

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

UNIVERSITY OF MASSACHUSETTS
DARTMOUTH

and

UNIVERSITY OF MASSACHUSETTS
DARTMOUTH FACULTY FEDERATION,
LOCAL 1895, AFT, AFL-CIO,
EDUCATIONAL SERVICES UNIT

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Case No.: SUP-15-4601

Date Issued: March 19, 2019

Hearing Officer:

Kendrah L. Davis, Esq.

Appearances:

James B. Cox, Esq. - Representing University of Massachusetts
Dartmouth

Haidee Morris, Esq. - Representing University of Massachusetts
Dartmouth Faculty Federation, Local 1895,
AFT, AFL-CIO, Educational Services Unit

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the University of Massachusetts Dartmouth
2 (Employer or UMD) violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of G.L.
3 c.150E (the Law) by retaliating against Donald King (King) for engaging in concerted
4 activity protected by Section 2 of the Law. For the reasons explained below, I find that

1 the Employer violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law as
2 alleged.

3 STATEMENT OF THE CASE

4 **Procedural History**

5 On May 27, 2015, the Union filed a Charge of Prohibited Practice (Charge) with
6 the Department of Labor Relations (DLR), alleging that the Employer had engaged in
7 prohibited practices within the meaning of Sections 10(a)(3), 10(a)(5) and, derivatively,
8 Section 10(a)(1) of the Law by giving King a negative evaluation after he filed a
9 grievance challenging his non-promotion. On September 17, 2015, the Union filed an
10 Amended Charge alleging that the Employer also retaliated against King by giving him a
11 negative evaluation for using intermittent leave.

12 At the investigation into the Charge on September 23, 2015, the Union withdrew
13 its Section 10(a)(5) allegation. On September 30, 2015, a DLR investigator issued a
14 Complaint of Prohibited Practice (Complaint), alleging that the Employer had violated
15 Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by retaliating against
16 King by giving him "marginal" and "unsatisfactory" ratings in his Annual Performance
17 Review Evaluation Report for requesting intermittent leave between June 30, 2013 and
18 June 19, 2014, for attempting to enforce his rights to leave, and for filing a grievance on
19 June 2, 2014. The Employer filed its Answer to the Complaint on October 7, 2015.¹ The

¹ On February 14, 2017, the Employer filed a Motion to Amend paragraph 8 of its Answer by admitting that the Union had filed a grievance on June 2, 2014, but denying all other allegations in that paragraph and by answering further that the grievance "shall speak for itself." The Union did not oppose the Employer's Motion to Amend, and I granted it at the hearing on April 13, 2017.

1 DLR issued a Notice of Hearing and eight Amended Notices of Hearing.² On October 5,
2 2016, the Union filed a Motion to Amend Complaint and, on October 12, 2016, the
3 Respondent filed its opposition to that Motion. By ruling on October 14, 2016, I denied
4 the Union's Motion to Amend Complaint.

5 I conducted eight days of hearing between October 17, 2016 and October 12,
6 2017, at which I afforded the parties a full opportunity to present testimony, exhibits and
7 arguments, and to examine and cross-examine witnesses. On March 5, 2018, both the
8 Employer and the Union filed post-hearing briefs.³

9 **1. The Subpoena Duces Tecum**

² The DLR issued its Amended Notices of Hearing on November 9, 2015, May 17, 2016, June 14, 2016, September 16, 2016, October 3, 2016, November 17, 2016, January 11, 2017, February 24, 2017, and May 8, 2017.

³ The Employer attached "Appendix A" to its post-hearing brief, which included a December 4, 2017 arbitration decision. On March 9, 2018, the Union filed a Motion to Strike to preclude "Appendix A" from entering the record. Six days later, on March 15, 2018, the Employer filed an Opposition to the Union's Motion to Strike and a Motion to Reopen Hearing. On March 18, 2018, the Union submitted an Opposition to the Employer's Motion to Reopen Hearing.

There is no dispute that on or about November 24, 2014, the Union filed a demand for arbitration. Nor is there any dispute that the arbitration was pending at all relevant times throughout the hearing. Between the first day of hearing on October 17, 2016, and the last day of hearing on October 12, 2017 when I closed the record, neither party requested that I keep the record open for the purpose of entering into evidence the anticipated arbitration decision. Similarly, between the arbitrator's issuance of the decision on December 4, 2017, and the parties' submission of post-hearing briefs on March 5, 2018, neither party raised the issue of the pending arbitration decision. Rather, the Employer waited three months after the decision date to attach the arbitration award to its post-hearing brief. Consequently, because the arbitrator issued the disputed decision almost two months after the record closed, and because the decision addresses only whether the Employer violated the parties' collective bargaining agreement but not whether it violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law, I deny the Employer's Motion to Reopen Hearing, and grant the Union's Motion to Strike Appendix A from entering the record.

1 On October 3, 2016, the Employer filed a subpoena duces tecum (subpoena)
2 seeking “[a]ll files (electronic and otherwise), books and records that constitute [King’s]
3 ‘work journal’ that [he] maintained while employed at UMass Dartmouth during the
4 period January 1, 2013 to the present and that [he] relied upon when constructing the
5 ‘Timeline’ or ‘FMLA_Timeline-color-coded-pdf.’” I issued that subpoena on October 4,
6 2016. The Union filed a Motion to Revoke or Modify Subpoena on October 17, 2016,
7 and the Employer submitted its response on October 24, 2016.

8 On November 14, 2016, I conducted an investigation pursuant to G.L. c. 30A,
9 §12(4) and 456 CMR 13.14(5), heard arguments, and received evidence from the
10 parties. By Ruling on December 9, 2016, I denied the Union’s Motion to Revoke or
11 Modify Subpoena in part, and granted it in part. Specifically, I granted the Motion by
12 revoking parts of the subpoena that sought information outside of the relevant
13 timeframe of June 21, 2013 through June 30, 2014, which was the period of King’s
14 intermittent leave. I also revoked parts of the subpoena that sought information about
15 King’s personal matters. However, I denied the Motion in all other respects, permitting
16 the Employer access to the remaining parts of King’s work journal.

17 **2. The In Camera Review**

18 Between December 23, 2016 and January 3, 2017, I conducted an in camera
19 review of King’s work journal which comprised 784 pages. On January 3, 2017, I
20 directed the Union to provide additional clarifying information to assist in my in camera
21 review. By letter dated January 10, 2017, the Union filed an interlocutory appeal seeking
22 relief from my January 3, 2017 directive. On January 17, 2017, I conducted a telephone
23 conference with the parties to discuss the document. The Union proposed withdrawing

1 its interlocutory appeal if I agreed to revise my January 3, 2017 directive and require the
2 Union to only submit pages from King's work journal that it believed should be excluded
3 from the subpoena. The Employer did not object to the Union's proposal, and I
4 accepted it. Accordingly, I issued a revised directive on January 17, 2017, instructing
5 the Union to submit the required information by January 26, 2017. By letter dated
6 January 26, 2017, the Union submitted the required information and contemporaneously
7 withdrew its interlocutory appeal. By letter dated February 2, 2017, I notified the parties
8 of my completed in camera review, determining that I would redact certain information
9 contained on page 352 of King's journal. I kept unredacted the remaining 783 pages
10 and returned the entire document to the Union to give to the Employer on or before
11 February 13, 2017, or by the next scheduled day of hearing.

12 ADMISSIONS OF FACT

13 The Employer admitted to the following facts:⁴

- 14 1. The Employer is a public employer within the meaning of Section 1 of the Law.
- 15 2. The Union is an employee organization within the meaning of Section 1 of the
16 Law.
- 17 3. The Union is the exclusive bargaining representative for certain employees
18 employed by the Employer, including the position of Internet Development
19 Manager/Webmaster.
- 20 4. The Employer and the Union are parties to a collective bargaining agreement for
21 the period July 1, 2012 to June 30, 2014 (2012-2014 Agreement).
- 22 5. The Employer and the Union are parties to an April 1, 2015 Memorandum of
23 Understanding for a successor agreement to the 2012-2014 Agreement (2015
24 MOU).

⁴ In its Answer and Amended Answer, the Employer made full and partial admissions of fact. This part of my decision reflects only the Employer's full admissions of fact.

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1. On June 2, 2014, the Union filed, on behalf of Mr. King, the grievance.

FINDINGS OF FACT

I. The Collective Bargaining Agreement

The parties executed a collective bargaining agreement (Agreement) that was effective until July 1, 2012. The parties executed a successor agreement that was effective from July 1, 2012 to June 30, 2014. Article XI of the Agreement pertains to Grievance Procedures.

A. Contractual Family Leave and the FMLA

Article VI, Section B(l) of the Agreement pertains to Family Leave Benefits, stating, in full:

It is understood that the provisions of the Family and Medical Leave Act of 1993 ("FMLA") apply to all eligible members of the bargaining unit and that when the collective bargaining agreement provides the same type of leave required under FMLA, any time spent by an employee on such contractual leave shall simultaneously be counted as an FMLA leave. Employees on FMLA leave may choose to use accrued vacation, personal, or sick leave credits and are entitled to apply for sick bank leave credits. Upon notice, employees may opt to use unpaid time.

If the leave benefits provided in the collective bargaining agreement are less than those available under the FMLA, the more generous provisions of the FMLA shall prevail.

If the leave benefits provided in the collective bargaining agreement are greater than required by FMLA, then relevant provisions of the agreement shall be honored, but the first twelve (12) weeks spent on such contractual leave shall, if applicable, be counted as FMLA leave.

Regular group health insurance coverage shall be maintained when a leave is granted in full accordance with Family Leave Policy or when the collective bargaining agreement specifically so requires.

Individuals who are on maternity leave and other forms of family leave in accordance with this section may be eligible for an extension of up to

1 twelve (12) weeks, subject to the approval of their division head. Such
2 extension must be requested in writing and shall require the approval of
3 the employee's division head. The extension shall be unpaid, unless the
4 employee has accrued vacation, personal, or sick leave credits available
5 to cover any portion of this period of time. Individuals denied an extension
6 by the division head may appeal to the Chancellor. Such appeals must be
7 in writing to the Chancellor. A decision by the Chancellor is final.

8
9 Members who have been employed for at least 3 consecutive months,
10 shall receive his/her regular salary for 10 days of said leave, at a time
11 requested by the employee. These 10 days of paid leave may be used on
12 an intermittent basis over the 12 months following the birth [sic], adoption,
13 or foster placement, except that the leave may not be charged in
14 increments of less than one day.

15
16 Members of the bargaining unit shall be eligible to use sick day accruals
17 for the purpose of FMLA.

18
19 **B. Promotional Procedures**

20 Article V, Sections C(5)(e), (f), and (g) of the Agreement pertain to Appointment
21 and Reappointment, and state in relevant part:

22 5. The Administration...shall have the right to promote a bargaining unit
23 member to a higher graded position within his/her current Department
24 without having to comply with the posting and search requirements listed
25 in items one (1) through four (4) above, in accordance with the following
26 stipulations:

27
28 e. The Department Head must demonstrate, in writing how each
29 candidate's background and experiences correspond to or deviate from
30 the posted qualifications, requirements, and duties and must demonstrate
31 in writing that the selected candidate is the most qualified.

32
33 f. Following the selection decision, the Department Head will submit all
34 supporting documentation to the Division Head, who will then forward the
35 decision to EEO and Human Resources for approval.

36
37 g. A [unit] member who duly submitted a written request for consideration
38 and was not promoted under this provision may request a meeting with
39 the Department Head to discuss the reasons why she or he was not
40 selected for the promotion. Such meetings will be granted by the
41 Department Head who will also provide written documentation to the
42 member detailing the factors which led to the Department Head's decision
43 not to promote the member. Such factors may include but not be limited

1 to education, training, professional experience or other such factors the
2 Department Head may have considered in making the decision.

3
4 **C. Evaluation**

5 Article V, Section E of the Agreement pertains to Annual Evaluation of Bargaining
6 Unit Members, and states, in pertinent part:

7 1. The parties agree that the evaluation instrument and instructions as
8 contained in Appendix B...shall be the sole exclusive instrument and
9 instructions used for the annual evaluation of unit members.

10
11 The Evaluation Process:

12
13 1. Annually, the supervisor will evaluate each bargaining unit member on
14 or near the member's anniversary date of hire or change of job.

15
16 2. The evaluation shall be recorded in writing. Prior to preparation of a
17 final draft, the evaluator shall meet with the unit member to discuss the
18 evaluation. Each unit member shall receive a complete copy of the final
19 evaluation and shall sign the evaluation to indicate receipt and review. The
20 signature shall not indicate agreement or disagreement with the content.

21
22 3. The unit member shall have the right to respond in writing to the
23 evaluation and to have these comments attached to the official file copy of
24 the evaluation.

25
26 4. The evaluation will be based on the University's and department's
27 mission, goals, and annual objectives on an annual plan of goals and
28 objectives arrived at between the department head and each individual
29 employee. Department heads will ensure that the evaluation process is of
30 a constructive nature and that it will aid the bargaining unit member in
31 correcting any deficiencies. Furthermore, the evaluation should provide
32 opportunity for discussion of evolution in job duties or expectations....

33

34
35 Appeals: Bargaining unit members may appeal their overall rating by
36 submitting in writing to the Division Head evidence that supports their
37 contention. The appeal must be sent within ten (10) working days from
38 the time that the bargaining unit member receives his/her annual
39 evaluation. The Division Head shall render a final decision on the appeal
40 within ten (10) working days of receiving the appeal.

D. Salary Adjustments

On April 1, 2015, the parties executed a memorandum of understanding (MOU) that succeeded their 2012–2014 Agreement. Article VI, Section A.6 of the MOU pertained to Salary and Fringe Benefits, and stated, in pertinent part:

....

Effective January 1, 2015:	1.25% base rate salary increase based on a "satisfactory" performance rating for members who were on the payroll as of December 31, 2013.
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....

Effective July 1, 2015:	1.75% base rate salary increase based on a "satisfactory" performance rating for members who were on the payroll as of July 1, 2014.
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II. King's Tenure (1990 – May 2014)

Beginning in 1990 and continuing through 1993, while King was enrolled as a student at UMD, the Employer hired him as a writing tutor in the Career Resource Center. King graduated in 1993, and in 1994 the Employer hired him as a part-time Web Designer in the Department of Computing and Information Technology Services (CITS). The Employer later promoted King to full-time Web Designer in that same department. In September of 1999, the Employer promoted King to Internet Systems Developer in CITS, where he reported to CITS Director of Internet Development Greg Stone (Stone).

In November of 2003, the Employer promoted King to Internet Development Manager/Webmaster (Webmaster) in CITS where he was responsible for directing, managing, and coordinating all issues for the UMD website, including: web content, design, structure and navigation; approving and recommending all website tools and

1 upgrades; and overseeing the development of website projects. King was also
2 responsible for managing the Web Design and Development Team (Webteam), where
3 he supervised Webteam members and met regularly with them individually throughout
4 the day or weekly. He also assigned projects to Webteam members, delegated tasks to
5 them, and had supervisory authority over student workers and volunteers. At all
6 relevant times, the Webteam consisted of the following positions: web designer, web
7 writer/editor, and web programmer. By July of 2013, King's Webteam consisted of two
8 Web Designers, Hillary Sylvia (Sylvia) and Kathleen Allen, and one Web Writer,
9 Christine Allen.⁵

10 As Webmaster in the CITS department, King reported to Chief Information Officer
11 and Associate Vice Chancellor of Information Technology Donna Massano (Massano),
12 and later reported to Director of Development Carolyn Hamel (Hamel). In 2008, the
13 Employer transferred King's position from CITS to the Office of Public Affairs, where he
14 reported to Assistant Chancellor John Hoey (Hoey).⁶ In or about June of 2013, the
15 Employer transferred King's position to the Marketing Department where he reported to
16 Assistant/Vice Chancellor Renee Buisson (Buisson).

17 **A. June 2013 – December 2013**

18 On or about June 21, 2013, King submitted FMLA documents to the Employer's
19 Human Resources office, requesting paternity leave. By e-mail dated June 28, 2013,
20 UMD Human Resources Generalist Danielle Drabble Almeida (Drabble Almeida)

⁵ To avoid confusion, I refer to Kathleen Allen and Christine Allen by their full names.

⁶ Under Hoey's supervision, King did not maintain UMD's social media webpages (e.g., controlling password and login information). Instead, Hoey performed that duty.

1 notified King that the Employer had approved his request for "FMLA leave for the
2 anticipated dates of 6/20/13 – 6/19/2014," valid for one year. On or about July 1, 2013,
3 the Employer approved a reduced work schedule for King where he would work a few
4 days each week.

5 At some point in July of 2013, the Employer hired Sylvia as Internet Systems
6 Developer/Designer (Web Designer). Around that time King also became a father, and
7 submitted a request on July 16, 2013 for ten days of paid leave.⁷ On July 22, 2013,
8 King met with Buisson to discuss his July 16, 2013 leave request. By e-mail on that
9 same date, King notified Buisson that he would be taking off additional time on the
10 following dates: half-days on July 22, 23, 24, 29, 30, and 31; and full days on July 25
11 and 26, and August 1, 2, 9, 16, 23 and 30.

12 **1. The T4 Conference and the Training**

13 Some of King's duties as Webmaster included working with the CITS Department
14 to upgrade UMD's content management system (CMS) to Terminal Four (T4).⁸ By e-
15 mail on September 23, 2013, Buisson notified King about an upcoming T4 conference in
16 October of 2013. The following day, Buisson met with King to discuss Sylvia's
17 attendance at that conference. By e-mail on October 17, 2013, King confirmed with
18 Administrative Assistant Kathy Beals (Beals) that he and Sylvia would be attending the
19 T4 conference. Around this time, King had also submitted Kathleen Allen's registration

⁷ In addition to recognizing a bargaining unit member's right to take family leave pursuant to the FMLA, Article VI, Section B(l) of the parties' Agreement also provides ten days of intermittent paid leave following the birth of a child. At some point in August of 2013, King had exhausted his contractual entitlement of ten days of intermittent paid leave.

⁸ The CITS department maintained the server on which T4 operated.

1 for the conference, but he later learned that she was unable to attend it.⁹ Although King
2 was responsible for canceling Kathleen Allen's registration, he failed to effectuate the
3 cancelation and the Employer paid for her non-attendance.

4 **2. Sylvia's Complaints and Buisson's Control over the Webteam**

5 At some point between July and November of 2013, while King was taking
6 intermittent family leave, Sylvia complained to Buisson about King's supervision of the
7 Webteam, particularly his failure to inform Sylvia about the work of other Webteam
8 members, and his failure to conduct group meetings with the Webteam. In response to
9 Sylvia's complaints, Buisson unilaterally began scheduling and conducting Webteam
10 group meetings in the fall of 2013.¹⁰ Buisson also began prioritizing many Webteam
11 assignments, sometimes without informing King.¹¹ At no time did either Sylvia or
12 Buisson notify King about Sylvia's complaints.

13 **3. Buisson's Comments about King's Family Leave**

14 On or about November 12, 2013, King contacted Buisson to request FMLA leave
15 to care for his son. Buisson commented that King had "taken a lot of time off" at that

⁹ At some point prior to November of 2013, Kathleen Allen had submitted her resignation as Web Designer. In or around November of 2013, Kathleen Allen resigned from her position as Web Designer, but continued to work with King and the Webteam as a part-time consultant.

¹⁰ Buisson testified that she acknowledged King's supervisory authority over the Webteam, which included his decision to meet individually with Webteam members. However, Buisson admitted that beginning in the fall of 2013, she unilaterally scheduled and conducted Webteam group meetings without first conferring with King.

¹¹ Buisson testified that during her scheduled group meetings she would directly assign specific tasks to the Webteam -- sometimes without prior notice to King. Buisson also testified that she sometimes assigned tasks to the Webteam outside of the group meetings -- without first informing King -- and that she relied on Webteam members to inform King about those outside assignments.

1 point, but she granted his request and he took leave on November 13, 2013. About that
2 same day, King suggested to Buisson that she hire a freelancer to perform the same
3 Google Analytics¹² duties that Kathleen Allen had performed as Web Designer.¹³
4 Buisson rejected King's suggestion but met with the Webteam on November 13, 2013 to
5 discuss Kathleen Allen's departure and the vacant Web Designer position. On or about
6 November 25, 2013, King notified Buisson that he wanted to use additional FMLA leave.
7 Again, Buisson granted the request but reminded King that it was a "busy time" for their
8 Department due to "reduced" staffing. On or about December 5, 2013, King met with
9 Buisson to discuss time off, including sick leave.

10 **4. King's 2012-2013 Performance Evaluation**

11 On or about December 13, 2013, Buisson evaluated King for the 2012-2013
12 academic year (AY), giving him a "satisfactory" rating in the category of
13 "Communication."¹⁴ Buisson informed King that she gave that rating because he failed
14 to submit a timely cancelation of Kathleen Allen's registration at the T4 training
15 conference in October of 2013. In his defense, King explained to Buisson that he had
16 copied her on an earlier e-mail, which included the cancellation. King also expressed
17 regret at having taken his FMLA leave on a reduced or "staggered" schedule rather than

¹² Google Analytics is a digital data storehouse that records all activity on the UMD website. Google Analytics reports show usage, visitor identity, duration of visit, search terms, etc.

¹³ After Kathleen Allen's departure, King performed her Google Analytics duties including preparing related reports for Buisson.

¹⁴ During his review, Buisson also discussed King's performance in the categories of supervisory responsibility, interrelationships, and overall performance. There is no evidence that Buisson discussed with King his performance in the categories of judgment and initiative, independent action, or accountability.

1 all at once. Specifically, he believed that by agreeing to a staggered work schedule, he
2 would be assisting the Webteam by making himself available -- especially to Buisson
3 and Sylvia who were both relatively new to the Webteam. King also believed that his
4 staggered schedule benefited both the Webteam and the Marketing Department based
5 on his ability to work two or three times a week, including half days.

6 In defense of the remaining parts of his 2012-2013 evaluation, King showed
7 Buisson that his workload had actually increased even though he was working on a
8 reduced schedule. For instance, he had assumed some of Kathleen Allen's former
9 duties, he was still assisting Sylvia's transition into her position as the newly-hired Web
10 Designer, and he was now performing duties that he had previously delegated to the
11 Webteam. Specifically, King complained that when Buisson assigned priority tasks to
12 the Webteam, those assignments prevented him from assigning his own projects to
13 Sylvia and Christine Allen because they were already too "busy" prioritizing Buisson's
14 projects. Last, King complained to Buisson that it seemed like she was punishing for
15 him taking off time to care for his family.

16 On or about December 18, 2013, King met with UMD Interim Equal Employment
17 Opportunity Director Deb Majewski (Majewski) telling her that Buisson had given him an
18 "extremely hard time whenever [he] brought up time off or requested FMLA." At some
19 point on or around December 23, 2013, King requested FMLA leave for December 24,
20 2013. By e-mail on December 23, 2013, Drabble Almeida notified King that the
21 Employer had granted his request for FMLA leave on December 24, 2013.

22 **B. January 2014 – May 2014**

23 **1. The T4 Upgrade**

1 At some point between late December 2013 and January 2014, King provided
2 Buisson with a T4 update. In addition to working with Buisson, the Webteam, and
3 Massano in CITS, King effectuated the T4 upgrade by also working with Web
4 Development Specialist Mary Avery (Avery),¹⁵ Assistant Vice Chancellor of
5 Administrative Services Michael P. LaGrassa (LaGrassa), CITS Interim Chief
6 Information Officer Holgel Dippel (Dippel), and the overseas T4 contractors Laura
7 Murphy (Murphy) and Barry Flannery (Flannery).

8 By e-mail chain beginning on or about January 17, 2014, King corresponded with
9 Buisson, Murphy, and Flannery concerning the T4 upgrade. On January 21, 2014, King
10 notified Murphy and Flannery about his concern that the T4 "timeline and project
11 plan...seems to be taking so long," and that he would follow-up with Flannery the next
12 morning, and organize a "small, diligent testing group" for the upgrade. On January 21,
13 2014, Flannery created a T4 "ticket" to address King's concerns; and, by reply e-mail,
14 Buisson instructed King to assess the T4 ticket and report back to the Webteam.

15 By e-mail on January 27, 2014, Buisson notified Massano that Steve Splinter's
16 (Splinter) role with T4 would be ending.¹⁶ By reply e-mail on January 28, 2014,
17 Massano notified Buisson that she wanted to meet with the Webteam to discuss
18 Splinter's T4 duties. By e-mail on January 29, 2014, King contacted Buisson about

¹⁵ As Web Development Specialist, Avery worked in the Academic Affairs Department where she assisted the Webteam with the T4 upgrade. In or about March of 2015, the Employer promoted Avery to Web Development Coordinator and moved her to the Marketing Department where she reported directly to Buisson. While Avery sometimes worked with the Webteam, she neither reported to King nor exercised supervisory authority over him or the Webteam.

¹⁶ Prior to 2011 or 2012, Steve Splinter worked for King as a Web Programmer. In or about 2011 or 2012, the Employer employed Splinter in another department at UMD.

1 possibly meeting on January 30, 2014 and/or February 3, 2014. On or about January
2 27, 2014, King began performing Splinter's T4/CMS Administrator duties.¹⁷

3 On or about February 3, 2014, King met with Buisson to discuss his FMLA leave
4 and informed her of his request to meet jointly with the Employer and the Union to
5 clarify his right to take family leave. During their meeting, Buisson initially requested
6 that King give her advanced notice and be more flexible about when he took his family
7 leave. King objected to Buisson's request, and the next day sent Majewski a formal
8 request to meet, which they later did.¹⁸ Around that time, Buisson also contacted
9 Human Resources who confirmed that Buisson could not restrict King's use of family
10 leave. On or about February 7, 2014, King met again with Buisson to discuss his FMLA
11 leave. During that meeting, Buisson apologized to King for her confusion about his
12 family leave, and stated that she would refrain from "bother[ing]" him about it, which she
13 did.

14 **2. King's Inadvertent Publication of T4 Material**

15 On or about February 4, 2014, King inadvertently approved the publication of T4
16 material onto the UMD website that was "pending approval" but not yet "approved."¹⁹

¹⁷ Pursuant to a February 12, 2014 e-mail to King, Splinter listed the tasks that he performed as the T4/CMS Administrator, which included: channel maintenance; recycling deleted content; approving content; updating TinyMCE configurations; user account administration; section maintenance; content types; page layout maintenance; lists; navigation objects; media library; external data source integration; transfer manager; miscellaneous.

¹⁸ King testified that he could not recall the date on which he met with Majewski.

¹⁹ King testified that prior to assuming the T4/CMS Administrator duty, UMD had experienced inadvertent publications of T4 material, which had occurred on an infrequent basis. King also testified that when the T4 accident occurred, he had been CMS Administrator for only a few weeks. The Employer did not rebut this testimony.

1 His approval resulted in the publication of approximately 500 “pending” files onto the
2 website—most of which were “test pages.” After noticing his mistake, King notified
3 Buisson, the Webteam, CITS, and Splinter by e-mail on February 4, 2014. Later that
4 same day, Avery assisted King by identifying the inadvertently-published material,
5 changing all statuses to “inactive,” and removing its publication from the UMD website.
6 At some point on February 4 or 5, 2014, Sylvia and Splinter also assisted King, and
7 King and Flannery scheduled a time to meet to discuss T4.

8 King continued to work on resolving the T4 issue on February 5, 2014, even
9 though it was a “snow” day. Specifically, his work involved testing UMD webpages,
10 reviewing social media sites for content removal, and checking search engines to
11 ensure that the published material was deleted. On this day, King made a second
12 attempt to contact Buisson via voicemail, and also corresponded with Flannery and
13 Dippel to apprise them of the T4 issue. By e-mail on February 6, 2014, King notified
14 Buisson, Dippel, and the Webteam that he would be sending a campus-wide message
15 to explain the accident and corrective steps.²⁰ On February 7, 2014, Buisson met with
16 King to discuss T4. She informed him that “mistakes happen” and directed him to
17 “move forward.”

18 By e-mail on February 10, 2014, King notified University of Massachusetts
19 Dartmouth School of Law (Law School) student/web developer Eric Marshall (Marshall)
20 about the T4 accident, informing Marshall that he had changed the status of all

²⁰ After the accident, King testified that he had implemented a new practice of single-section deletions, and ceased all “bulk” deletions and bulk approvals that had previously occurred under Splinter. King also testified that he revised the UMD’s website policy to reflect these changes. The Employer did not rebut this testimony.

1 published files to "inactive," and that he was postponing the deletion of "inactive" files
2 until February 18, 2014. On or about February 14, 2014, King had "contained" the T4
3 issue by instructing the Webteam to change the status of all affected files from "inactive"
4 to "pending." By conference call on February 27, 2014, King spoke with Flannery,
5 Sylvia, and Splinter once more regarding T4.

6 **3. Buisson's Increased Control over the Webteam**

7 At some point prior to February 20, 2014, Buisson instructed King to provide her
8 with a memorandum related to the T4 upgrade, and King delegated the task to Christine
9 Allen. On or about February 20, 2014, Buisson met with King and Christine Allen, and
10 admonished King for delegating that task. King first waited for Christine Allen to leave
11 the meeting, then asked Buisson to confirm whether he had the supervisory authority to
12 delegate duties to the Webteam. Buisson told King that he had the supervisory authority
13 to delegate tasks to the Webteam, but informed him that she wanted him to prioritize
14 tasks for her and did not want anyone other than him to perform them. King then told
15 Buisson that she was wrong for admonishing him in front of Christine Allen, and that he
16 felt "out of the loop" when Buisson assigned priority tasks directly to the Webteam
17 without first informing him. King also repeated to Buisson that it seemed like she still
18 had an issue with his FMLA leave.

19 On or about March 27, 2014, Buisson permitted King to delegate some duties
20 related to the T4 upgrade. However, on or about April 29, 2014, Buisson unilaterally
21 assigned priority tasks to Christine Allen and Sylvia without first notifying King.

22 **4. King's Job Description**

1 In or about 2008, King notified the Employer that he wanted to discuss updating
2 his job description as Webmaster, but Hoey tabled that discussion due to the 2008
3 budget crisis. When the Employer transferred King's position to the Marketing
4 Department in or about June of 2013, King first contacted Buisson on July 16, 2013 to
5 discuss upgrading his job description. He met with Buisson on July 22, 2013, and by e-
6 mails on September 6 and 12, 2013, invited her to meet again on September 13, 2013²¹
7 to continue the discussion.

8 By e-mail on October 8, 2013, Drabble Almeida provided King with a copy of his
9 current job description. By telephone on or about October 23, 2013, King spoke with
10 Buisson about upgrading his job description, and on November 4, 2013, they met. By
11 e-mail on November 4, 2014, King provided Buisson with copies of his original job
12 description and a revised version of it. Buisson and King met again on November 12,
13 2013 to discuss his job description, and by e-mail that same day King provided Buisson
14 with copies of additional revisions.

15 On or about December 13, 2013, King and Buisson continued to discuss possible
16 upgrades to his job description. They met again on or about February 3, 2014, to
17 specifically discuss the inclusion of Splinter's former T4/CMS Administrator duties to
18 King's job description. By e-mails on February 12, 2014, Splinter provided King with a
19 complete list of his T4/CMS administrative duties, which King immediately forwarded to
20 Buisson. At some point between February 14 and 24, 2014, King and Buisson
21 continued their discussion of possibly adding the T4/CMS Administrator duties to King's

²¹ Although a meeting took place on that day, neither King nor Buisson recalled whether they discussed upgrades to King's job description at that time.

1 job description. By follow-up e-mail on February 24, 2014, King notified Buisson that he
2 would provide her with a “breakdown” of Splinter’s T4/CMS Administrator duties, which
3 he did by e-mail on February 26, 2014. On or about February 18, 2014, Buisson
4 informed King that she would no longer meet with him to discuss his job description.
5 King notified Buisson by e-mail on February 24, 2014, that he would provide her with
6 final updates to his job description, which he did by e-mail on February 26, 2014.

7 On or about March 17, 2014, King provided Buisson with advanced notice of his
8 intent to take extended FMLA leave in April of 2014. On or about that same day, King
9 asked Buisson about the status of his job description, and she replied that it was
10 “moving along.” On or about March 25, 2014, King spoke with Buisson about his family
11 leave.²² By e-mail on March 26, 2014, King notified Buisson that he was taking FMLA
12 for the weeks of March 31 – April 4, 2014, and April 14 - 18, 2014. By separate e-mail
13 that same day, King reminded Buisson about her commitment to “forward an updated
14 version of [his] job description revision.” On or about March 26, 2014, Buisson
15 submitted to the Employer a final draft of King's revised job description; but she did not
16 copy King on that submission. On or about March 27, 2014, Buisson provided King with
17 a copy of his revised job description, which did not include the previously-discussed
18 upgrades (e.g., the T4/CMS Administrative duties), and which removed some duties
19 that King had previously performed (e.g., supervising the Webteam and student
20 workers).²³ At no point between July of 2013, when King first contacted Buisson about

²² On March 25, 2014, King also requested a reduced schedule to pursue a master’s degree “on work time.” Buisson denied this request, explaining that a reduced schedule was “not possible” for that purpose.

1 upgrading his position, and March of 2014, when they last met to discuss his upgrade,
2 did Buisson ever inform King that his performance was deteriorating.

3 **5. The New Director Position**

4 At some point on or prior to March 5, 2014, Buisson decided that she wanted to
5 hire an employee who possessed more “project management skills, leadership, vision,
6 and communication skills.” Buisson based this decision on her opinion that King neither
7 possessed the “vision” nor the “skill set to take the [UMD] website to the next level.”
8 Thus, on or about March 5, 2014, Buisson met with Sue Wilbur (Wilbur) from the UMD
9 Human Resources Department to create a new job posting for the position of Director of
10 Web Systems and Communications (Director) in the Marketing department.

11 On or about March 27, 2014, Buisson provided King with a copy of the Director
12 position, which included some of the duties that King had previously performed as
13 Webmaster, including supervision over the Webteam. By e-mail on April 4, 2014,
14 Buisson notified the Webteam, along with Union Chairperson Bruce Sparfven
15 (Sparfven), and Human Resource Employment Specialist Leslie Mecure (Mecure), that
16 the Employer was posting the Director position, and that all applications were due by
17 April 15, 2014. At some point between April 15 and May 9, 2014, the Employer
18 interviewed candidates for the Director position. King and Sylvia were the only two
19 applicants. Sylvia submitted her application for that position on or about April 7, 2014.
20 King submitted his application on April 15, 2014.

²³ There is no evidence in the record that the Union filed a grievance challenging the Employer's 2014 revisions to King's job description.

1 By e-mail on April 22, 2014, King thanked Buisson for the opportunity to interview
2 for the Director position and provided her with web links for his web design work. By
3 follow-up email the next day, King also provided Buisson with examples of portal pages
4 that he had "designed/developed and then worked on over a number of years with
5 several Webteam designers."

6 **6. Sylvia's Promotion to Director and King's Family Leave**

7 On or about May 9, 2014, King learned that the Employer had offered the
8 Director position to Sylvia, which she accepted. Although King remained Webmaster
9 and continued to be responsible for certain projects, project timelines and reports, he
10 now reported directly to Sylvia and no longer supervised the Webteam or student
11 workers.

12 By e-mails on May 9, 12, and 14, 2014, King informed Sylvia of his intent to take
13 personal leave on the following dates: May 9, 12, 13, 14, 15, 19-23, 2014. By email on
14 May 14, 2014, King also notified Sylvia that his "FMLA time period ends June 19[,
15 2014]," and that he would be taking summer vacation on the following Fridays: "May 30,
16 June 6, 13, 20, 27, July 11, 18, 25, August 1, 8, 15, 22, 29[, 2014]." At some point
17 between May 9 and 13, 2014, Sylvia questioned King's use of FMLA leave, specifically
18 asking if King understood the message he was sending to the Webteam and his
19 supervisors by using family leave. When King asked Sylvia to clarify her question,
20 Sylvia responded that the situation was "disgusting." On or about May 13, 2014, King
21 met with Majewski to discuss his ongoing concerns about his right to use family leave.
22 By e-mails on May 29, 2014 and June 2, 2014, King informed Sylvia that he would be
23 taking personal leave on those same days.

1 On or about June 9, 2014, King met with Sylvia to discuss his use of family leave.
2 At that meeting, Sylvia informed King that she had spoken with UMD Director of Labor
3 Relations Kim Sylvia who told her that she could deny King's use of family leave for
4 certain reasons. At that point, King asked Hillary Sylvia if they could meet together in
5 his office with Union Grievance Officer Verena Lisinski (Lisinski).²⁴ When Lisinski
6 arrived at the meeting, Hillary Sylvia repeated Kim Sylvia's statements about her
7 authority to approve King's use of family leave. Lisinski corrected Hillary Sylvia by
8 stating that UMD had already approved King's request for leave on June 28, 2013, and
9 that Hillary Sylvia could not deny that request even though she was now King's
10 supervisor.

11 In response to Lisinski, Hillary Sylvia stated that King's use of family leave was
12 "disrespectful" to the Webteam because it created the burden of an additional workload.
13 Lisinski responded that workload was something that Hillary Sylvia had to decide as a
14 manager. Lisinski also stated that King had a right to use intermittent, 12-month family
15 leave pursuant to the Agreement and under the law. Hillary Sylvia then told Lisinski and
16 King that she was the "head of her household," and asked them how it would look if she
17 took "all this time off." Lisinski responded that Hillary Sylvia wasn't alone because both
18 Lisinski and King were heads of their respective households. Lisinski then explained
19 that Hillary Sylvia had a right to use family leave if the Employer approved her use of
20 that time, and that the Union would support her right to use it. At that point, Hillary

²⁴ At all relevant times, Lisinski was also employed at UMD as Senior IT/Project Change Manager in the CITS department.

1 Sylvia stated that she was “not a fan of unions.”²⁵ King interjected by informing Hillary
2 Sylvia that he was taking family leave because his wife was sick. By the end of the
3 meeting, Sylvia acknowledged the accuracy of Lisinski’s statements concerning family
4 leave, and apologized to King.

5 **7. King’s Grievance**

6 When King learned that the Employer had promoted Sylvia to the Director
7 position, he contacted the Union on or about May 9, 2014. By e-mail on May 13, 2014,
8 Sparfven contacted UMD Assistant Vice Chancellor of Human Resources Carol Santos
9 (Santos), requesting written reasons for King’s non-promotion pursuant to Article V.C.2

²⁵ Both King and Lisinski testified that Hillary Sylvia had stated during their June 9, 2014 meeting that she was “not a fan of unions” and that King’s use of family leave was “disrespectful.” Sylvia testified that she did not make those statements, and that she was actually a “fan of unions” based on her husband’s membership in two educational unions. Sylvia also testified that she personally appreciated the job security that unions provided. She testified further that during their meeting on June 9, 2014, Lisinski told her to “to be careful of things that she says or asks for” because the Employer could terminate Sylvia pursuant to the contract and UMD policy. Lisinski denied making those statements to Sylvia at that time, testifying instead that she made those statements to Sylvia one year prior, in or about the summer of 2013, when UMD first hired Sylvia. Specifically, Lisinski testified that in her capacity as Union representative, she had lunch with Sylvia and another newly hired employee to explain the terms of their probationary employment status. While I credit Sylvia’s testimony that Lisinski told Sylvia “to be careful of things that she says or asks for” because the Employer could terminate Sylvia pursuant to the terms of her probationary status, I do not credit Sylvia’s testimony that Lisinski made those statements at the June 9, 2014 meeting. Instead, I find that Lisinski made those statements in the summer of 2013 when she had lunch with Sylvia to explain the scope of her employment. I base this finding on Lisinski’s specific recollection of events that took place at the 2013 luncheon which included another newly hired employee. I also base my finding on the Employer’s failure to rebut Lisinski’s testimony about the 2013 luncheon. Next, I credit the corroborative testimonies of King and Lisinski that Sylvia had stated at the June 9, 2014 meeting that she was “not a fan of unions,” and that King’s use of family leave was “disrespectful” to the Webteam. I base this credibility determination on the specific recollections of King and Lisinski, and on Sylvia’s misplaced recollection about Lisinski’s 2013 statements, which Sylvia erroneously believed occurred at the June 9, 2014 meeting.

1 of the contract. By memorandum dated May 16, 2014, Santos replied to Sparfven's
2 request, explaining the reasons for King's non-promotion.

3 By letter dated June 2, 2014, Lisinski filed a grievance on behalf of King pursuant
4 to Article V, Sections C(5)(e), (f), and (g) of the parties' Agreement, challenging the
5 Employer's decision not to promote King, and alleging that Santos' May 16, 2014 letter
6 failed to provide the Union with all of the contractually-required information.²⁶ On June
7 30, 2014, the Employer conducted a level II grievance hearing, where the Union argued
8 that the Employer's reasons for not promoting King to the position of Director were
9 based partly on his use of family leave. By letter dated August 26, 2014, Kim Sylvia
10 denied King's grievance, stating in pertinent part:

11 In accordance with Article V Section C.2 of the [Agreement,] the University
12 furnished [Sparfven] on May 16, 2014 a written memo highlighting the
13 selection criteria and the reasons that [King] was not selected for the
14 position. The non-selection memo does not reference [King's] time off.
15 The memo provided speaks to the position's duties and qualifications and
16 [King's] abilities and the examples of his experiences that he provided
17 during the interview process.

18
19 The grievant/[U]nion did not produce this memo at the hearing and did not
20 argue the points provided as reasoning for the non-selection. After the
21 meeting, [King] provided a copy of the Director... job description and listed
22 his years of experience.

23

24
25 Buisson followed the correct procedure as outlined in the [Agreement], in
26 making her final selection. As the hiring authority, she exercised her
27 discretion to place emphasis on measures or indicators upon which the
28 relative qualifications of the applicant were fairly judged. Based on her
29 due diligence, interview with the candidate and work history observed
30 while supervising [King], she was able to clearly articulate how [King's]

²⁶ Around this time King also became the Union's "Recorder" who gave unit members contract advice "from time-to-time." The Union did not clarify King's duties and responsibilities as Recorder, and did not present evidence showing that the Employer was aware of King's new Union position.

1 experiences did not fit the qualifications of the posted position and why the
2 selected candidate was the most qualified.

3
4 For this reason the grievance is denied.

5
6 By letter dated September 10, 2014, Lisinski filed a Level III grievance with UMD
7 President Dr. Robert L. Caret (Caret), alleging that the Employer violated Article V,
8 Sections C(5)(e), (f), and (g) of the Agreement because the "information provided by the
9 Administration did not adequately or accurately portray Mr. King's qualifications for the
10 position that he held for 15 years at the [UMD], which are directly in line with the
11 experience and qualifications required for the promotion." By that letter, the Union also
12 alleged that the Employer's "decision was discriminatory based upon Mr. King's use of
13 FMLA during the first year after his son's birth, to which Ms. Buisson made mention on
14 many occasions."

15 On October 2, 2014, the Employer conducted a Level III grievance hearing via
16 conference call. By memorandum dated October 24, 2014, UMD Interim Chief Human
17 Resources Officer Andrew Russell (Russell) notified the Union that the Employer had
18 denied King's grievance at Level III, stating in part:

19 After taking into consideration the information presented at the hearing,
20 considering the prior decision by Kim Sylvia, and reviewing the materials
21 provided by both the Union and by campus management, our office finds
22 that there have been no violations of the Agreement. We uphold the
23 decision issued in response to the Level I grievance, and find
24 that...Buisson followed the process prescribed by the Agreement. With
25 regard to the "feeling" that the non-selection of Mr. King was in some way
26 discriminatory based on his use of time under FMLA, although the
27 documentation presented demonstrates that there was confusion among
28 the parties concerning the rules that govern FMLA, we find there is no
29 evidence to support the allegations of discrimination.

30
31 Finding no violations of the Agreement, the grievance is denied.

32
33 On November 24, 2014, the Union filed a demand for arbitration.

III. King's Performance Evaluations

A. September 1999 - November 2013

Between September of 1999 and December of 2013, King had several different supervisors who evaluated him annually. In December of 2000, CITS Director of Internet Development Stone evaluated King for the period between September 19, 1999 through September 19, 2000 (1999-2000 AY), giving King an overall performance rating of "very good," and six individual ratings in the following categories:

- Judgment and Initiative – very good;
- Independent Action – outstanding;
- Accountability – very good;
- Interrelationships – outstanding;
- Communication – very good;
- Supervisory Responsibility – satisfactory.

In October of 2006, CITS Director of Development Hamel evaluated King for the period of September 19, 2005 through September 18, 2006 (2005-2006 AY), giving him an overall performance rating of "outstanding," with individual ratings in the following six categories:

- Judgment and Initiative – very good;
- Independent Action – outstanding;
- Accountability – very good;
- Interrelationships – outstanding;
- Communication – outstanding;
- Supervisory Responsibility – outstanding.

In January of 2008, Hamel evaluated King for the period of September 19, 2006 through September 18, 2007 (2006-2007 AY), giving him an overall performance rating of "outstanding," with individual ratings in the following six categories:

- Judgment and Initiative – outstanding;
- Independent Action – outstanding;
- Accountability – very good;
- Interrelationships – outstanding;

- Communication – very good;
- Supervisory Responsibility – very good.

On or about November 29, 2012, Assistant Chancellor Hoey evaluated King for the period of September 19, 2011 through November 30, 2012 (2011-2012 AY), giving him an overall performance rating of “very good,” with individual ratings in the following six categories:

- Judgment and Initiative – very good;
- Independent Action – very good;
- Accountability – outstanding;
- Interrelationships – very good;
- Communication – very good;
- Supervisory Responsibility – very good.

On or about December 5, 2013, Hoey and Buisson evaluated King jointly for the period of December 1, 2012 through November 30, 2013 (2012-2013 AY),²⁷ giving him an overall performance rating of “very good,” with individual ratings in the following six categories:

- Judgment and Initiative – very good;
- Independent Action – outstanding;
- Accountability – very good;
- Interrelationships – very good;
- Communication – satisfactory; and
- Supervisory Responsibility – very good

B. December 2013 - November 2014

At some point on or prior to November 25, 2014, Buisson and Sylvia met to discuss their evaluation of King for his annual performance review during the period of

²⁷ While the Employer listed Hoey as King’s “Supervisor” on his 2012-2013 evaluation, both Hoey and Buisson signed that document in their shared capacity as King’s “Immediate Supervisor.”

1 December 1, 2013 through November 30, 2014 (2013-2014 evaluation).²⁸ Around this
2 time, both Buisson and Sylvia completed King's 2013-2104 evaluation by making written
3 comments, while Buisson approved King's final ratings.²⁹ On November 25, 2014,
4 Sylvia met with King and conducted his annual performance review. At the end of their
5 meeting, Sylvia provided King with a final copy of his evaluation, and instructed him to
6 sign it by November 28, 2014. By e-mail on November 25, 2014, Sylvia notified
7 Buisson that she had conducted King's 2013-2014 evaluation.³⁰

8 King's 2013-2014 evaluation stated in pertinent part:

²⁸ Buisson testified that she did not recall having specific conversations with Sylvia about King's 2013-2014 evaluation. However, because Sylvia testified to editing Buisson's comments in that evaluation, and because Sylvia met with King on November 25, 2014, and presented him with a written copy of it on that date, I find that Buisson and Sylvia met at some point on or prior to November 25, 2014 to discuss the final version of King's 2013-2014 evaluation.

²⁹ Buisson testified that she evaluated King in November of 2014 based on overseeing his work prior to Sylvia's promotion in May of 2014. Sylvia testified that Buisson had authored all of King's evaluation comments and approved all final edits in his 2013-2014 evaluation. Sylvia also testified that she made only minor edits to Buisson's comments in King's 2013-2014 evaluation; however, Sylvia conceded that some comments were based on her observations of King when he was her supervisor. Sylvia also conceded that she referred to herself as "I" throughout King's evaluation. While I credit Sylvia's testimony that Buisson approved all comments in the final version of King's 2013-2014 evaluation, I discredit Sylvia's testimony that her role in evaluating King consisted only of making minor edits to Buisson's commentary. Many of the comments in King's 2013-2014 evaluation referred to Sylvia either in the first person (i.e., "I") or in the third person (i.e., "Hillary"). Many other comments in that evaluation referred to Buisson in the third person (i.e., "Renee" or "she"), and referred collectively to Sylvia and Buisson as either "we" or "Renee and I." Further, there is no evidence that Buisson made any first person or third person references in King's previous 2012-2013 evaluation, even though both Buisson and Hoey evaluated King pursuant to their shared supervisory capacity during that evaluation period. Rather, the overlapping personal references in King's 2013-2014 evaluation appear for the first time only after Sylvia became his supervisor. Based on the totality of this evidence, I find that Sylvia was the primary author of the comments in King's 2013-2014 evaluation, and that her participation in King's evaluation consisted of more than just making minor edits to Buisson's commentary.

1 II. EVALUATION PROFILE:

2

3
4 B. Goals and Objectives5
6 [King] had three goals that we identified last year:

- 7
-
- 8 1. [King]
- will oversee the transition of web content to the portal.*
- [King]
-
- 9 has not been involved in the portal development.
- ³¹
- As a new
-
- 10 employee, I volunteered to become involved from a design and user
-
- 11 interface perspective, and [King] did not offer[] oversight or input. An
-
- 12 asset inventory of what might be moved to the portal would have been
-
- 13 valuable since he knows the website so well, but [he] has not offered
-
- 14 that level of leadership.
- ³²
- The strong affinity between websites and
-
- 15 intranets means this is definitely an area where the webmaster should
-
- 16 be intimately involved in understanding how they can effectively work
-
- 17 together. Under professional development last year, Renee specified
-
- 18 that he would need to learn more about Liferay, the portal product.
-
- 19
-
- 20 2. [King]
- will oversee the transition of the [Website] as we upgrade the*
-
- 21
- CMS. He will serve as the main point of contact with [T4] to ensure we*
-
- 22
- achieve what we need.*
- [King] did oversee the upgrade. He was the
-
- 23 main liaison with the vendor and communicated to the group at regular

³⁰ At some point on November 25, 2014, King also requested a vacation day for November 28, 2014, and Sylvia approved his request.

³¹ Buisson testified that when King supervised Sylvia, Sylvia had taken initiative, volunteered to work on the portal design, and eventually became the liaison between the Marketing and CITS Departments on that project. Buisson also testified that while King had historical knowledge of the UMD website, he failed to offer suggestions about how to improve it, and failed to offer Sylvia more direction regarding how to complete the assignment. Specifically, Buisson testified that Sylvia was doing all of the design work that "[she] could see," whereas King's designs were "older and out of sync." The Employer did not offer evidence to clarify why Buisson had conflated her evaluation of King in the area of portal design with Sylvia's performance on the portal design project while Sylvia was King's supervisor.

³² Buisson testified that King failed to create an asset inventory. She also testified that he lacked leadership because he was quiet in group meetings and did not provide her with status updates after those meetings. While King was "enthusiastic about the website," Buisson testified that he "lacked depth compared to other webmasters with whom [she had] worked." Buisson testified further that she expected King to be more involved with assisting CITS and providing Sylvia with more insight regarding the transition of web content to the portal.

1 meetings. However, a written project management plan we requested
 2 by Renee [sic] in order to make sure the process went smoothly [sic].
 3 He did not create a testing plan.³³ The need for a plan became so
 4 great that I created a low level plan to help the group stay on task.
 5 Renee also requested a memo be sent to T4 users at [UMD] and this
 6 was not done (prior to upgrade, describing the timing of the upgrade).
 7

8 3. *[King] will designate resources and help oversee the implementation*
 9 *[of] the new academic web pages.* [King] hired a former employee to work
 10 on the project, but support ended there. Even when we were slow making
 11 progress with this project, he did not offer support or advice to help move
 12 the process along. He has not performed any specific project work to
 13 support the implementation.³⁴
 14

15 C. Evaluation Factors

- 16
- 17 • Judgment and Initiative:
- 18 Satisfactory.
- 19

20 Comments:

21 [King] works hard on projects he has been assigned or that people
 22 request from him. He is not clear on how to prioritize projects and
 23 resources based on the priorities of the department and organization.
 24 He works on projects in the order in which they are requested and/or
 25 assigned and does not have conversations or make recommendations
 26 about order of priority. He will work on projects without necessarily
 27 keeping the University Marketing Team, or the Web team, well informed
 28 of projects that may be of importance to others. [King] is making
 29 improvements in this area and we are now having weekly meetings to
 30 share this information.
 31

³³ Buisson testified that King failed to provide her with a testing plan, which was a “very big project” because it entailed rewriting 83 pages and would take about a year to complete. Buisson also testified that it took a long time for King to get a project plan from T4, and that there was no testing plan for moving content from servers to the cloud. She testified further that King did not give a lot of advice to the Webteam about the technical aspects of T4, and that he usually let Splinter handle that subject without further instruction to the Webteam.

³⁴ Buisson testified that while King maintained contact with the outside designer, he “did nothing specific” and had no ideas or recommendations on how to complete implementation of the new academic web pages. Buisson acknowledged that King did hire someone to help oversee the project, but she testified that he never completed the project and was unable to articulate his project priorities to her.

1 He has spent a great deal of time and effort helping the University
 2 update the Course Catalog this year and learning more about the
 3 system. This is very helpful. Sometimes he takes on parts of the project
 4 that he should not, which is part of judgment he needs to refine. For
 5 example, Renee was clear that he had to stop because Chris Kaylor
 6 was the subject matter expert, not him.³⁵

7
 8 He has also assumed responsibility for [the] slider on the homepage
 9 and has done a nice job on selecting photos to appear. He does not
 10 generally offer suggestions of what type of information could appear on
 11 the slider and this would be a valuable addition to his contributions.

- 12
- 13 • Independent Action:
- 14 Satisfactory.
- 15

16 Comments:

17 [King] will often meet with people throughout the University to discuss
 18 web projects and offer to help them. Issues arise when he offers to help
 19 with a project and does not adequately communicate his projects to the
 20 rest of the team. This affects the selection of priorities and it also does
 21 not allow us to connect web projects to the initiatives of the rest of the
 22 University Marketing Team. Also, some of these projects require more
 23 consultation, and [King] generally seems to give people what they ask
 24 for instead of offering higher-level advice. [King] doesn't raise issues
 25 within the [Webteam] to determine if other resources are needed for
 26 projects that have been requested of him.

27
 28 Specifically, he worked on a Career Development site for the "Purple
 29 Briefcase" and had not really sought any team feedback on the project.

30
 31 [King] had complained to Renee on a number [of] occasions that he did
 32 not have access to the institution's social media sites. When she got
 33 access and offered it to him, he declined saying that he didn't see that
 34 as part of his role as Webmaster. He does not pursue new

³⁵ Buisson testified that she based her rating in this category on King's inappropriate removal of courses from "Acalog" which is a software system used by UMD to manage its academic course catalog. Specifically, in or about February or March of 2014, Buisson directed King to prioritize the upgrades for UMD's CMS via Acalog. She also directed King to train Acting Registrar Chris Kaylor on how to remove courses from the UMD academic course catalog by using Acalog. Around that time, Buisson conducted a Webteam meeting where she admonished King for removing courses from the catalog because it was not his "area of expertise." The Union did not rebut Buisson's testimony on this point.

1 technologies that could better serve our constituents and make our
2 website more effective.

- 3
- 4 • Accountability:
- 5 Marginal.³⁶
- 6

7 Comments:

8 [King's] accountability for his work is sporadic. There was an instance
9 when he made a significant mistake that affected the entire website.
10 He inadvertently published information that had been in the sandbox.
11 He brought [Webteam] members together and asked all of them to
12 help him, which they did; and then the University had a snow day and
13 he did not work on this problem from home. The other members of the
14 team did. He did not demonstrate his commitment to correcting his
15 own mistake.

16
17 Renee had asked for a written project management plan for the T4
18 upgrade. [King] did not put together that document although Renee
19 had clearly stated that it was his responsibility. I (Hillary) put it together
20 to ensure that we completed all tasks before it went live. Another
21 project that has still not been completed is departmental policies.
22 Renee had asked him to draft Web policies last January and Renee or
23 I have not yet seen a draft. He was even told that he could use the
24 UMass Boston policies as a model.

25
26 [King] tends to "forward" requests for web issues to other staff or
27 departments;³⁷ we are working towards a model to research the issue

³⁶ Buisson testified that she gave King a "marginal" rating in this area because he failed to inform the Law School about the T4 incident until one week later, and refused to work from home on the day the accident because it was a "snow" day. King testified that he did work from home during the disputed snow day, and the Union presented documentary proof of his work. Specifically, by e-mails on February 4 and 5, 2014, King notified Buisson of the accident and then worked to correct the mistake on those days with the Webteam, Splinter, Avery, Murphy and Flannery. On those days, King also tested UMD webpages, checked search engines, and performed other tasks related to T4. On cross-examination, Buisson admitted that she did not give King an opportunity to review his 2013-2014 evaluation prior to finalizing it, and did not give him an opportunity to provide evidence to rebut some of her comments (e.g., showing that he had worked on the snow day in February of 2014). Based on this evidence, I credit King's testimony that he did work from home on the snow day in February of 2014, and that Buisson inexplicably denied King the opportunity to correct this fact in his 2013-2014 evaluation.

³⁷ Buisson testified that in her professional experience with other webmasters, they would first attempt to resolve an issue before forwarding it to other people. However, King would forward clients' requests to other staff and departments (e.g., CITS) before attempting to resolve them himself. Specifically, Buisson testified that Sylvia had

1 and attempt to solve it first. If [King] tries to solve problems it will
 2 provide him with valuable skills to support future projects for the Web
 3 team and our clients. This level of attention to detail also helps ensure
 4 satisfactory completion of the project for the requesting party.

- 5
- 6 • Interrelationships:
- 7 Satisfactory.
- 8

9 Comments:

10 [King] has done a great deal of history to contribute to the team and he
 11 needs to be more comfortable with communicating what he is working
 12 on with the rest of the [Webteam] and the [U]niversity [M]arketing
 13 [T]eam so that we can integrate our efforts. Stronger internal
 14 relationships within the University Marketing [T]eam will improve our
 15 overall productivity and effectiveness.

16

17 [King] is very accommodating with people outside the University
 18 Marketing Team, and Renee has received positive feedback. Renee
 19 and I have found that [King] does exactly what people ask of him, so
 20 they are satisfied.

21

22 We would like [King] to bring people together to accomplish projects
 23 that have been requested of him. He is more of a lone wolf and
 24 sometimes neglects to involve other members of the team in projects.
 25 When he was a supervisor, he assigned all the projects to other people
 26 and did not clearly identify what pieces he would do. He also did not
 27 have the team come together to decide how to work on project, they
 28 met with him on an individual basis.

- 29
- 30 • Communication:
- 31 Marginal.³⁸

complained about King's inability to handle certain website problems, and that King often forwarded those problems to the Webteam or to Splinter for resolution.

³⁸ Buisson testified that she gave King a "marginal" rating in this category for several reasons. First, she asked King to write a memorandum about the T4 upgrade and gave him several weeks to accomplish that task, but he never completed it. When Buisson directed King not to assign the task to Chris Allen, King ignored her directive and delegated the task to Allen. When Buisson asked King to produce other memoranda, she testified that they were usually just one page, which demonstrated marginal communication on King's part. Buisson also testified that King had failed to communicate adequately with Dean Peck and Splinter about the removal of a student's access to the UMD website, and that King had resolved the issue only after she brought it to his attention. Next, when King inappropriately removed academic courses via Acalog, he failed to communicate to Buisson or Kaylor about those removals. Last, King

Comments:

[King's] communication skills need to be improved. In meetings with clients, [King] does not generally offer suggestions or contribute to the discussion. When Renee asked him to write a memo about the upgrade to T4 and gave him several weeks to accomplish it, he did not. He asked that Chris Allen write the memo about a project for which he was responsible.

As [W]ebmaster, [King's] role is to be a subject matter expert on all things web and to offer clients guidance and expertise in the structure of content and design of the pages or site they are working on. He is involved in staff meetings where we discuss our Web projects so he should be very comfortable informing clients when we have projects or initiatives [that] may affect their projects and goals.

- Supervisory Responsibility (if applicable)³⁹
Unsatisfactory.⁴⁰

Comments:

[King] was a supervisor for about half of this year and Renee found that the team was not cohesive. He did not meet with the [Webteam] as a group, only met with individuals. He did not bring together the team to brainstorm how they approached projects, he simply assigned

failed to communicate with Administrative Assistant Beals about canceling Allen's registration for the T4 conference in October of 2013. Specifically, Buisson testified that while King did copy her on his e-mail to Beals, he failed to "close the loop" by effectuating the cancellation of Allen's registration. Although Buisson had already evaluated King on this issue in his 2012-2103 evaluation and gave him a rating of "satisfactory" in the same category, she failed to reconcile why she relied on this incident in his 2013-2014 evaluation.

³⁹ In King's 2013-2014 evaluation, the Employer did not differentiate between the duties that he performed during his tenure as supervisor prior to May of 2014, and the non-supervisory duties that he performed as Sylvia's subordinate after May of 2014.

⁴⁰ Buisson testified that she gave King "unsatisfactory" rating in this area based on the T4 upgrade and King's failure to introduce new technology related to the upgrade. She also testified that King failed to recommend changes for the UMD website, and failed to provide her with evidence of other technological research. While Buisson admitted that King had previously notified her about potential problems with T4, and that UMD had experienced an earlier four-year delay related to the upgrade, she testified that she was not satisfied with King's overall performance on that project.

1 projects to each individual.⁴¹ Renee did not see him demonstrate
 2 strong leadership in support of the team and he did not establish clear
 3 priorities.⁴² She did not find that he offered me any professional
 4 recommendations/direction for the Web and what we could do to
 5 improve our website or the projects his team was working on.
 6

7 As his employee, [King] was supportive when I asked for support but I
 8 found a need for priorities to be established and [King] was unable to
 9 do so. I once forwarded 20 tasks I needed clarification on and did not
 10 hear back from [King], only Renee.⁴³ The big picture was never clear

⁴¹ Buisson testified that King only brought staff together when she brought them together during the Webteam group meetings. She also testified that because King only had individual meetings with his staff, he failed to bring them together as a team. She testified further that Sylvia and Christine Allen both complained that King did not meet with them as a group. Sylvia testified that as King's subordinate, she interacted with him "a couple of times per day." Sylvia also testified that during this time she asked King if she could submit work reports to him weekly rather than daily, which he approved; and, that if she had a question she could go to his office or email him. Further, she admitted that as King's subordinate, he was supportive when she asked for help, and that she could call on King at any point when she had a question. However, Sylvia insisted that King offered no team guidance, prioritizing, leadership; provided "no direction, no initiative, no value-add;" and offered only "minimal" interaction/communication as her supervisor. Specifically, Sylvia testified that King's supervision was just, "complete the project the way that they asked for it to be done." Sylvia also testified that as King's subordinate, when she saw areas for improvement she would unilaterally take that upon herself because King failed to tell her about the other Webteam projects.

⁴² Buisson testified that while King followed her instructions in terms of prioritizing her tasks, he never provided her with feedback or suggested different priorities other than what she had already established.

⁴³ On or about April 8, 2014, Sylvia sent an e-mail to both King and Buisson, seeking assistance on how to prioritize the following assignments:

1. OPEN HOUSE EMAIL-ADMISSIONS: have design almost complete. [N]eed to work out details of how to send through Zimbra to Search List.
2. Soc[iology]/Anth[ropology] NEWSLETTER: have content, need to get images and create newsletter in constant contact[.]
3. NEW ADMISSIONS Open House email: is this different than the one to the Search [L]ist? I wrote it in my notes from Monday['s] meeting[.]
4. DIRECT EDIT: need to add link to >75 page layouts. Need to edit TinyMCE. Have notes typed up ready for Verena.
5. ORIENTATION[:] emails sent from Holger's system. Need to get info from [Buisson] on how to proceed. Have what I need from Holger.

1 and I often needed direction which I only received from Renee. Other
2 team members experienced the same thing.

4 III. OVERALL PERFORMANCE RATING

5 Marginal.

7 Evaluation Comments (*Must be completed by Supervisor*)

8 [King] has a great deal of institutional history at [UMD] regarding the
9 [website], and he brings some specific knowledge to the [Webteam].
10 He is very responsive with helping [UMD] staff with smaller projects that
11 fall within his knowledge base. Renee and I would like to see [King]
12 expand his problem solving skills within T4, contribute strategic
13 solutions to the group, and improve project management skills. [King]
14 attended a project management webinar recently and reported his
15 opinion back to me - that was a great improvement in his
16 communication and critical thinking and whenever possible I will
17 support [King] in whatever else he would like to expand his knowledge
18 in this way.

19
20 His supervisory role changed in the middle of the year because he did
21 not have the skill set to bring the website to the next level. He has not
22 demonstrated a broader institutional awareness of how the web site
23 and other marketing channels are interconnected. He did not get
24 involved with accomplishing projects and understanding how they all

-
6. MAYMESTER Online student portal page: need to go through external site and gather content for portal site. Jen Riley is anxious to get this going.
 7. MASTER PLAN: Facilities sites; portal, timeline, and external sites. Can start working on external site immediately, and linking strategic plan site to /about section[.]
 8. University Studies [WEB PAGE]: new web page (?), have content from [Allen] just need to design.
 9. CARES: promoting cares on website. I added the block to...chancellor page and posted march recipient to home page. [A]nything else?
 10. SLIDER images: summer courses, living gallery, study abroad
...not to mention the UMass in Lisbon site that was due April 1st. I maybe have 50% of that done.
[Emphases in original.]

Based on the tasks listed by Sylvia, the record reveals that while King assigned some tasks (i.e., task numbers four, five, and seven), most were assigned by Buisson (i.e., task numbers one, two, three, five, six, eight, nine, and ten). King testified that he asked Buisson how she wanted to prioritize Sylvia's list, who responded that Sylvia should prioritize Buisson's projects and treat his tasks as secondary. Based on Buisson's response, and based on Buisson's prior actions of assigning tasks to the Webteam without first notifying King, he did not reply to Sylvia's e-mail.

interrelate. He focused on delegating the work to others. With the staffing model at [UMD], all managers/ supervisors/ directors/ and staff are expected to be working with members of the team.

IV. FUTURE ACTION

A. Goals and Objectives for Next Evaluation Period

1. Research, implement, and maintain easy to use news tool available to [U]niversity staff that works with T4 and efficiently distributes news. The system should be able to be managed by Web Development staff.
2. Redesign and implement improved online course catalog using Acalog. This will include facilitating the new workflow/process of the [R]egistrar's [O]ffice and integrating that into Acalog as a technology tool.
3. Implement identified efficiencies and functionality acquired during T4 discovery days training.

B. Professional Growth and Development

One project management and/or one computer science course of [King's] choice, and one professional development of his choice. Courses can be online or in person based on financial availability.

C. **King's Appeal of the 2013-2014 Evaluation**

By letter dated December 10, 2014, King appealed his 2013-2014 evaluation to Chancellor Divina Grossman (Grossman) pursuant to Article V, Section E of the Agreement. He contended that based on his "very good" overall performance ratings from the 2011-2012 AY and the 2012-2013 AY, the Employer should have given him an overall rating of "very good" for the 2013-2014 AY, instead of "marginal." King also contended that the Employer should have given him individual ratings of "very good" in the following five categories: Judgment and Initiative, Independent Action, Accountability, Interrelationships, and Supervisory Responsibility. For the sixth remaining category of Communication, King contended that his rating should have been "satisfactory." In his appeal, King stated, in pertinent part:

There is an inherent conflict of interest with one of the reviewers in this evaluation putting forth a critique as both a reportee and a supervisor. I

1 also question the validity of this evaluation when compared to the
 2 evaluations of the previous 14 years. I feel this is a continuation of the
 3 unprofessional, hostile and abusive work environment I have been
 4 subjected to since shortly after the birth of my son on July 12, 2013. It is
 5 retaliation for challenging and then exposing such an environment and for
 6 confronting both my supervisors. I submit this is the reason this review
 7 rating sits in such stark contrast to every previous performance evaluation.
 8 During the first year of my son's life, I was consistently and constantly
 9 challenged whenever I requested the use of pre-approved FMLA.
 10 Following the transition to a new supervisor in June of this year, I was
 11 immediately challenged regarding my use of FMLA time off....

12
 13 The FMLA states a person taking time off returns to the same position. I
 14 have been told I am no longer a manager, I am no longer a supervisor,
 15 and I am no longer in charge of the website. This is a complete change in
 16 my overall duties, functionality and role.

17
 18

19
 20 Supervisory Responsibility – Unsatisfactory
 21 *Rating should be Very Good* [Emphases in original.]
 22

23
 24 During the past 20 years I have supervised dozens of full time staff, over a
 25 dozen temporary and part-time employees, and nearly 50 students. Only
 26 after taking significant FMLA time, have I received a negative review.
 27 During the period for which I am being reviewed, I agreed to a staggered
 28 schedule, to be on call at all times, and to come in if needed. Each time a
 29 request was made, I made myself available. I did this because [Buisson]
 30 requested I not use all of my FMLA time during her and [Sylvia's]
 31 transitions; both of them started mid-summer 2013. I thought it would be
 32 best for the team, the new director, and the new designer if I came in most
 33 days, only taking one or two days off per week. As the team leader I felt I
 34 should do my best to be available during such a state of transition.
 35 [Buisson] and I agreed to a staggered schedule for several months and
 36 that I would be able to take extended time off later in my year of FMLA
 37 (June 12, 2012 – June 11, 2013).⁴⁴
 38

⁴⁴ Although the Union did not offer evidence to clarify whether King had misstated the dates of his family leave in his December 10, 2014 appeal, I find that based on the totality of all documentary and testimonial evidence presented, including the birth of King's son in July of 2013, King's disputed family leave period occurred between June of 2013 and June of 2014, not June of 2012 through June of 2013 as stated in his December 10, 2014 appeal.

1 While I was supervisor I hired a full-time web developer, whom I
2 subsequently trained on all aspects of T4, the website, the web systems
3 and the communications applications. I hired a part-time consultant who
4 worked remotely on academic projects and initially supervised her
5 progress and kept her on task for completion of assigned duties.
6

7 I oversaw the projects and met regularly with the [W]eb [W]riter in order to
8 utilize her skill set on numerous long and short term projects. Having
9 earned a Communications degree myself allowed my supervisory role to
10 also be collaborative in guiding the direction of web content.
11

12 These examples clearly show that I was available and competent in my
13 role as a supervisor and deserve a rating of Very Good.
14

15 By memorandum dated December 19, 2014, Grossman notified King that she
16 had granted his appeal in part, and denied it in part. Specifically, Grossman stated, in
17 full:

18 Following receipt of your letter appealing your recent Performance Review
19 rating and reviewing your comments, I communicated directly with Renee
20 Buisson, and indirectly with Hillary Sylvia. After reviewing your document
21 and checking on your position, I find that you had an approved intermittent
22 FMLA leave and at the conclusion of your approved leave you maintain
23 the same title⁴⁵ and salary prior to utilizing FMLA.
24

25 It is important to note that the Performance Review terms are clearly
26 defined on the Performance Review and that the evaluation covers just
27 the last year of service. "Marginal" indicates that the employee "meets
28 some job requirements and needs to improve in other functions."
29 "Satisfactory" indicates that the employee "consistently meets standard
30 expectations and requirements," and "Very Good" indicates that the
31 employee "reflects extra effort and produces results beyond expectations
32 and requirements."

33 Your efforts this year in many categories are satisfactory, and other
34 categories show room for improvement. You had suggested that you
35 thought you deserved "Very Good" in all but one category (extra effort
36 beyond requirements). Ms. Buisson and Ms. Sylvia listed specific reasons
37 why your efforts fall into the "Marginal" and "Satisfactory" categories. The
38 category of "Supervisory Responsibilities" can be changed from

⁴⁵ In her decision, Grossman did not address the change in King's supervisory duties and responsibilities pursuant to his revised job description from March of 2014.

1 "Unsatisfactory" to "Marginal" based on the behaviors you listed for your
2 supervisory performance.

3
4 In summary, I am comfortable that the rest of the review, and according to
5 my communication with Ms. Buisson and Ms. Sylvia, it [sic] is accurate
6 and should remain as written.⁴⁶
7

8 DECISION

9 **Section 10(a)(3)**

10 When considering an alleged violation of Section 10(a)(3) of the Law, the
11 Commonwealth Employment Relations Board (CERB) first determines whether the
12 charging party has established a prima facie case of discrimination based on protected
13 activities, and requires proof of the following four elements: (1) the employee engaged
14 in activity protected by Section 2 of the Law; (2) the employer knew of the protected
15 activity; (3) the employer took adverse action against the employee; and, (4) the
16 employer's conduct was motivated by a desire to penalize or discourage the protected
17 activity. Town of Brookfield, 28 MLC 320, 327, MUP-2538 (May 1, 2002), aff'd sub nom.
18 Town of Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005); see also
19 Town of Carver, 35 MLC 29, 47, MUP-03-3894 (June 30, 2008).

20 **1. King's Protected Activity**

21 The CERB holds that an employee's activity is protected if it focuses on generally
22 applicable terms and conditions of employment that impact the collective bargaining unit
23 as a whole. Town of Shrewsbury, 5 MLC 1519, 1522-23, MUP-2999 (Dec. 22, 1978).
24 To be concerted, the evidence must demonstrate that the employee is acting with other
25 employees, or on the authority of other employees, rather than acting out of self-

1 interest. City of Newton, 32 MLC 37, 47-48, MUP-2849 (June 29, 2005) (citing Town of
2 Southborough, 21 MLC 1242, 1248-49, MUP-8521 (Aug. 29, 1994)).

3 The Employer does not dispute that King's filing of a grievance on June 2, 2014
4 constituted concerted, protected activity. Rather, it denies the allegation that King
5 attempted to enforce his leave time rights pursuant to the parties' Agreement or, in the
6 alternative, that any of those attempts between June 20, 2013 and June 19, 2014
7 amounted to concerted activity protected by Section 2 of the Law. The Employer also
8 disputes that King's use of intermittent FMLA leave and his use of ten days of paid
9 contractual leave constitute concerted, protected activity because King was not acting
10 on behalf of other employees when he took that leave.

11 In support of its argument, the Employer relies on Town of Southborough, 21
12 MLC at 1248-49, which cites to Meyers Industries, 268 NLRB 493, 497-98 (1984). In
13 Meyers, the National Labor Relations Board (NLRB) found that the employer did not
14 violate Section 8(a)(1) of the National Labor Relations Act (NLRA)⁴⁷ by discharging a
15 truck driver after determining that the employee had acted alone when he refused to
16 drive his truck and then contacted local authorities about the condition of the truck. In
17 Town of Southborough, the CERB dismissed an employee's 10(a)(3) allegation after
18 finding no evidence that she was engaged in concerted, protected activity. While that

⁴⁶ Grossman failed to address King's complaint that the Employer had created an "inherent conflict of interest" by allowing Sylvia to evaluate him "as both a reportee and a supervisor."

⁴⁷ Although Meyers pertained to Section 8(a)(1) of the NLRA, and while that section usually correlates to Section 10(a)(1) of the Law, the CERB found that case to be "illustrative" in the context of determining the scope of concerted, protected activity for unrepresented employees not belonging to any bargaining unit. Town of Southborough, 21 MLC at 1249.

1 employee was a part-time dispatcher who had “an undisclosed number of meetings”
2 with other part-time dispatchers, the CERB found that she was acting alone when she
3 sent letters to the chief and the board of selectmen concerning the town’s reduction of
4 hours for part-time dispatchers and its assignment of open shifts to full-time dispatchers.
5 21 MLC at 1249. Because the employee stated in her letters that she could only speak
6 for herself—although other employees had expressed the same concerns—and
7 because no other part-time dispatchers testified that she had acted on their behalf, the
8 CERB concluded that the employee was acting on her own and, thus, was not engaged
9 in concerted, protected activity. Id. at 1250.

10 I am persuaded by the Employer’s argument that King’s requests to take family
11 leave between June of 2013 and June of 2014 were actions that he took on his own
12 behalf, and not on behalf of other bargaining unit members or on their authority. This is
13 because King admitted that he requested his leave for personal reasons (i.e., to care for
14 his family). However, I disagree with the Employer’s argument that King’s attempts to
15 enforce his statutory and contractual family leave between June 20, 2013 and June 19,
16 2014 was not concerted, protected activity because he took such action for the specific
17 purpose of enforcing Article VI, Section B(l) of the Agreement. See Town of
18 Shrewsbury, 5 MLC at 1522-23 (citing Interboro Contractors, Inc., 157 NLRB 1295,
19 enfd sub nom., 399 F.2d 495 (2d Cir. 1967)) (CERB found that employee’s individual
20 complaint was protected activity because it was aimed at enforcement of the contract).
21 Specifically, King attempted to enforce the Agreement on June 9, 2014, by requesting a
22 meeting with Sylvia and Lisinski to address Sylvia’s belief that she could deny his use of
23 family leave. When Lisinski met with King and Sylvia on that day, she corrected Sylvia’s

1 misunderstanding about King's use of family leave by explaining that the Employer had
2 already approved it in June of 2013. By the end of that meeting, Sylvia had
3 acknowledged her misunderstanding and apologized to King. King's activity was also
4 protected and concerted because he sought to enforce his rights to contractual leave by
5 meeting with both the Union and the Employer on June 9, 2014. Finally, King was
6 engaged in protected, concerted activity when the Union filed a grievance on his behalf
7 seven days earlier on June 2, 2014. Town of Southborough, 21 MLC at 1248; Town of
8 Shrewsbury, 5 MLC at 1523.

9 Thus, the Union has satisfied the first element of its prima facie case by
10 establishing that King was engaged in concerted activity that was protected under
11 Section 2 of the Law when he filed a grievance on June 2, 2014, and seven days later
12 he met with Lisinski and Sylvia to enforce his rights to contractual leave on June 9,
13 2014.

14 **2. Employer Knowledge**

15 Because I have determined that King was engaged in concerted, protected
16 activity on June 2, 2014 and June 9, 2014, and because the Employer does not dispute
17 knowing about King's protected activity on these dates, I next consider whether the
18 Employer's decision to give King "marginal" and "unsatisfactory" ratings in his 2013-
19 2014 evaluation constituted adverse action.

20 **3. Adverse Action**

21 The CERB has consistently defined adverse action as an adverse personnel
22 action. City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (Jan. 9, 2009) (citing Town of
23 Dracut, 25 MLC 131, 133, MUP-1397 (Feb. 17, 1999)). Many management decisions,

1 though possibly inconvenient or even undesirable, do not constitute adverse
2 employment actions unless the charging party is materially disadvantaged in some way.
3 City of Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009) (citing MacCormack v.
4 Boston Edison Co., 423 Mass. 652, 662 (1996)).

5 Here, I find that the Employer's decision to give King "unsatisfactory" and
6 "marginal" ratings in his 2013-2014 evaluation was an adverse personnel action
7 because it materially affected King's ability to receive the salary adjustments pursuant to
8 Article VI, Section A.6 of the parties' MOU. See, e.g., City of Boston, 35 MLC at 291
9 (citing Sallis v. Univ. of Minnesota, 408 F.3d 470, 476 (8th Cir. 2005) (termination,
10 reduction in pay or benefit, and changes in employment that significantly affect an
11 employee's future career prospects constitute material employment disadvantage)).

12 **4. Unlawful Motivation**

13 Next, I consider whether the Employer was unlawfully motivated by a desire to
14 penalize or discourage King's protected activity when it gave him "unsatisfactory" and
15 "marginal" ratings in his 2013-2014 evaluation. To support a claim of unlawful
16 motivation, the charging party may proffer direct evidence of discrimination,
17 circumstantial evidence of discrimination, or both, depending on the nature of the
18 evidence. Town of Brookfield, 28 MLC at 327-28 (citing Wynn & Wynn, P.C. v.
19 Massachusetts Commission Against Discrimination, 431 Mass. 655, 667 n. 23 (2000)).

20 **a. Direct Evidence**

21 Direct evidence is evidence that, if believed, results in an inescapable or at least
22 a highly probable inference that a forbidden bias was present in the workplace. Town of
23 Brookfield, 28 MLC at 328 (citing Wynn & Wynn, P.C., 431 Mass. at 669). Under the

1 direct evidence analysis, the charging party must first prove by a preponderance of the
2 evidence that a proscribed factor played a motivating part in the challenged employment
3 decision.

4 Here, the Employer argues that there is no evidence, direct or otherwise, to
5 support the allegation that it harbored unlawful animus towards King, and relies on the
6 fact that neither Buisson nor Sylvia ever referenced King's use of family leave in his
7 2013-2014 evaluation. Regarding Buisson, it asserts that she has always been
8 supportive of unions because she was raised in a "pro-union" household, and both of
9 her parents belonged to unions. Regarding Sylvia, the Employer makes several
10 contentions. First, it contends that she was not the primary author of King's 2013-2014
11 evaluation because Buisson performed that role. Next, it contends that any comments
12 made by Sylvia in that evaluation were "supportive" of King, and that any negative
13 commentary allegedly made by Sylvia could not have affected his evaluation because
14 her contributions were insignificant. The Employer also maintains that Sylvia is a
15 demonstrated "fan of unions" because her husband is in two educational unions, and
16 that she personally appreciated the job security that unions provided her. In the
17 alternative, the Employer argues that even if Sylvia stated that she was "not a fan of
18 unions," such a statement is ambiguous and insufficient to show unlawful motivation
19 because the Union is unable to corroborate it. It also maintains that Sylvia's motivation
20 "be it pro- or anti-union is not relevant to whether evaluations written by another
21 supervisor is retaliatory."

22 Conversely, the Union argues that there is direct evidence that the Employer
23 discriminated against King. First, it points to May 13, 2014, when Sylvia stated that the

1 message sent by King to the Webteam regarding his use of family leave was
2 “disgusting.” Next, it points to the June 9, 2014 meeting where Sylvia stated that King’s
3 use of family leave was “disrespectful” to the Webteam, and that she was “not a fan of
4 unions.” Finally, the Union points to Buisson’s statements on November 12, 2013,
5 November 25, 2013, December 13, 2013, and January 29, 2014, in which she
6 commented about the amount of family leave that King had used.

7 Concerning Buisson, I do not find that her statements on November 12, 2013,
8 November 25, 2013, or on January 29, 2014, amount to direct evidence of unlawful
9 motivation. On those dates, the record shows that she was confused about the scope
10 of King’s family leave. While she did complain to King about the amount of leave he
11 had taken up to that point, she never denied any of his requests to take that leave, and
12 there is no evidence that she ever discouraged him from taking leave, or that she tried
13 to penalize him for it. In fact, after King met with both Majewski and Buisson in
14 February of 2014, Buisson had resolved her confusion and no longer “bothered” King
15 about his use of family leave. Similarly, I find no evidence that Buisson’s statements on
16 December 13, 2013 amount to direct evidence of discrimination because on that date it
17 was King, not Buisson, who raised the issue of family leave. Specifically, King
18 complained to Buisson that he should have used his family leave “all at once” instead of
19 on a “staggered” schedule, and that he felt like Buisson was punishing him for taking
20 family leave. Aside from King’s statements, the Union cannot show that Buisson made
21 any statements or expressed any animus on that date relative to King’s use of family
22 leave. Instead, Buisson continued to approve all of King’s family leave requests
23 between June of 2013 and June of 2014. Based on this evidence, I do not find that

1 Buisson's statements between November of 2013 and January of 2014 demonstrate
2 direct evidence of unlawful motivation.⁴⁸

3 **b. Circumstantial Evidence**

4 Absent direct evidence of unlawful motivation, the charging party may establish
5 unlawful motivation through circumstantial evidence and reasonable inferences drawn
6 from that evidence. City of Holyoke, 38 MLC at 156; Town of Carver, 35 MLC 29, 48
7 MUP-03-3894 (June 30, 2008) (citing Town of Brookfield, 28 MLC at 327-28); Suffolk
8 County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001). Several
9 factors may suggest unlawful motivation, such as: the timing of the alleged
10 discriminatory act in relation to the protected activity; the triviality of reasons given by
11 the employer; shifting or inconsistent reasons given by the employer; disparate
12 treatment; an employer's deviation from past practices; or expressions of animus or
13 hostility towards a union or the protected activity. Town of Carver, 35 MLC at 48 (citing
14 Melrose School Committee, 33 MLC 61, 69, MUP-02-3549 (Sept. 27, 2006)).
15 Circumstantial evidence of unlawful motive may also be shown by demonstrating an
16 "employer's general bias or hostility toward the union or toward employees engaged in
17 concerted activity." Board of Higher Education, 43 MLC 148, 154, SUP-14-3771 (Nov.
18 30, 2016) (citing Town of Halifax, 1 MLC 1486, 1490, MUP-2059, (June 30, 1975)).

⁴⁸ I need not decide whether Sylvia's statement on May 13, 2014 (i.e., that the message sent by King to the Webteam regarding his use of family leave was "disgusting"), or her statements on June 9, 2014 (i.e., that King's use of family leave was "disrespectful," and that she was "not a fan of unions") constituted direct evidence of unlawful animus because after applying the higher burden of proof required by Trustees of Forbes Library, 384 Mass. 559 (1981), I find that the Union meets its burden of establishing that but for King's concerted, protected activities, the Employer would not have given him "marginal" and "unsatisfactory" ratings in his 2013-2014 evaluation.

i. Timing

First, the Union argues that the timing of the Employer's adverse act of giving King "marginal" and "unsatisfactory" ratings in his 2013-2014 evaluation on November 25, 2014, suggests unlawful motivation because it occurred "at the exact time" that King's June 2, 2014 grievance was pending. The Union advanced the grievance to Level III on September 10, 2014, which the Employer denied on October 24, 2014. The Union then filed a demand for arbitration on November 24, 2014, which was one day before Sylvia had met with King to give him his 2013-2014 evaluation.

ii. Deviation from Established Practices

The Union also argues that the Employer deviated from established practices when it gave King "marginal" and "unsatisfactory" ratings in his 2013-2014 evaluation. Prior to November 25, 2014, the Employer had established a long-standing practice that only supervisors who had supervised King during his entire evaluation period could evaluate him based on their supervisory observations. For instance, all of the ratings and comments in King's performance evaluations between 1999 and 2013 were made by supervisors (e.g., Stone, Hamel, and Hoey) who based their entire evaluations on supervisory observations made throughout each evaluation period. However, on November 25, 2014, the Employer deviated from this practice by permitting Sylvia to evaluate King based on observations that she had made between December of 2013 and May of 2014 while she was his subordinate.

The Employer also deviated from its practice of permitting King the opportunity to review his evaluations and offer evidence to rebut any factual misstatements prior to the Employer finalizing his 2013-2014 evaluation. For instance, in December of 2013, King

1 met with Buisson to explain why he deserved a rating higher than “satisfactory” in the
2 category of “Communication” in his 2012-2013 evaluation. While King disputed the
3 lower ratings in his 2013-2014 evaluation by filing an appeal weeks after Buisson had
4 finalized his evaluation on November 25, 2014, there is no indication that the Employer
5 provided him with an opportunity to challenge or correct those ratings prior to that date.
6 Nor is there any indication that the Employer provided King with an opportunity to
7 submit rebuttal evidence prior to the finalization of this 2013-2014 evaluation. In fact,
8 the Employer admitted that Buisson did not provide King with these opportunities.

9 **iii. Insubstantial Reasons for the Adverse Action**

10 Next, the Union points to the Employer’s insubstantial or trivial reasons for why it
11 gave King “marginal” and “unsatisfactory” ratings in his 2013-2014 evaluation. Under
12 the category of “Accountability,” the Employer stated that King had refused to work from
13 home on a snow day in February of 2014. However, the evidence shows that he
14 worked from home on that disputed day, and also sent e-mails to Buisson on that date
15 to verify his work.

16 Under the category of “Supervisory Responsibility,” the Employer failed to clarify
17 whether its 2013-2014 evaluation of King differentiated between the duties that he
18 performed as a supervisory Webmaster from December 1, 2013 to May 9, 2014, versus
19 the duties that he began performing as a non-supervisory Webmaster between May 9,
20 2014 and November 25, 2014. The Employer also failed to consider certain factors
21 before it gave King an “unsatisfactory” rating in this category. Specifically, the Employer
22 accused King of failing to respond to Sylvia’s April 8, 2014 e-mail request for assistance
23 even though Buisson had established a prior practice of unilaterally assigning tasks to

1 Sylvia without first notifying King. Concerning that e-mail, Buisson also told King that
2 she wanted Sylvia to prioritize her tasks over his tasks. While Grossman later changed
3 King's rating from "unsatisfactory" to "marginal," her reasoning was insubstantial
4 because she merely stated that she had based her change "on the behaviors [that King]
5 listed [in his December 10, 2014 appeal] for [his] supervisory performance," but failed to
6 offer any additional explanation to substantiate the change.

7 The Employer also failed to explain why it had relied on King's previous failure to
8 cancel Kathleen Allen's registration in October of 2013, even though that incident
9 occurred outside of his relevant evaluation period (i.e., December 1, 2013 through
10 November 30, 2014). Indeed, the Employer offered no explanation for why it included
11 that event in King's 2013-2014 evaluation, or why it had decided to give him a rating
12 that was lower than "satisfactory," which is what he received in his 2012-2013
13 evaluation. Last, the Employer failed to address why it permitted Sylvia to include
14 observations in King's 2013-2014 evaluation that she had made in her capacity as his
15 supervisee between December 1, 2013 and May 8, 2014.

16 Based on the totality of this evidence, including the timing of the adverse action,
17 the insubstantial reasons for taking the action, and the Employer's deviation from
18 established practices, I find that the Union has successfully met its burden of proving a
19 prima facie case of discrimination.

20 **Shifting Burdens**

21 **1. Legitimate, Non-Discriminatory Reasons**

22 Once the charging party establishes a prima facie case of retaliation, the burden
23 shifts to the employer to produce legitimate, non-discriminatory reasons for taking the

1 adverse action. Trustees of Forbes Library v. Labor Relations Commission, 384 Mass.
2 at 566. The employer's burden to produce legitimate, non-discriminatory reasons for
3 taking the adverse action is more than simply stating an unsubstantiated allegation.
4 Commonwealth of Massachusetts, 25 MLC 44, 46, SUP-4128 (Aug. 24, 1998) (citing
5 Boston School Committee, MUP-9067 (Mar. 2, 1994), aff'd sub. nom. School
6 Committee of Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327, 335
7 (1996), further app. rev. den'd, 422 Mass. 1111 (1996)). The employer must state a
8 lawful reason for its decision and produce supporting facts indicating that the proffered
9 reason was actually a motive in the decision. Trustees of Forbes Library, 384 Mass. at
10 566; see also Melrose School Committee, 33 MLC at 70 (citing Quincy School
11 Committee, 27 MLC 83, 92, MUP-1986 (Dec. 29, 2000)).

12 Here, the Employer has shown legitimate, non-discriminatory reasons for its
13 decision to give King "marginal" and "unsatisfactory" ratings in his 2013-2014
14 evaluation. First, it gave King a "marginal" rating in the category of "Accountability"
15 based on his failure to provide Buisson with a written project management plan for the
16 T4 upgrade, and his failure to notify the Law School about his inadvertent publication of
17 T4 material in February of 2014 until one week after the incident. It also rated King as
18 "marginal" in this category based on his failure to resolve other issues before forwarding
19 them to other people and/or departments. Next, the Employer gave King a "marginal"
20 rating in the category of "Communication" based on his insistence to delegate a task to
21 Christine Allen even though Buisson specifically directed him not to delegate that task.
22 King's performance was also marginal in this area based on his production of

1 memoranda that usually consisted of just one page, and based on his inappropriate
2 removal of courses from Acalog.

3 Based on this evidence, I find that the Employer has met its burden to produce
4 legitimate, non-discriminatory reasons for giving King "marginal" ratings in his 2013-
5 2014 evaluation. City of Easthampton, 35 MLC 257, 265, MUP-04-4244 (April 23, 2009)
6 (citing Boston Water & Sewer Commission, 29 MLC 176, 181, MUP-1677 (April 2,
7 2003)).

8 **2. Mixed Motives**

9 Once the employer produces evidence of a legitimate, non-discriminatory reason
10 for taking the adverse action, the case becomes one of "mixed motives" and the CERB
11 then shifts the burden to the charging party to demonstrate that "but for" the protected
12 activity, the employer would not have taken the adverse action. Trustees of Forbes
13 Library, 384 at 565-66; Suffolk County Sheriff's Department, 27 MLC at 160; Quincy
14 School Committee, 27 MLC at 92.

15 Although the Employer presented legitimate reasons for its actions, I find that but
16 for King's protected activity, the Employer would not have given King "marginal" and
17 "unsatisfactory" ratings in his 2013-2014 evaluation. First, Buisson never told King that
18 his job performance was deteriorating, even though by the fall of 2013 Sylvia had
19 complained to Buisson about King's supervision of the Webteam while he was on family
20 leave. In response to Sylvia's complaints, Buisson assumed greater control over the
21 Webteam by scheduling and conducting group meetings, and by assigning tasks
22 directly to Webteam members without first notifying or conferring with King. At no time
23 between the fall of 2013 and November of 2014 did Buisson ever bring these

1 complaints to King's attention. Even when Buisson and King met to discuss upgrading
2 his job description between July of 2013 and February of 2014, Buisson never
3 communicated to King that she was not satisfied with his job performance.

4 Further, within four or five days of Sylvia's promotion to Director in early May of
5 2014, she questioned King's use of family leave and directly asked if he understood the
6 message that he was sending to the Webteam by taking that leave, and that it was
7 "disgusting." Not long after that incident, the Union filed a grievance on King's behalf on
8 June 2, 2014, challenging his non-promotion to the Director position. Seven days after
9 filing the grievance, Sylvia met with King and told him that his use of family leave was
10 "disrespectful" to the Webteam, and that she was not a "fan of unions." Within 30 days
11 of the Employer denying King's grievance at Level II on October 24, 2014, the Union
12 made a timely demand for arbitration on November 24, 2014. The next day, the
13 Employer gave King "marginal" and "unsatisfactory" ratings on his 2013-2014
14 evaluation. This combined evidence shows that each time King attempted to exercise
15 his rights by enforcing the terms of the Agreement in early May, June, and November of
16 2014, the Employer expressed hostility toward that protected activity on in early May,
17 June, and November of 2014.

18 Prior to King's 2013-2014 evaluation, he consistently received overall
19 performance ratings of "very good" or "outstanding," and a combination of individual
20 ratings of "satisfactory," "very good," or "outstanding." Although King began using
21 intermittent family leave between June of 2013 and June of 2014, at no time during that
22 period did the Employer ever communicate to him that he was at risk of receiving a
23 negative performance evaluation that could possibly disqualify him from receiving a

1 base salary rate increase pursuant to Article VI, Section A6 of the parties' MOU.
2 Instead, the Employer waited until November 25, 2014 to inform King that his
3 performance during the 2013-2014 AY warranted "marginal" and "unsatisfactory"
4 ratings. The Employer arrived at those ratings by deviating from at least two
5 established practices (i.e., permitting Sylvia rely on observations that she had made
6 while she was King's supervisee, and denying King the opportunity to present evidence
7 to rebut the inaccuracy of those observations). The Employer also offered insubstantial
8 reasons for giving King those ratings (e.g., inexplicably conflating his tenure as
9 supervisor with his tenure as a non-supervisor, and failing to reconcile the fact that he
10 worked on the February 2014 snow day), and relied on the irrelevant fact of his failure to
11 effectuate the cancellation of Kathleen Allen's registration in October of 2013.
12 Consequently, I find that this evidence, combined with the timing of King's grievance in
13 relation to his evaluation ratings, shows that the Employer would not have given King
14 negative ratings in his 2013-2014 evaluation but for his protected activity.

15 Thus, the Union has satisfied its shifting burden of proving that but for King's
16 protected activities, the Employer would not have taken the adverse action of giving him
17 "marginal" and "unsatisfactory" ratings in his 2013-2014 evaluation in violation of
18 Section 10(a)(3) of the Law.

19 CONCLUSION

20 Based on the record, I conclude that the Employer discriminated against King for
21 engaging in concerted activity protected by Section 2 of the Law, in violation of Section
22 10(a)(3) and, derivatively, Section 10(a)(1) of the Law.

23 ORDER

1 WHEREFORE, based on the foregoing, it is hereby ordered that the Employer
2 shall:

3 1. Cease and desist from:

- 4
5 a. Retaliating against Donald King for engaging in concerted, protected
6 activity;
7
8 b. In any like manner, interfering with, restraining and coercing its
9 employees in any right guaranteed under the Law.

10
11 2. Take the following affirmative action that will effectuate the purpose of the
12 Law:

- 13
14 a. Change the "Overall Performance Rating"⁴⁹ in Donald King's 2013-
15 2014 annual performance evaluation from "Marginal" to "Satisfactory;"
16
17 b. Give Donald King the salary increase provided in Article VI, Section
18 A.6 of the parties' April 1, 2015 Memorandum of Understanding;
19
20 c. Make Donald King whole for any economic losses he may have
21 suffered as a result of the Employer's unlawful actions when it gave
22 him "marginal" ratings in his 2013-2014 evaluation, plus interest on all
23 sums owed at the rate specified in M.G.L. c. 231, Section 6I,
24 compounded quarterly;
25
26 d. Sign and post immediately in conspicuous places where employees
27 usually congregate or where notices to employees are usually posted,
28 including electronically, if the Employer customarily communicates to
29 its employees via intranet or e-mail, and maintain for a period of thirty
30 (30) consecutive days thereafter signed copies of the attached Notice
31 to Employees;
32
33 e. Notify the DLR in writing of the steps taken to comply with this decision
34 within thirty (30) of the steps taken by the Employer to comply with the
35 Order.
36

37 SO ORDERED.

⁴⁹ Article VI, Section A.6 of the parties' MOU is silent about whether the qualifying performance rating of "satisfactory" applies only to a unit member's "overall" performance or their individual performance in particular sub-categories of their annual evaluation; and, the Union did not argue that I should order the Employer to amend the sub-categories of King's 2013-2014 evaluation.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.



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

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the University of Massachusetts Dartmouth (Employer) violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of G.L. Chapter 150E by retaliating against Donald King for engaging in concerted, protected activities. The Employer posts this Notice to Employees in compliance with the Hearing Officer's order.

Section 2 of the Law gives all employees: (1) the right to engage in concerted protected activity, including the right to form, join and assist unions, to improve wages, hours, working conditions, and other terms of employment, without fear of interference, restraint, coercion or discrimination; and, (2) the right to refrain from either engaging in concerted protected activity, or forming or joining or assisting unions.

WE WILL NOT unlawfully retaliate against bargaining unit members represented by the Association 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 change the "Overall Performance Rating" in Donald King's 2013-2014 annual performance evaluation from "Marginal" to "Satisfactory."

WE WILL give Donald King the salary increase provided in Article VI, Section A.6 of the April 1, 2015 Memorandum of Understanding between the Employer and University of Massachusetts Dartmouth Faculty Federation, Local 1895, AFT, AFL-CIO, Educational Services Unit.

WE WILL make Donald King whole for any economic losses he may have suffered as a result of the Employer's unlawful actions when it gave him "marginal" ratings in his 2013-2014 evaluation, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly.

University of Massachusetts Dartmouth

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