tracking repairs.**

5 Before the PC III position, Haskins knew all the repairs that were being done by
6 memory and by maintenance tickets given to him by the area foremen. There is no
7 evidence as to how this has changed since Kotski became the PC III and, consequently,
8 I decline to find that this duty has been transferred.

9 • **Making decisions about whether a vehicle would be repaired or**
10 **auctioned.**

11
12 The evidence shows that prior to Kotski becoming the PC III, Haskins did not have
13 a role in determining if equipment would be repaired or go to auction. Rather, he informed
14 Labbee about whether the equipment failed a safety inspection and the cost of a repair.
15 Now he provides this information to Kotski. Since Haskins was not responsible for this
16 duty, there has been no transfer.

17 • **Making recommendations regarding the purchase of new equipment.**

18
19 Prior to Kotski becoming the PC III, Haskins would give input on what equipment
20 he felt was needed. Now, Kotski works with DiOrio and others to prioritize needs and put
21 a list together to present up the chain, and Haskins has no role in making
22 recommendations. Therefore, this duty has been transferred.

1 • **Snow and Ice**

2 Haskins has always needed approval before scheduling mechanics for overtime
3 to get ready for snow and ice season. He now gets such approval from Kotski. This does
4 not constitute a transfer of work.

5 To summarize, I conclude that MassDOT has transferred the following duties from
6 the MEM IV in the Lee garage in District 1 to the PC III: taking incoming calls to prioritize
7 the repair of equipment and scheduling repair work; making decisions about outside
8 repairs; and making recommendations regarding the purchase of new equipment.

9 *District 2 – Chicopee Garage*

10 The Union alleges that Bieg took over the duties listed below from Fimognari. I
11 find as follows:

12 • **Collecting and submitting accident reports.**

13 Prior to Bieg becoming the PC III, accident reports would go to Fimognari, who
14 would then send them to Boston and schedule appraisals. Now, Bieg receives the reports
15 and sends them to Northampton. However, Fimognari is still responsible for coordinating
16 the appraisals. The duty of sending the reports is *de minimis* and does not constitute a
17 transfer.

18 • **Tracking and reporting vehicle condition, and tracking the assignment of**
19 **staff to certain locations.**

20
21 Prior to the PC III position, Fimognari would maintain logs of the equipment, track
22 who was assigned to use it, and report on mileage. Now, Bieg tracks who is assigned to

1 use each vehicle and receives monthly mileage sheets from the drivers.⁶¹ I conclude that
2 these duties have been transferred from Fimognari to Bieg.⁶²

3 • **Consulting with the fleet supervisor regarding the purchase of new**
4 **equipment.**
5

6 As an MEM IV, Fimognari would tell Labbee which equipment needed to be
7 replaced after considering the cost to fix it or make it usable. He also would decide if
8 there was another use for a vehicle taken out of service or whether it should go to auction.
9 Now, Bieg talks to the Foremen and the people using the equipment for recommendations
10 on which equipment to turn in as part of a "team effort." Bieg then makes
11 recommendations to Wanar about purchasing.

12 MassDOT argues that while it may have been reasonable for Fimognari to be
13 involved in purchasing decisions before the merger, these decisions must now be made
14 district-wide. This is irrelevant to my analysis of whether the duty has actually been
15 transferred, and I conclude that it has.

16 • **Certain prioritizing of repairs.**

17 Both before and after Bieg became the PC III, Fimognari was responsible for
18 scheduling and prioritizing all motor equipment repairs. On two or three occasions, Bieg

⁶¹ Rather than characterizing this as "managing assignments" as the Union does, I find this is more accurately described as tracking assignments.

⁶² Because it is not clear who is now preparing reports that detail the condition of the equipment, including snow and ice readiness, there is not sufficient evidence to consider this a duty that has been transferred outside of the bargaining unit.

1 has told Fimognari that he needed something done right away. I consider this a *de*
2 *minimis* variation that does not constitute a transfer of unit work.

3 • **Ensuring compliance with policies regarding equipment use.**

4 Before and after Bieg became the PC III, Fimognari inspected vehicles after they
5 came back to the garage to ensure that they were clean and undamaged and in
6 compliance with MassDOT policy. There is no evidence that Bieg also does this.
7 Therefore, this duty has not been transferred.

8 • **Identifying and coordinating training needs.**

9 Fimognari previously identified training needs and assigned staff to training, but
10 stopped doing it after Bieg became the PC III. Now, Bieg coordinates the time and place
11 for training with the manufacturer of the equipment. Accordingly, I find that this duty has
12 been transferred.

13 • **Coordinating with other garages and statewide operations.**

14 Although Fimognari testified that he talked to other garages and Labbee, there is
15 no evidence that Fimognari was ever responsible for coordination between garages, or
16 was a statewide liaison responsible for the district. Therefore, there has been no transfer.

17 In summary, based on the evidence presented, I conclude that MassDOT has
18 transferred the following MEM IV duties at the Chicopee garage in District 2 outside the
19 bargaining unit: tracking and reporting vehicle mileage; tracking the assignment of staff
20 to certain locations; consulting with the fleet supervisor regarding the purchase of new
21 equipment; and identifying and coordinating training needs. The Employer argues that

1 Fimognari's duties were not transferred to "any substantial degree;" however, the
2 evidence shows that there was more than a *de minimis* variation of these duties.

3 *District 3 – Auburn garage*

4 The Union alleges that the duties in District 3 listed below have been transferred
5 from the Foreman to the PC III. I find as follows:

6 • **Auction and Purchasing Decisions.**

7 When St. Jean was an MEM IV, he would make recommendations to his supervisor
8 regarding which equipment should be replaced. Now as PC III, he makes the
9 determination on his own 80% of the time, and the Foremen do not have much of a role
10 in assessing vehicles or making recommendations for purchase. Therefore, this duty has
11 been transferred.

12 • **Coordinating training with vendors.**

13 As an MEM IV, St. Jean would initiate training by vendors. Now, the Foremen come
14 to him to request training and he coordinates it. Thus, this duty has been transferred.

15 • **Information gathering for accident reports.**

16 As a PC III, St. Jean now completes the necessary paperwork for accident reports
17 that he used to do as an MEM IV. I conclude that this duty has been transferred.

18 • **Resolving transponder issues.**

19 St. Jean handles issues regarding the transponders in vehicles, which he used to
20 handle as an MEM IV. Therefore, this duty has been transferred.

1 • **Generating overtime reports.**

2 St. Jean completed weekly garage overtime reports as an MEM IV; he now does it as
3 a PC III. I find that this duty has been transferred.

4 In summary, I conclude that MassDOT has transferred the following duties in District
5 3 at the Auburn garage to the PC III: auction and purchasing decisions; coordinating
6 training; paperwork for accident reports; resolving transponder issues; and overtime
7 reports.

8 *District 6 – South Boston and Charlestown garages*

9 With regard to District 6, the Union alleges that the duties listed below have been
10 transferred from Campbell to Gear. I find as follows:

11 • **Assessing vehicles for purchase and auction.**

12 Prior to the creation of the PC III position, Campbell would assess the vehicles and
13 make recommendations on what to purchase, keep, and auction. Currently, Campbell
14 still makes recommendations, although Gear has created and implemented a
15 spreadsheet system where Gear evaluates a number of factors and decides whether to
16 repair or auction the vehicle. Because Gear now assesses the vehicle, albeit with a
17 different system than Campbell used, there has been a transfer of the duty.

18 • **Handling purchase orders and buying equipment.**

19 Prior to Gear becoming the PC III, Campbell needed approval from Labbee for
20 purchase orders for parts over \$500; now he is required to get this approval from Gear.
21 This does not constitute a transfer. Although Gear now purchases equipment, such as

1 lifts and tire machines, there is no evidence that Campbell used to be responsible for
2 purchasing such equipment, and Gear does not have responsibility for general parts
3 ordering. I therefore conclude that there is not sufficient evidence to establish that this
4 duty has been transferred.

5 • **Changing or attempting to change Campbell's overtime schedule.**

6 Prior to Gear becoming the PC III, Campbell scheduled the mechanics for
7 overtime. For a time after Gear became the PC III, he attempted to change the scheduled
8 overtime, however, he was ordered to restore it to Campbell's schedule. I do not find this
9 *de minimis* difference in scheduling to be a transfer of this duty.

10 • **Prioritizing certain repairs and dictating priorities to Campbell's**
11 **subordinate employees.**
12

13 Before Gear became the PC III, Campbell would decide which mechanics would
14 repair which vehicle. Now, Gear at times tells Campbell that something needs to be fixed
15 right away. I conclude that this duty has been transferred outside the bargaining unit;
16 however, there is no evidence that Gear directly dictates the priorities to subordinate
17 employees.

18 • **Evaluations**

19 Before Gear was selected for the PC III position, Campbell conducted the
20 evaluations of the mechanics. Now, Gear evaluates them. Thus, this duty has been
21 transferred.

22 In summary, I find that at the Charlestown and South Boston garages in District 6,
23 MassDOT transferred the following duties from the MEM IV to the PC III: assessing

1 vehicles for purchase and auction; prioritizing repairs; and conducting evaluations of the
2 mechanics.

3 *District-Wide Nature of Duties*

4 MassDOT argues that the PC IIIs perform their duties on a district-wide basis, while
5 the MEM IVs perform their duties only at their garages and, accordingly, there has not
6 been a transfer. However, MassDOT fails to recognize that although the PC IIIs may be
7 performing their duties on a larger scale or for multiple facilities, this has caused an
8 overlap of district-wide duties with what was once the Foremen's exclusive work at their
9 respective garages. For example, prior to the PC III position, Fimognari would maintain
10 logs of the equipment, track who was assigned to use it, and report on mileage. Now,
11 Bieg tracks who is assigned to use each vehicle and receives monthly mileage sheets
12 from the drivers. The fact that Bieg is performing these duties throughout the district, and
13 not just at one garage, does not change the fact that the duties have transferred from
14 Fimognari with respect to the Chicopee garage.⁶³ Similarly, the Employer's argument
15 that the district-wide reporting requirements are beyond the jurisdiction of the MEM IVs
16 does not excuse its transfer of the work formerly performed by the MEM IVs only at their
17 respective garages without bargaining to resolution or impasse.

⁶³ The Union contends that the fact that a PC III performs certain duties on a district-wide basis only means that there has been a transfer of work from all the MEM IVs in the district. However, as noted above, this decision is relevant only to the specific districts and garages discussed as the evidence shows that the MEM IV duties were not consistent at different garages.

1 The Employer also argues that the MEM IVs are still performing many of their duties,
2 even if the PC IIIs are performing them as well. However, work that exclusively belonged
3 to the bargaining unit cannot be permissibly shared between unit and non-unit members
4 without first bargaining to resolution or impasse.⁶⁴

5 Adverse Impact

6 The Board has long held that depriving a bargaining unit of an opportunity to
7 perform work that it previously performed constitutes an adverse impact on the unit even
8 if the loss of bargaining unit work may not directly result in a reduction in the number of
9 bargaining unit personnel. See Lowell School Committee, 28 MLC 29, 32, MUP-2074
10 (June 22, 2001) (citing City of New Bedford, 15 MLC 1732, 1739, MUP-6488 (May 31,
11 1982)); City of Cambridge, 23 MLC 28, 36, MUP-9171 (June 28, 1996) aff'd sub nom.
12 Cambridge Police Superior Officers Association v. Labor Relations Commission, 47
13 Mass. App. Ct. 1108 (1999); Cf., Chief Justice for the Administration and Management of
14 the Trial Court v. Commonwealth Employment Relations Board, 79 Mass. App. Ct. 374
15 (2011) (no adverse impact where record establishes that work would have gone undone
16 if per diems were not hired). Although there is no evidence that any unit members were
17 eliminated because of the transfer of unit work to the PC III, the role of the Foremen at
18 the garages at issue has been diminished with the loss (or sharing) of certain duties,

⁶⁴ The Employer also argues that accident reports were shared work, and done by others at a much more involved level. Where I have found a transfer in Fimognari and St. Jean's garages, there is no evidence that the specific portion of the accident reporting performed by Fimognari and St. Jean were shared duties.

1 including certain supervisory and decision-making responsibilities. Therefore, I find that
2 the transfer of the duties described above resulted in an adverse impact on the bargaining
3 unit.⁶⁵

4 **Notice and Opportunity to Bargain**

5 It is undisputed that MassDOT gave the Union notice of its creation of the PC III
6 position and that the parties had two bargaining meetings. The parties disagree on
7 whether they reached impasse at these meetings.

8 After good faith negotiations have exhausted the prospects of concluding an
9 agreement, an employer may implement changes in terms and conditions of employment
10 that are reasonably comprehended within its pre-impasse proposals. City of Leominster,
11 23 MLC 62, 66, MUP-8528 (August 7, 1996) (citing Hanson School Committee, 5 MLC
12 1671, MUP-2196 (February 27, 1979)). Factors considered in determining whether
13 impasse has been reached include: bargaining history, the good faith of the parties, the
14 length of negotiations, the importance of the issues to which there is disagreement, and
15 the contemporaneous understanding of the parties concerning the state of negotiations.

⁶⁵ The Union also argues that the transfer of higher-level administrative duties from the Foremen will affect the ongoing reclassification study, and thus have an impact on the placement and pay rates of the positions. Because I have found the adverse impact described above, I need not consider this argument. However, even if I were to consider it, the Union's argument is unpersuasive where it has shown that there has not been a consistent transfer of the same duties among the garages at issue in this case, nor is there any evidence regarding how inconsistent practices could affect the reclassification study. Further, in Town of Cohasset, which the Union cites for support that the loss of earning potential can be an adverse impact, the lost earnings involved future overtime, not potential reclassification. 40 MLC 258, MUP-12-1495 (H.O. March 14, 2014), aff'd. 41 MLC 206 (January 30, 2015).

1 Ashburnham-Westminster Regional School District, 29 MLC 191, 195, MUP-01-3144
2 (April 9, 2003). Impasse exists only where both parties have bargained in good faith on
3 negotiable issues to the point where it is clear that further negotiations would be fruitless
4 because the parties are deadlocked. Ashburnham-Westminster Regional School District,
5 29 MLC at 195 (citing Commonwealth of Massachusetts, 25 MLC 201, 205, SUP-4075
6 (June 4, 1999); Town of Brookline, 20 MLC 1570, 1592, MUP-8426 (May 20, 1994)). An
7 analysis of whether the parties are at impasse requires an assessment of the likelihood
8 of further movement by either side and whether they have exhausted all possibility of
9 compromise. Ashburnham-Westminster Regional School District, 29 MLC at 195 (citing
10 Town of Plymouth, 26 MLC 220, 223, MUP-1465 (June 7, 2000); Woods Hole, Martha's
11 Vineyard and Nantucket Steamship Authority, 14 MLC 1518, 1529-1530, UP-2496
12 (February 3, 1988)).

13 The evidence shows that at both bargaining meetings, the Union continued to
14 object to the PC III position because it believed that its unit members were performing
15 some of the duties. MassDOT argues that the Union refused to accept its representations
16 about the actual duties and purpose of the new positions, and that the Union "would have
17 never agreed to any MassDOT initiative that did not give these new positions to [Union]
18 members." However, MassDOT did not engage in sufficient bargaining to reach this
19 conclusion. The second meeting included questions from the Union and a request for a
20 process to get to agreement. This does not evidence that the parties were deadlocked
21 or that further negotiations would be fruitless. Further, both meetings were attended by

1 representatives from several unions who were permitted to comment and ask questions.
2 The presence of additional unions, and the time spent addressing those unions, limited
3 the time that MassDOT and the Union had to engage in bargaining. Despite that,
4 MassDOT offered the Union no further opportunity to bargain before posting the PC III
5 positions. Although MassDOT did revise the final PC III posting to reflect the district-wide
6 nature of the position as discussed at the bargaining meetings, it did not provide the
7 posting to the Union to determine if it satisfied its concerns, or whether it requested
8 additional bargaining on the matter. I therefore find that the parties did not reach
9 resolution or impasse on the issue, and that MassDOT unlawfully transferred certain
10 bargaining unit duties to non-unit members, as described above.

11 Remedy⁶⁶

12 Transfer of Bargaining Unit Work

13 The Board fashions remedies for violations of the Law by attempting to place
14 charging parties in the position they would have been in but for the unfair labor practice.
15 Natick School Committee, 11 MLC 1387, 1400, MUP-5157 (February 1, 1985). The
16 traditional remedy where a public employer has unlawfully refused to bargain over a
17 decision to transfer unit work is an order to restore the status quo ante until the employer
18 has fulfilled its bargaining obligation, and to make all affected employees whole for any
19 economic losses they may have suffered. Commonwealth of Massachusetts, 35 MLC
20 105, 110, SUP-04-5054 (December 10, 2008). Therefore, I am ordering MassDOT to

⁶⁶ MassDOT does not address remedy in its post-hearing brief.

1 restore the transferred duties at the garages at issue until it has fulfilled its bargaining
2 obligation. The Union requests that the MEM IVs also be made whole for the loss of their
3 work by the payment of overtime for the work that was performed by non-unit personnel.
4 However, there is no evidence or allegation that the MEM IVs lost overtime opportunities
5 because MassDOT transferred certain specific duties to the PC IIIs and I decline to order
6 this remedy.⁶⁷

7 Failure to Promote Fimognari and Haskins

8 The Union requests that I order that MassDOT offer promotions to Fimognari and
9 Haskins if I find that they were retaliated against in violation of Section 10(a)(3) of the
10 Law. Because the circumstances of the failure to promote are different, I must order
11 different remedies.

12 With respect to Fimognari, his interview score placed him fourth out of seven
13 candidates. Although I conclude that the Employer did discriminate against Fimognari
14 when it selected Bieg for the position over him, I am not able to conclude that he would
15 have otherwise received the promotion since I have no information about the other
16 candidates who scored higher. Therefore, I will only order that the Employer rescind the
17 selection of Bieg for the PC III position in District 2 and repeat the interview and selection
18 process, taking into account only lawful considerations. See, Town of Randolph, 8 MLC
19 2044, MUP-4589 (April 23, 1982) (Board orders rescission and fair consideration of all

⁶⁷ Notably, the Union has not alleged that lost overtime opportunities were an adverse impact of the transfer of unit work.

1 candidates before making selection). Further, in order to ensure a fair selection process,
2 the Employer's interview panel must not include the interviewers who selected Bieg for
3 the position in 2013,⁶⁸ and the selection should be made based on the circumstances that
4 existed at the time of the original application deadline in order to ensure that Fimognari
5 and the other candidates are in the same position that they would have been in had it not
6 been for the Employer's discrimination.

7 Haskins' situation is different because he scored second in the interview process
8 after Kotski. Because I have concluded that MassDOT discriminated against Haskins by
9 selecting Kotski instead of him, and there were no other candidates who scored higher
10 than Haskins, I order MassDOT to rescind Kotski's selection and offer Haskins the PC III
11 position with a full make whole remedy.⁶⁹ See, Town of Clinton, 12 MLC 1361, MUP-
12 5659 (November 9, 1985) (Board follows "ample precedent" that supports such remedy,
13 and distinguishes Town of Randolph because, in that case, it could not determine which
14 candidate would receive the promotion had the employer followed lawful procedures);
15 Town of Mashpee, 36 MLC 163, MUP-02-3653 (April 15, 2010) (Board orders town to

⁶⁸ If Fimognari chooses to remain retired from MassDOT and not interview for the PC III position, the order does not apply and Bieg may remain in the position. If Fimognari does apply and is selected for the position, he shall be deemed to have held the position since the day it was filled in District 2 and made whole, as further detailed in the below order.

⁶⁹ The evidence established that Haskins was far more qualified for the PC III position than Kotski. I therefore am not ordering that the Employer unnecessarily repeat the interview and selection process for Haskins and Kotski.

1 offer position to discriminatee as of date that improperly selected candidate assumed
2 position).

3 Conclusion

4 Based on the record and for the reasons explained above, I find that MassDOT
5 violated Sections 10(a)(3), 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by: 1)
6 transferring unit work to non-unit employees and 2) retaliating against Fimognari and
7 Haskins for their protected activity. In addition, I find that the Employer did not retaliate
8 against Campbell for his protected activity, and did not retaliate against Haskins in
9 violation of Section 10(a)(4) of the Law.

Order

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED THAT
MassDOT shall:

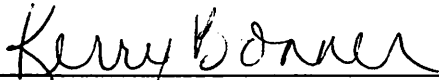
1. Cease and desist from:
 - a. Transferring bargaining unit work to non-bargaining unit employees without first bargaining to resolution or impasse with the United Steelworkers, Local 5696 over the decision to transfer the work and the impact of that decision on bargaining unit members' terms and conditions of employment;
 - b. Discriminating against Peter Fimognari and Douglas Haskins for engaging in concerted, protected activities;
 - c. In any like manner, interfering, restraining and coercing any employees in the exercise of their rights guaranteed under the Law.
2. Take the following action that will effectuate the purposes of the Law:

- a. Upon request, bargain in good faith with the Union to resolution or impasse about the decision and impact of the decision to transfer the following duties to non-unit employees:
 - i. District 1, Lee Garage: taking incoming calls to prioritize the repair of equipment and scheduling repair work; making decisions about outside repairs; and making recommendations regarding the purchase of new equipment;
 - ii. District 2, Chicopee Garage: tracking and reporting vehicle mileage; tracking the assignment of staff to certain locations; consulting with the fleet supervisor regarding the purchase of new equipment; and identifying and coordinating training needs;
 - iii. District 3, Auburn Garage: auction and purchasing decisions; coordinating training; paperwork for accident reports; resolving transponder issues; and overtime reports;
 - iv. District 6, South Boston and Charlestown Garages: assessing vehicles for purchase and auction; prioritizing repairs; and conducting evaluations of mechanics.
- b. Restore to the bargaining unit the duties referenced in paragraph 2(a) of this order. The obligation to restore the duties to the bargaining unit shall continue until the earliest of the following conditions is met:
 - i. Mutual agreement is reached with the Union relating to the subjects of bargaining set forth in paragraph 2(a) above;
 - ii. Good faith bargaining results in a bona fide impasse;
 - iii. The Union fails to request bargaining within 15 days of this order; or
 - iv. The Union subsequently fails to bargain in good faith.
- c. Immediately rescind the promotion of Stephen Kotski to the position of PC III in District 1;
- d. Offer Douglas Haskins the position of PC III in District 1, which position he shall be deemed in terms of seniority, benefits, and all rights and privileges to have held since the day the PC III position was filled in District 1 in April 2014;

- e. Make Douglas Haskins whole for all losses he suffered, if any, as a result of the discriminatory denial of his promotion. He shall be paid a sum equal to the difference between what he would have earned as a PC III and his salary as an MEM IV from the date that the PC III position was filled in April 2014 to the date of compliance with this order, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly;
- f. Rescind the promotion of John Bieg to the PC III position in District 2;
- g. Repeat the interview and selection process for the PC III position in District 2, taking into account only lawful considerations. In order to ensure a fair selection process, MassDOT's interview panel must not include the interviewers who selected Bieg for the position in 2013, and the selection should be made based on the circumstances that existed at the time of the original application deadline;
- h. If MassDOT selects Peter Fimognari for the PC III position after completing the process described in paragraph 2(g), he shall be deemed in terms of seniority, benefits, and all rights and privileges to have held the position since the day the PC III position was filled in District 2 in April 2014;
- i. If MassDOT selects Peter Fimognari for the PC III position after completing the process described in paragraph 2(g), make Peter Fimognari whole for all losses he suffered, if any, as a result of the discriminatory denial of his promotion. He shall be paid a sum equal to the difference between what he would have earned as a PC III and his salary as an MEM IV from the date that the PC III position was filled in April 2014 to the date of compliance with this order, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly;
- j. Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if MassDOT 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;
- k. Notify the DLR in writing of the steps taken to comply with this decision within thirty (30) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS


KERRY BONNER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11 and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.



**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 that the Massachusetts Department of Transportation (MassDOT) violated Sections 10(a)(3), 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by 1) discriminating against Peter Fimognari (Fimognari) and Douglas Haskins (Haskins) for their protected, concerted activity and 2) unilaterally transferring bargaining unit work outside of the unit without bargaining about the decision and impact of the decision with United Steelworkers, Local 5696 (Union).

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

MassDOT assures its employees that:

- WE WILL NOT unilaterally transfer bargaining unit work to non-unit employees;
- WE WILL NOT fail or refuse to bargain in good faith with the Union by failing to provide the Union with prior notice and the opportunity to bargain to over the decision to transfer bargaining unit work to non-unit members;
- WE WILL NOT discriminate against Fimognari and Haskins for engaging in concerted, protected activities;
- WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of their rights protected under the Law.
- WE WILL take the following affirmative action that will effectuate the purpose of the Law:
 - Upon request, bargain in good faith with the Union to resolution or impasse over the decision to transfer the bargaining unit work described in the Order in Case # SUP-14-3576 and SUP-14-3640 to non-unit members and the impacts of that decision;
 - Restore to the bargaining unit the duties referenced in the Order in Case # SUP-14-3576 and SUP-14-3640 until the earliest of the conditions referenced in the Order are met;
 - Immediately rescind the promotion of Stephen Kotski to the position of PC III in District 1;
 - Offer Haskins the position of PC III in District 1, which position he shall be deemed in terms of seniority, benefits, and all rights and privileges to have held since the day the PC III position was filled in District 1 in April 2014;
 - Make Haskins whole for all losses he suffered, if any, as a result of the discriminatory denial of his promotion, paying him a sum equal to the difference between what he would have earned as a PC III and his salary as an MEM IV from the date that the PC III position was filled in April 2014 to the date of compliance with the order, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly;
 - Rescind the promotion of John Bieg to the PC III position in District 2;
 - Repeat the interview and selection process for the PC III position in District 2, taking into account only lawful considerations. The interview panel will not include the interviewers who selected Bieg for the position in 2013, and the selection will be made based on the circumstances that existed at the time of the original application deadline;
 - Deem Fimognari in terms of seniority, benefits, and all rights and privileges to have held the position since the day the PC III position was filled in District 2 in April 2014 if he is selected for the position;
 - Make Fimognari whole for all losses he suffered, if any, as a result of the discriminatory denial of his promotion if he is selected for the position. He shall be paid a sum equal to the difference between what he would have earned as a PC III and his salary as an MEM IV from the date that the PC III position was filled in April 2014 to the date of compliance with the order, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly;
 - Notify the DLR within thirty (30) days after the date of service of this decision and order of the steps taken to comply with its terms.

For MassDOT

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, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).