

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

TOWN OF BLACKSTONE

and

BLACKSTONE POLICE UNION,
MCOP, LOCAL 442, AFL-CIO

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Case No. MUP-16-5329

Date Issued: February 23, 2018

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Stephen C. Pfaff, Esq.	-	Representing the Town of Blackstone
Kareem A. Morgan, Esq.	-	Representing the Blackstone Police Union, MCOP, Local 442, AFL-CIO

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the Town of Blackstone (Town or Employer)
2 violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of Massachusetts General
3 Laws, Chapter 150E (the Law) by discriminating against Blackstone Police Union,
4 MCOP, Local 442, AFL-CIO (Union or MCOP) unit member Maxwell Hurwitz (Hurwitz)
5 for engaging in concerted, protected activities. I find that the Town violated the Law in
6 the manner alleged.

STATEMENT OF THE CASE

1 On June 28, 2016, the Union filed a charge of prohibited practice with the
2 Department of Labor Relations (DLR), alleging that the Town violated Sections 10(a)(3)
3 and (1) of the Law. A DLR hearing officer investigated the charge on July 26, 2016. On
4 August 9, 2016, the investigator issued a complaint alleging that the Town violated
5 Sections 10(a)(3) and, derivatively, Section 10(a)(1) by discriminating against Hurwitz
6 for engaging in concerted, protected activities when it bypassed him for promotion to
7 sergeant. The Town filed its answer on August 17, 2016.

8 I conducted a hearing on November 14 and November 16, 2016. Both parties
9 had an opportunity to be heard, to call witnesses and to introduce evidence. The
10 parties submitted their post-hearing briefs on January 17, 2017.¹ Upon review of the
11 entire record, including my observation of the demeanor of the witnesses, I make the
12 following findings of fact and render the following opinion.

Findings of Fact²

13
14 The Town's Police Department currently includes patrol officers, sergeants, a
15 lieutenant and a police chief. The patrol officers and the sergeants are unionized and
16 are members of the same bargaining unit. In 2012 or 2013, MCOP succeeded
17 AFSCME as the exclusive representative for that unit. The Town and MCOP have
18 negotiated two collective bargaining agreements pertaining to the bargaining unit for the
19 periods July 1, 2013 through June 30, 2016 (2013-2016 CBA) and July 1, 2016 through

¹ The DLR provided copies of the electronic recording of the hearing to the parties at the close of the proceeding. After the parties submitted their post-hearing briefs, the DLR requested that Marsha Johnson of All-Write Transcription and Reporting Services produce a transcript of the electronic recording. The hearing officer used that transcript to write the decision.

² The DLR's jurisdiction in this matter is uncontested.

1 June 30, 2019 (2016-2019 CBA). The Town has employed Hurwitz as a police officer
2 since September 2010, and he is a member of MCOP's bargaining unit.

3 Hurwitz's Background Information

4 Hurwitz attended Champlain College in Burlington, Vermont from 2001 through
5 2005 and obtained a bachelor's degree in criminal justice.³ From 2002 through 2004,
6 Hurwitz worked for the Chittenden County Sheriff's Office in Vermont as a deputy
7 sheriff.⁴ Hurwitz then worked for the Shelburne, Vermont (Shelburne) Police
8 Department as a patrol officer from 2004 through 2007.⁵ While still working several
9 shifts per month at the Shelburne Police Department,⁶ Hurwitz also took a position as a
10 campus police officer with Framingham State College (FSC) on October 16, 2006.
11 Approximately three months later, in early 2007, Hurwitz also took a position in the
12 Town of Berlin as a reserve police officer while continuing to work at FSC. Hurwitz
13 subsequently resigned from the Shelburne Police Department. Thereafter, Berlin
14 notified Hurwitz that it was going to send him to the Municipal Police Training

³ While at Champlain College, Hurwitz joined the Army Reserve Officer Training Corps (ROTC) and concurrently the Vermont National Guard. The United States Army awarded him a full ROTC scholarship for college. The record does not indicate whether Hurwitz continued with the ROTC and/or the Vermont National Guard until his graduation.

⁴ While at the Chittenden County Sheriff's Office, Hurwitz was assigned to an interstate uniformed drug interdiction team.

⁵ Hurwitz's assignments included working as an elementary school police liaison and working with a local narcotics task force.

⁶ Hurwitz had grown up in Massachusetts and wanted to return there. The Shelburne police chief agreed to allow him to work several shifts per month, while he looked for a full-time police position in Massachusetts. Hurwitz continued to work part-time in Shelburne while he worked at FSC.

1 Committee Basic Training Course in Boylston (Boylston Academy). Hurwitz resigned
2 from FSC on June 13, 2007.⁷ Hurwitz began the Boylston Academy in August 2007
3 and graduated in November 2007. Hurwitz then worked full-time until 2010 as a per
4 diem Berlin police officer.⁸ Because Berlin, for fiscal reasons, was unable to offer
5 Hurwitz a permanent position as a police officer, he searched online for a permanent,
6 municipal police officer position in other communities.

7 Employer's Hiring of Hurwitz

8 In July 2010, Hurwitz applied for an opening for a patrol officer in the Employer's
9 police department. He submitted a cover letter and a resume.⁹ The resume described
10 his employment as the Chittenden County Sheriff's Office from 2002 to 2004, the
11 Shelburne Police Department from 2004 to 2007, and the Berlin Police Department from
12 2006 to the present.¹⁰ He also listed his academic background, including his high
13 school and college degrees, noting that since 2006 and continuing, he had taken
14 classes at FSC towards a master's degree in public administration. Finally, he

⁷ Hurwitz asserted that he left FSC because he wanted to work as a municipal police officer as he had done in Shelburne rather than in what he characterized as a security/unarmed police position.

⁸ While at Berlin, Hurwitz worked as a narcotics investigation officer

⁹ The Employer did not have an employment application that it required potential hires to complete.

¹⁰ At hearing, Hurwitz acknowledged that the 2006 start date was erroneous, and that he commenced his employment with Berlin in 2007.

1 described his Army ROTC experience. However, Hurwitz's resume contained no
2 reference to his employment at FSC.¹¹

3 On August 10, 2010, Hurwitz attended an interview with the Employer's Police
4 Chief Ross Atstupenas (Atstupenas) and Lieutenant Gregory Gilmore (Gilmore). At the
5 August 10, 2010 interview, Hurwitz mentioned that he previously worked at FSC¹² and
6 discussed the other prior employers that he had listed on his resume.

7 Thereafter, Chief Atstupenas chose Hurwitz as a finalist for the open position and
8 requested that Gilmore conduct a full background check on Hurwitz.¹³ On August 14,
9 2010, Gilmore sent Atstupenas a memorandum that stated in pertinent part:

10 Please find the following information regarding Maxwell E. Hurwitz,
11 candidate for PATROLMAN for the Blackstone Police Department
12

13 POLICE IN HOUSE CHECK-CHAMPLAIN COLLEGE
14

15 *Champlain College Campus Security, Burlington VT* [Emphasis in the
16 original]: I called and spoke with an officer from the college who stated
17 there were no records regarding the candidates that he had access to. He

¹¹ At hearing, Hurwitz contended that he did not list his FSC work experience on his resume because a resume was a marketing tool to show his best attributes, and that he viewed his FSC position as a transitional job.

¹² Atstupenas asserted that Hurwitz did not mention his employment at FSC during the interview. However, I credit Hurwitz's testimony on this point because Gilmore had to have known about FSC, when he contacted FSC, as well as Hurwitz's other prior employers, as part of Hurwitz's background investigation. When asked about the reference to FSC in the background investigation report, Atstupenas claimed that Hurwitz had noted in his resume that he was taking graduate courses at FSC, and that Gilmore merely had assumed that Hurwitz had worked for campus security as a student. Contrary to Atstupenas' claim, when Gilmore referenced Hurwitz's police-related training in the background investigation report, he noted that Hurwitz had held several different police officer positions, including at FSC campus security. He made no reference to student employment. Finally, Gilmore could not recall whether Hurwitz referenced his employment at FSC at the August 10, 2010 interview.

¹³ On August 11, 2010, Hurwitz executed a written authorization releasing his personnel files, disciplinary files, academy files and any other files to Gilmore.

1 suggested I request more information from the college staff. I emailed
2 Ashley Mikell requesting any information on the candidate and she has yet
3 to return my request.
4

5 POLICE IN-HOUSE CHECK-FRAMINGHAM STATE COLLEGE

6

7 *Framingham State Campus Security:* A check of the campus security in
8 house records showed no adverse activity involving HURWITZ. A desk
9 officer conducted the in-house check.
10

11 BERLIN POLICE DEPARTMENT

12

13 *Chief Otto Rhodes:* I called and left a message for Chief Rhodes on
14 August 13, 2010. I was told he was on vacation and would be returning
15 the week of the 23rd. On August 24, 2010 I called and spoke with the
16 chief. He was very complimentary of the candidate, stating that he is
17 knowledgeable, has good communication skills, and is personable. The
18 chief stated that HURWITZ has worked with many other officers outside of
19 the Berlin, MA jurisdiction, mostly due to his narcotics training, and he is
20 spoken of highly by the other officers he works with. The chief went on to
21 explain that he is competent in court, will do whatever is asked of him, and
22 performs his duties in an effective and professional manner. I inquired
23 about any disciplinary actions taken toward the candidate while under the
24 supervision of Chief Rhodes. The chief indicated that he has two (2)
25 minor infractions in his file. The first is for being out of uniform during in-
26 service training and the other is for leaving in-service training early. The
27 chief considered this insignificant but wanted us to be aware of them since
28 they do exist. Overall the chief gave a very strong recommendation for
29 the candidate.
30

31 CHITTENDEN COUNTY SHERIFF'S OFFICE

32

33 *Captain Major:* I left an email message for Cpt. Major of the sheriff's office
34 regarding the candidate. No return call or email has been sent.
35

36 SHELBURNE POLICE DEPARTMENT

37

38 *Chief James Warden:* I left an email message for Chief Warden of the
39 Shelburne Police Department regarding the candidate. I followed up with
40 a phone call message and on August 24, 2016 the chief returned my call.
41 He confirmed the candidate's employment dates. He was complimentary
42 of the officer, stating that he had no trouble getting along with other
43 officers, would take orders without question or attitude, and overall had
44 nothing adverse to say about HURWITZ. He stated there were no citizen
45 complaints in his file and no negative items in his personnel records. He

1 indicated that the candidate left the department to seek employment in
2 Massachusetts.

3
4 POLICE RELATED TRAINING

5
6 In August 2007, HURWITZ enrolled in the Boylston Municipal Police
7 Academy. He successfully graduated from this academy in November
8 2007. Either prior to or after his full time academy training, HURWITZ has
9 held several different police officer positions. He has worked for the
10 Chittenden County Sheriff's Office in Burlington, VT, the Shelburne Police
11 Department in Shelburne, VT, the Framingham State College Campus
12 Security (approx.. 4 months), and currently with the Berlin Police
13 Department in Berlin, MA

14
15 SUMMARY

16
17 This concludes the pre-employment background check of the subject
18 Maxwell E. HURWITZ [Emphasis in original]. There appears to be no
19 adverse information that was uncovered during the investigation to deduce
20 the candidate will be unsuitable for the position of police officer.

21
22 End of Report.

23 On August 25, 2010, Hurwitz completed a four-page, new member enrollment
24 form for the Worcester Regional Retirement System (WRRS), the retirement system to
25 which the Employer belonged. On the first page of the form, Hurwitz answered
26 affirmatively to the question whether he was ever a member of any other Massachusetts
27 Retirement System. When asked to list his prior or current public retirement system
28 membership and the dates of membership, Hurwitz recorded Berlin Police Department,
29 06 to 10, DYS [Department of Youth Services]¹⁴ 09 to 10 and Framingham State Coll.
30 [FSC] 06 to 07. On page 2 of the form, when asked to list prior or current employment
31 with the Commonwealth or one of its political subdivisions and the dates of employment,
32 Hurwitz recorded Berlin Police Department, 06 to 10, DYS, 09 to 10 and Framingham

¹⁴ Atstupenas was unaware that Hurwitz worked for DYS until that information came to light during the hearing.

1 State Coll. Police, 06 to 07. Although the Employer subsequently placed a copy of the
2 form in Hurwitz's personnel file, Atstupenas did not read the form until it was brought to
3 his attention in June 2017.

4 On September 7, 2010, the Employer hired Hurwitz as a patrol officer for the
5 period ending on June 30, 2011. The Employer subsequently reappointed him each
6 year. Hurwitz was a probationary employee for one year and was not eligible to
7 become a union member until September 2011. Hurwitz originally worked on the
8 second shift from 4:00 PM to 2:00 AM before transferring to the third shift.¹⁵ Then he
9 returned back to the second shift, which he currently still works. As a patrol officer,
10 Hurwitz conducted patrols, answered calls, performed traffic stops, issued citations and
11 warnings, made arrests and performed what he characterized as "pro-active police
12 work."

13 Complaints and a Letter of Support from the Public about Hurwitz

14 During Hurwitz's six years of employment with the Town, he was the subject of
15 complaints¹⁶ from members of the public about three incidents as well as the subject of
16 a letter of support. On November 23, 2011, Hurwitz stopped, i.e. pulled over, a motor
17 vehicle containing E.Z. the driver and J.B. the passenger. On November 28, 2011, both
18 E.Z. and J.B. filed complaints against Hurwitz. Gilmore subsequently investigated the
19 complaints. On December 7, 2011, he submitted a memorandum to Atstupenas that
20 stated in pertinent part:

¹⁵ The record does not reveal the hours of work of the third shift.

¹⁶ Atstupenas agreed on cross-examination that the complaints against Hurwitz ultimately were not substantiated. Atstupenas also acknowledged that he previously had been the subject of unsubstantiated complaints.

1 ... As a result of this complaint, I called both parties on November 30,
2 2011. I spoke with both subjects asked if they wished to be heard in
3 person or on the phone and they stated the phone was fine. Their
4 account of the interaction with Officer Hurwitz was similar in all aspects to
5 their written complaint. The basis of their complaint is that the officer was
6 not courteous during his interaction with them. They also had concerns
7 about why they were stopped as well as the fact that they were charged
8 with certain crimes as a result of the stop. I assured them I would speak
9 with the officer and determine any wrong doing on his part.

10
11 On December 7, 2011, I spoke with Officer Hurwitz. I explained the
12 complaint. He was not surprised that they had filed a complaint due to the
13 fact that he had interacted with both subjects before. That previous
14 interaction led to the arrest of [J.B.]. The officer reminded me that I
15 assisted him on that arrest and I did recall that. I asked him his reasoning
16 for the stop and he explained that he observed what he felt based on his
17 training and experience to be some sort of possible illegal activity involving
18 drugs. He stated he stopped the car for two legitimate reasons ... but
19 after observing in plain view drugs the stop took a turn toward that
20 possible drug nexus. As it turned out, [E.Z.] was found to possess both
21 marijuana and Class C pills and was fined and summonsed. I asked if the
22 officer ever explained to either party that they had been stopped for traffic
23 violations and he stated he didn't recall and that he might not have.

24
25 After the interview of the officer and after hearing the complaint I found the
26 officer acted appropriately, save for not telling the subjects about the
27 legitimate purpose for the stop. We both agreed that the complaining
28 parties may have acted differently if they knew they had violated traffic
29 laws. Without that knowledge it is fair to assume they thought they were
30 being unfairly targeted. That along with the fact that the officer had dealt
31 with both subjects previously and both subjects were found to be
32 somewhat disorderly on that occasion, it is not surprising they filed this
33 complaint. Officer Hurwitz stated that [E.Z.] again was very animated,
34 discourteous and disrespectful. I recall that when the officer and I dealt
35 with them previously ... she was very uncooperative and rude.

36
37 The meeting was ended by agreeing that the officer should continue to
38 work hard in his drug interdiction but to make sure he uses proper
39 authority for stopping vehicles and expresses this information to the
40 occupants as they understand they are not being randomly stopped for no
41 legitimate reason.

42 On or about August 22, 2012, a motorist called and complained about the
43 manner in which Hurwitz operated his police cruiser. Thereafter, Gilmore investigated

1 the complaint. On September 5, 2012, Gilmore sent a memorandum to Atstupenas that
2 stated in pertinent part:

3 Please accept this follow up narrative in reference to the complaint
4 received on August 22, 2012 regarding the operation of a police cruiser by
5 Officer Hurwitz. As you know the officer was on extended time off and my
6 follow up interview was delayed due to this. On September 4, 2012 I had
7 the opportunity to speak with Officer Hurwitz. I asked him if he recalled a
8 near collision on the date in question and he did recall it. I asked him to
9 explain what happened.

10
11 Officer Hurwitz stated that he was merging onto Rt. 495 northbound and
12 was in the far right lane (slow lane). He stated he then activated his
13 directional and began to merge into the middle lane. As he did he looked
14 over his shoulder and noticed there was a vehicle in his "blind spot." He
15 quickly adjusted his position in the roadway so as not to collide with the
16 vehicle in question. He said the operator of that vehicle then pressed his
17 horn for an extended period of time. Officer Hurwitz said he then entered
18 the middle lane and waived his hand out the window, offering a sign of
19 apology for his error. The officer stated he then continued on Rt. 495 and
20 shortly thereafter exited the highway.

21
22 Officer Hurwitz freely admitted that he was in error by failing to use due
23 caution when entering the middle travel lane. He said he did check the
24 lane before completely entering it and by doing this he was able to avoid
25 colliding with the complainants' vehicle. He denied any malicious intent
26 when he waving his hand out the window; he stated he was simply trying to
27 let the other driver know he had made a mistake and was waving his
28 apology.

29
30 Officer Hurwitz will be issued a warning for failure to use caution while
31 operating a police cruiser.

32 Also, on September 5, 2012, Gilmore sent a memorandum to Hurwitz stating in
33 pertinent part:

34 I have completed my inquiry into the near collision on Rt. 495 you
35 experienced on August 22, 2012. As you know the department received a
36 complaint about your actions on this date. As a result of the inquiry I am
37 warning you to use caution while operating a police cruiser, especially in
38 traffic conditions similar to the conditions that existed on that date. For a
39 driver to take the time to call and make such a complaint is indicative of a
40 serious incident that they felt was unacceptable.
41

1 The fact that you were able to avoid an actual collision is good, but in the
2 future avoiding near collision is more preferable. Safe, uneventful cruiser
3 operations will almost never lead to complaints.

4 On August 29, 2012, Hurwitz assisted a Millville police officer (S.K.) in performing
5 a motor vehicle stop. An individual (D.L.) was operating the automobile and
6 subsequently sent a complaint via email to the Employer about the motor vehicle stop.
7 Gilmore then contacted D.L. about his complaint. On October 13, 2012, Gilmore sent a
8 memorandum to Atstupenas stating in pertinent part:

9 As we discussed I spoke with [D.L.] in reference to a Millville car stop on
10 August 29, 2012 (August 29, 2012 Millville motor vehicle stop). There was
11 a question whether the officer in this case had properly identified himself.
12 I spoke with Officer Hurwitz and he did not recall the subject asking for
13 identification. Officer Hurwitz did recall a heated exchange between D.L.
14 and the Millville Officer [S.K]. I spoke with [D.L.] and he agreed that there
15 were tense moments between he and the Millville officer, including the
16 Millville officer refusing to identify himself. D.L. claims that he also wanted
17 Officer Hurwitz' information but was rejected. He stated he really had no
18 issues with Officer Hurwitz other than wanting to subpoena him as a
19 witness. I also spoke with Millville police officer S.K. He recalled the
20 situation because of the attitude of D.L. Officer [S.K.] does not remember
21 D.L. asking for Officer Hurwitz's information.

22 Also, on October 13, 2012, Gilmore issued Hurwitz a memorandum (October 13, 2012
23 memorandum) concerning a verbal warning for a failure to call out, which, in part,
24 referenced the August 29, 2012 Millville motor vehicle stop. The October 13, 2012
25 memorandum stated in pertinent part:

26 This is to confirm your recent verbal warning for failing to call out of your
27 cruiser. As we discuss[ed] when you were given your warning, it is the
28 policy of this department to radio the dispatcher if you are exiting your
29 cruiser. This is a safety issue for you and other officers. Secondly,
30 although it is uncertain whether or not the complaining party on August 29,
31 2012 ... did in fact ask for your name or badge number, please be
32 reminded that it is the policy of this department to identify yourself when
33 asked by a citizen. This should be done by either stating your last name
34 and/or your badge number.

1 On January 16, 2014, an individual came into the police station and reported that
2 he had left his wallet at a local restaurant. When he went back for the wallet, he alleged
3 that cash was missing from it. The Employer assigned Hurwitz to investigate the
4 incident, which he did by going to the restaurant and speaking with two employees who
5 found the wallet. Also, on January 16, 2014, a bystander named R.R. filed a complaint
6 via email concerning Hurwitz's questioning of the two restaurant employees.

7 Gilmore subsequently investigated the complaint. On January 29, 2014, Gilmore
8 compiled what was entitled "Narrative Entry", which related in pertinent in pertinent part:

9 ... In the email, the complaining party, identified as R.R., wrote that he was
10 in line at the ___ restaurant in Blackstone on January 16, 2014 when a
11 Blackstone police officer approached the two girls working behind the
12 counter and spoke with them (the officer was investigating a stolen wallet).
13 He stated the officer "rudely" called over one of the girls to ask her
14 questions and questioned the other girl outside away from the patrons with
15 no jacket on. R.R. stated it appeared one of the girls was nearly about to
16 cry. He felt the exchange was "distasteful and unacceptable". ...

17
18 The two girls involved in this incident were identified as K.B. and D.B. I
19 called K.B. and spoke with her after receiving the email from R.R. She
20 stated she was the first person the officer spoke with and she stated he
21 eventually ended up speaking with her partner that night because D.B. was
22 not working the night the wallet was stolen. She stated she was willing to
23 come to the police station and speak with me about the incident. We
24 scheduled a meeting for January 21, 2014 at 4 pm. She never arrived for
25 the meeting and did not call to reschedule. On January 24, 2014 I spoke
26 with D.B on the phone. I explained why I was calling and she told me she
27 didn't need to speak with me in detail about the incident because she had
28 no problem with what the officer did. She stated the only problem she had
29 with the incident was that he was conducting the questioning during a busy
30 time at the restaurant so she was concerned about the long line. She said
31 "he was just doing his job". I asked her if the officer was respectful during
32 his questioning and she said "yes".

33
34 I spoke with Officer Hurwitz about the complaint. He denied being rude or
35 disrespectful to the girls. He stated that he was shocked that someone
36 filed a complaint. He was confident that the girls would support his claim
37 that he was not badgering them in any way. He opined that the reason the
38 person filed the complaint was because it slowed down the line to order

sandwiches. The officer agreed that the timing of his questioning most likely interrupted the normal flow of business at the restaurant.

I sent several return emails to R.R. and asked him to contact me. He wrote back on one occasion and stated he works third shift so it would be inconvenient to discuss the matter outside of email. I wrote an apology on behalf of the department for anything the officer did that offended him and again made an offer for him to come to discuss the matter further. Referred to Chief Atstupenas for review.

The record does not show that Atstupenas took any further action on the matter.

On March 26, 2013, M.M., a Worcester attorney, sent a letter to Atstupenas praising Hurwitz. M.M. stated in pertinent part:

I am writing this letter in regard to Officer Maxwell Hurwitz. I have had the opportunity to work on cases in which he has been involved. I am writing this letter to simply let you know that I think he is a fine young officer who impresses me very much. He is an extremely capable young man. He handles himself well out on the street. I have talked to several clients who indicate that although he is firm he is a gentleman out on the street. I have dealt with him in court with him testifying against my clients. He is an extremely capable officer. He is always polite, courteous and everything that a police officer should be. He is true credit to your department. The people in Blackstone are lucky to have him as one of the officers in their town.

I don't usually write letters like this but I am so impressed with him that I thought I should write this letter. I have been a lawyer for thirty-eight years, a former Mass. Defender and Assistant District Attorney. I have literally been trying cases for thirty-eight years and I can say with a great deal of experience that Officer Hurwitz is exceptional young man.¹⁷

Hurwitz's Protected Activity Prior to January 2016

Tenure as Local President

In 2013, Hurwitz became local union president for a bargaining unit of thirteen employees. On or about that time, unit members changed their exclusive bargaining representative from AFSCME to MCOP. Hurwitz took issue with how the prior Union

¹⁷ Atstupenas did not consider M.M.'s letter when deciding whether or not to promote Hurwitz.

1 leadership had handled the local's finances because the Union only had approximately
2 \$800 in its treasury. Also, he disagreed with how the prior leadership represented the
3 bargaining unit members because he contended that the Employer had violated the
4 FLSA (Fair Labor Standards Act) and had failed to adhere its contractual obligations
5 concerning the use of time off and paid leave. Thereafter, Hurwitz and Atstupenas met
6 to discuss the alleged FLSA and contractual violations referenced above.

7 *Retiree Health Insurance*

8 Prior to Hurwitz becoming local union president, the Town did not provide health
9 insurance to its municipal retirees (retiree health insurance). Shortly after Hurwitz
10 became president, Hurwitz successfully advocated for the Town to provide retiree
11 health insurance. He spoke at Town Meeting urging residents to vote in favor of
12 adopting the necessary provisions of M.G.L. c.32B concerning retiree health insurance.

13 *GPS Devices*

14 Also, Hurwitz successfully opposed the Town's installation of GPS devices in
15 police cruisers. Atstupenas had requested an article at Town Meeting to allocate funds
16 for GPS devices. At Town Meeting, Hurwitz expressed the Union's opposition to the
17 Police Chief's request, and Atstupenas spoke in favor of it. Town Meeting members
18 ultimately denied the allocation request.

19 *February 2014 Dispute over Compensatory Time*

20 On or about early February of 2014, the Town paid Hurwitz four hours for
21 attendance at a training session. On February 6, 2014 at 4:27 PM, Hurwitz sent an
22 email message to Atstupenas stating in pertinent part:

1 You said that everyone was getting 5hr for this last training, prior to our
2 meeting. How come I was only given four hours, and the other officers
3 were given five?

4 Atstupenas responded via email that same date at 5:03 PM stating in pertinent part:

5 Did you work that night? And in the future I would appreciate a better email
6 not one that has that tone. Just ask me.

7 Twenty-two minutes later at 5:25 PM, Hurwitz replied via email: "No tone at all intended,
8 my apologies." Seven minutes later at 5:32 PM, Atstupenas sent an email message
9 stating: "Let me look into it." On February 11, 2014, Hurwitz then went to see
10 Atstupenas and informed him that he had not intended to have a tone in his email.

11 Atstupenas responded: "You can figure out if there's a tone in your email while you are
12 home on suspension."¹⁸ Also, on February 11, 2014, Hurwitz completed an incident
13 report to document to his correspondence with Atstupenas and their meeting. Hurwitz in
14 the February 11, 2104 report noted in pertinent part:

15 On 2/10/14, I spoke with Chief Atstupenas in his office in reference to the
16 email I sent him about my comp-time hours, where his response was
17 referring to my "tone". Chief immediately became defensive and
18 accusatory, stating that I was insubordinate towards him in the email. I
19 explained to him there was no intent of that, as was explained in my
20 extensive response email at the time. He subsequently disagreed. And
21 stated: "You can explain to me how there was no tone in your email while
22 you[r] home on a Suspension."

23
24 I took this as overly aggressive and threatening towards a simple question
25 that was asked, and following me taking the time to explain myself, due to
26 the fact that he was overly upset from the email response. ...

27 Atstupenas subsequently did not discipline Hurwitz for his February 6, 2014 email.

¹⁸ At hearing, Atstupenas could not recall the February 11, 2014 discussion with Hurwitz but, in response to a question from his own counsel, did confirm that he never threatened Hurwitz with a suspension during Hurwitz's seven years of employment. However, I credit Hurwitz's testimony on this point because it is supported by the incident report referenced above, which he wrote contemporaneously with the meeting.

1 *Claims of Intimidation*

2 Early in Hurwitz's presidency, he and Atstupenas agreed to meet and try to
3 resolve any disputes that arose before the Union took any further action.¹⁹ Hurwitz and
4 Union local vice-president Gregory Haynes (Haynes) typically met with Atstupenas
5 once or twice per month to discuss any outstanding issues. At certain meetings,
6 Atstupenas became upset and commented that the Union could not tell him what to do.
7 Hurwitz perceived the Police Chief's conduct at some of these meetings as intimidating
8 and opined at hearing that Atstupenas should not have treated him as a subordinate but
9 as an equal when Hurwitz acted on behalf of the Union.²⁰ On or about July 26, 2014,
10 Hurwitz sent a letter²¹ to Atstupenas with the subject line "Treatment towards Union
11 officials". Hurwitz's letter stated in pertinent part:

12 I would like to notify you that I will no longer be taking the time and effort
13 to notify you of any upcoming Union Business involving our Administration
14 in the future, as you requested by you at a previous meeting. This was
15 seen as a sign of our generous compliance for your request on this matter.
16

17 As the Union President, I will no longer be put in a position where Threats,
18 Intimidation and Retaliatory statements will be made in reference to non-
19 related issues other than the ones being addressed. When a Union action
20 is required to be taken, I am to feel free of the commonly used tactic of
21 engaging in these unrelated threats of Retaliation from you, and to
22 exercise the right to represent any of our men if they have been neglected
23 and/or treated unfairly in regards to any Labor Standards Set Forth.
24

25 I feel that it is the aforementioned type of responses by you, that will
26 further breakdown the attempts by our Union Officials to have a
27 Harmonious and Cooperative relationship with you and the Administration.

¹⁹ At hearing, Atstupenas pointed to this fact in support of his opinion that he and Hurwitz had a "good relationship."

²⁰ The record does not contain specific details about these meetings, including the dates of the meetings and the topics that were discussed at those meetings.

²¹ Hurwitz's letter was undated.

1 This has been thoroughly reported to our Primary Legal Counsel, and any
2 responsive action to these situations from hereon will be their decision to
3 make and dealt directly with Blackstone Town Counsel.

4 Hurwitz did not file a grievance or a prohibited practice charge as a follow-up to
5 his July 26, 2014 letter. Instead, he requested that MCOP labor counsel Kareem
6 Morgan (Morgan) schedule a meeting with Atstupenas and Town Administrator Daniel
7 Keyes (Keyes). The meeting took place on November 12, 2014. Hurwitz, Haynes and
8 Morgan attended on behalf of the Union, Atstupenas, Keyes and Town counsel Stephen
9 Pfaff (Pfaff) attended on behalf of the Employer.²² The parties discussed several Step 1
10 grievances as well as certain other matters. On November 20, 2014, Morgan sent a
11 letter (November 20, 2014 letter) to Hurwitz regarding the November 12, 2014 meeting,
12 which stated in pertinent part:

13 On November 12, 2014, a meeting was held between Blackstone Police
14 Patrolmen's Association (BPPA), Chief of Police Ross A. Atstupenas,
15 Town Administrator Daniel M. Keyes, and town counsel Stephen C. Pfaff.
16 Present for the union was Max Hurwitz, Greg Haynes, and union counsel.
17

18 In addition to several step 1 grievances that were heard, the following is a
19 summary of the items discussed and their status at the close of the
20 hearing:
21

22 **Comp Time** (Emphasis in the original) With respect to the accrual, usage,
23 and granting of comp time, the Town agreed that the federal regulations
24 (Fair Labor Standards Act, or FLSA) control and will be followed. The
25 mutual agreement and understanding between the parties is that, while
26 the Town has not budgeted for wide-scale payouts of overtime (versus
27 comp time), it will honor those occasions where an officer elects to receive
28 overtime pay instead of accrued comp time. It is understood that the
29 overtime vs. comp time issue will be revisited during negotiations for the
30 next contract period.

²² Although Hurwitz and Atstupenas referred to the November 12, 2014 meeting in their testimonies, they did not provide detailed descriptions of what took place at that meeting.

1 Another issue involving comp time is the contractual provision under
2 Article XXXII which provides that "[The Union] and the Town of Blackstone
3 hereby agree that each officer who does yearly gun range qualification
4 will be awarded five (5) hours of compensation time." The Union took the
5 position that this is a faulty provision-not only because a member should
6 be entitled to overtime if s/he so chooses-but because it potentially caps
7 him or her at less than they might otherwise be entitled (i.e. four hours
8 overtime equates to six hours comp time). Again, relying on the FLSA, the
9 Union took the position that this provision was illegal. The Town's initial
10 response was that the Union agreed to it, to which the Union responded
11 that parties cannot enter into an illegal agreement. The Town agreed to
12 look into this and get back to the Union.

13
14 The last issue involving comp time that arose was the denial of the use of
15 comp time. This involves a separate, but related issue-the Chief's ability
16 to unilaterally create **Mandatory Days On**. The Union's position is clear-
17 the contract only allows for mandatory days (i.e. no vacation leave) on
18 Memorial Day (as per the contract), and in emergency situations. The
19 Town's position is that this is a management right. Further legal action is
20 currently being contemplated by the Union.

21
22 **Vacation/Time Off Requests** With respect to the issue of [the] Chief
23 granting or denying requested time off, the Chief agreed that, pursuant to
24 the terms of the contract (Art. IX), the Lieutenant could grant requests for
25 vacation, etc. in the Chief's absence. In the event the vacation computer
26 program is not functioning (and the Chief is not available), members
27 should direct their requests to the Lieutenant.

28
29 **Threats of Retaliation to Union Action/Officials** This was a follow-up
30 conversation of the letter given to the Chief (dated 7/26/14) by President
31 Hurwitz regarding the hostile treatment and reaction to the Union for
32 conducting Union business. While the Chief denied both retaliation
33 against the Union and targeted reprimands of specific officers, the parties
34 agreed as to the treatment of union officials moving forward.

35
36 **Annual In-Service Training** The parties mutually agreed that the current
37 system for the yearly in-service training will remain in place. Training days
38 will be "day for a day," meaning members will be compensated at their
39 normal rates and cannot be forced into work, even if the training runs
40 shorter than their regularly scheduled shift. All other training that is not
41 required for annual certification will be treated as voluntary, which will be
42 disbursed as comp time in accordance with past practices.

43
44 **Force List** Pursuant to Article XV, the Chief has agreed to honor the force
45 list/order in list, whereby the five least senior officers eligible for overtime
46 will be ordered in (on a rotating list) for whatever overtime if it cannot

1 otherwise be filled. For example, if a senior officer requests to take
2 Thanksgiving off three working days in advance, and there are no other
3 external reasons to deny the request, the Chief understands that he may
4 have to refer to the force list to fill the shift (assuming there are no other
5 volunteers to fill it).
6

7 **Narcan** Given the added duties and responsibilities of observing the
8 Department's Narcan policy, the Union has requested an additional one
9 (1) year of the members' base salary (in addition to the 2 percent clothing
10 allowance members already receive) as consideration for the Union's
11 cooperation and compliance. The Town is considering the proposal and
12 will get back to the Union.
13

14 If you have any additional questions or need clarification of any of the
15 above-mentioned items, please feel free to contact me. ...

16 After the November 12, 2014 meeting, Hurwitz mostly communicated with
17 Atstupenas regarding labor relations matters via email. Hurwitz used email because he
18 wanted documentation of his communications, and because it was the most efficient
19 means of communication as he and Atstupenas worked different shifts.

20 *Instances when Hurwitz and Atstupenas Reached Agreement*

21 At certain times, Hurwitz and Atstupenas worked together in what Hurwitz
22 characterized as a professional and productive manner to resolve outstanding labor
23 issues. They negotiated the 2013-2016 CBA. Also, in September 2013, the Police
24 Chief agreed to provide a Keurig coffeemaker for the break room. In the Fall of 2013,
25 Atstupenas designated Hurwitz as the go-to-person for individuals who were found to
26 have drugs in their possession or had been arrested for drug possession. Also, in
27 December of 2013, the Police Chief agreed to Hurwitz's request to attend specialized
28 training concerning sexual assault investigations and interrogation tactics. In April
29 2014, Atstupenas agreed to Hurwitz's request to hang the new Union charter in the
30 break room. On or about June 4, 2014, Hurwitz and Atstupenas agreed to a procedure

1 that would be followed when a contractor wanted to use a civilian flag man rather than a
2 police detail at a construction site. In July 2014, Hurwitz and Atstupenas agreed that
3 the Town would pay compensatory time to unit members.²³ On or about October 20,
4 2014, they reached an agreement regarding court time. In December 2014, Hurwitz did
5 not receive the correct amount of compensatory time that he had earned and the Police
6 Chief agreed to fix the error. In January 2015, Hurwitz and Atstupenas met to discuss
7 the impacts on unit members of an expected blizzard. In May of 2015, they came to
8 agreement regarding the issue of forced overtime. In June of 2015, Hurwitz and
9 Atstupenas negotiated about how to fill outside details during the summer. On or about
10 July 17, 2015, Atstupenas approved Hurwitz's request to place a sign with the Union
11 logo above the bulletin board. In December 2015 and January 2016, Atstupenas and
12 Hurwitz agreed that unit members who went to a particular training would be paid a
13 certain amount of overtime.

14 Hurwitz and Atstupenas also agreed in approximately six instances from 2013
15 through 2015 that the Employer would reduce or remove discipline that a unit member
16 previously received. The surnames of the affected officers and the approximate dates
17 of the agreements were: Hurwitz, in February 2013 and June 2015; Loether in
18 November 2014, and on an unspecified date; and, Lungarini and Brodeur in November
19 2014.

20 Bargaining over the Sergeant's Promotional Process

21 In November 2015, the sole police sergeant named Ryan retired. On or about
22 that time, Atstupenas informed Hurwitz as Union president that not only did he intend to

²³ Hurwitz later asserted that Atstupenas failed to abide by that compensatory time agreement.

1 fill the vacant sergeant's position, he also intended to appoint two additional sergeants.
2 A municipal bylaw, Blackstone, Massachusetts Bylaw, SS33-19 (amended 1989),
3 addressed the Employer's filling of the sergeant positions. The bylaw read as follows:

4 Sergeants: Only those who have served at least five years as a
5 patrolperson would be eligible to take the qualifying written exam. All
6 candidates must have a minimum of an associate's degree in Law
7 Enforcement or a related field. Promotion shall be made by the appointing
8 authority based not only on the written exam results, but a thorough
9 interview by three Police Chiefs. The Blackstone Police Chief will not be a
10 part of the interview process but will submit an evaluation of the
11 individual's past performance. The appointing authority will make final
12 selection.

13 The parties' 2013-2016 CBA contained no language concerning the procedure to be
14 used to fill sergeant vacancies.

15 On January 14, 2016, Atstupenas sent a memorandum (January 14, 2016
16 memorandum) to the Union's officers, including Hurwitz, as well as the steward and the
17 business agent, regarding the sergeants' promotional process. The January 14, 2016
18 memorandum stated in pertinent part:

19 Attached is a copy of the proposed Sergeants' promotional process for the
20 Blackstone Police Department. As Chief of Police, it is my obligation to
21 attempt to ensure that our department's currently vacated Sergeants'
22 positions are filled and that such vacancies are filled by the most qualified
23 candidates. I would welcome any input you or your membership might
24 have concerning this promotional procedure.

25
26 If you feel that this procedure involves or impacts on a mandatory subject
27 of bargaining and you want to engage in bargaining over it, please forward
28 a request for bargaining to me by 01/22/2016 (or ask for more time by that
29 date if necessary).

30 The attachment entitled Blackstone Police Department Sergeant's Promotional Process
31 described the following process by which the Employer anticipated filling the three
32 vacant sergeant positions:

1 The process will involve the following two prongs in order to score each
2 candidate for the position of Sergeant:

3
4 ASSESSMENT CENTER The Department will utilize the services of Public
5 Safety Consultants, LLC to conduct the Assessment Center. The
6 Assessment Center consists of trained assessors (Subject Matter Experts)
7 who score each candidate in a series of individual and group exercises that
8 simulate critical aspects of the target job. The exercises are developed
9 and determined as a result of a Job Task Analysis developed specific to
10 the Town of Blackstone. Trained assessors will observe each candidate's
11 performance and responses and evaluate exhibited behavior on predefined
12 dimensions that relate to the specific job in question.

13
14 [Candidates may receive a maximum score of 70 points from the
15 Assessment Center.]

16
17 ORAL INTERVIEW PANEL: The Department will also utilize an oral
18 interview panel, consisting of three (3) chiefs of police from the
19 Commonwealth of Massachusetts. While the Blackstone Police
20 Department Chief of Police may sit on the oral interview panel to ask
21 questions and observe the candidates, said individual will not award the
22 candidates any points. The oral interview panel may be expected to ask
23 candidates various questions and may grade each candidate's respective
24 cover letter and resume.

25 [Candidates may receive a maximum score of 30 points from the oral
26 interview panel.]

27
28 **The total possible points that a candidate may receive for the entire**
29 **promotional process is 100 points.** (Emphasis in the original)

30
31 Top candidates must successfully complete/pass a background
32 investigation and psychological examination.

33 Thereafter, the Union requested to bargain over the promotion process. On January 20,
34 2016, Hurwitz replied to the January 14, 2016 memorandum by stating:²⁴

35 These ... are the responses to me from our legal counsel. As my counsel
36 has stated, maybe they happen to be oversights, but they have suggested
37 that you and I put some thought into them. ...

38
39 **Sergeant's Promotional Process-**Does Public Safety Consultants LLC,
40 have the ability to provide a list of eligible or suggested Chiefs [t]o use

²⁴ The letter also made certain inquiries about the Employer's proposed policy concerning the use of Narcan.

1 during Step Two of the process? A simple 'Yes' or 'No' response will be
2 sufficient.

3 The Union and the Employer subsequently met four to six times to bargain over
4 the promotional process with Hurwitz and Atstupenas both present at those meetings.
5 The Union and the Employer communicated a number of times about the issue, with
6 Haynes as the vice-president acting on behalf of the Union. Ultimately, the parties
7 agreed upon a two-part process, which would take place over three days. The
8 assessment center would take place on two days and the police chiefs' interview panel
9 (oral board) would take place on the third day. The candidates' scores from the
10 assessment center would comprise seventy percent of their total scores while their
11 scores from the oral board would comprise the remaining thirty percent. The Employer
12 also would conduct a background investigation²⁵ and a psychological assessment on
13 the top candidates.²⁶ The Union and the Employer never agreed that the candidates'
14 with the top three scores would receive promotions.

15 Successor Contract Negotiations

16 In January and February 2016, the parties were engaged in negotiations for a
17 successor collective bargaining agreement, which would take effect on July 1, 2016.
18 On January 19, 2016, Hurwitz sent Atstupenas a Union proposal (January 19, 2016
19 proposal) to incorporate the language of SS-319 into Article 4, Job Posting and Bidding

²⁵ Hurwitz's understanding was that the background investigation would consist of a review of the candidates' personnel files and certain performance statistics, including the number of traffic citations, traffic warnings, etc., that the candidates had issued.

²⁶ The record does expand upon the phrase "top candidates".

1 in the successor contract.²⁷ The parties were scheduled to hold successor contract
2 negotiations on February 3, 2016. Hurwitz requested to meet with Atstupenas a day in
3 advance in order that they could unofficially discuss certain proposals, and Atstupenas
4 agreed. At the February 3, 2016 bargaining session, the parties agreed upon a
5 tentative successor collective bargaining agreement (tentative agreement). The Union
6 then submitted the tentative successor contract to its unit members for a ratification
7 vote. On February 9, 2016 at 7:25 PM, Hurwitz sent an email message to Atstupenas
8 stating in pertinent part:

9 Everything has been voted on and ratified on our end. Long road, I'm
10 exhausted!!!

11 In a reply sent via email three minutes later, Atstupenas commented:

12 Well I hope they appreciate everything you have done. I know what you
13 have done and it has changed and I enjoy working with you.

14 Hurwitz responded via email one minute later stating:

15 That means a lot coming from you Chief. I very much appreciate it. See
16 you at the office.

17 On April 7, 2016, the parties executed the 2016-2019 CBA, which included the
18 language that the Union had sought in its January 19, 2016 proposal.

19 Posting of the Sergeants' Vacancies

20 In February 2016, the Town posted the three vacancies for sergeant. Thereafter,
21 six candidates, all of whom were internal candidates, applied for the vacancies. The

²⁷ Below the language of SS-319, the Union's proposal also sought to include the following paragraph:

In the event that the aforementioned language is to be changed or amended by a Town Meeting, then the change in the ... contract shall amend as such at the next contract negotiation.

1 candidates were: Hurwitz, Matthew Manton (Mantoni), Kevin Luis (Luis), Shawn
2 Brodeur (Brodeur), Anthony Lungarini (Lungarini) and Haynes. The Employer did not
3 have applications for the candidates to complete. Hurwitz submitted a letter of interest
4 and a resume. Hurwitz's letter of interest stated in pertinent part:

5 My name is Officer Maxwell E. Hurwitz, and I have been serving the Town
6 of Blackstone since September of 2010. I am presenting this letter to you
7 with hopes of showing you as to why I am the most qualified candidate to
8 achieve the Rank of Sergeant within the Blackstone Police Department.
9

10 I sit in front of you today with aspirations of furthering the duties and
11 responsibilities that will inherently be placed on me in the event that I am
12 bestowed with the Honor of becoming a Patrol Sergeant and leader within
13 our Department.
14

15 My Law Enforcement career began in 2001 as a Deputy Sheriff with the
16 Chittenden County Sheriff's Office in the State of Vermont. As a young
17 "Nineteen Year Old" Deputy, I began to work patrol and was ultimately
18 given the duty of working Uniformed Drug Interdiction throughout the
19 County and State. I worked alongside members of the Drug Enforcement
20 Administration (DEA), Alcohol Tobacco and Firearms (ATF), Federal
21 Bureau of Investigation (FBI), Border Patrol & Customs (ICE), Vermont
22 National Guard and numerous Departments of State, County and Local
23 Police. Alongside these agencies, I was fortunate enough to participate in
24 advanced investigations, which ultimately forged a foundation for the
25 future of my career.
26

27 In 2004, I was offered a position with the Town of Shelburne, Vermont,
28 where my advanced investigative work continued. For the first time, I
29 began to participate in plain clothes operations alongside many of the
30 same aforementioned agencies. The tasks demanded of me included
31 drafting warrants, serving warrants, confidential informant management,
32 undercover operations and Police asset management.
33

34 In 2006, I returned to Massachusetts and was hired by the Town of Berlin.
35 After one year of service, I was given the opportunity and accepted the
36 position of Narcotics Detective. I worked alongside Detectives from the
37 Central Worcester County Drug Task Force, to which I was a member. I
38 was fortunate enough to work numerous Narcotic investigations with the
39 Worcester DEA Office. Also known as the "High Intensity Drug Trafficking
40 Area Task Force" or 'HIDTA'. These investigations took me to many
41 different areas throughout the Commonwealth and forged long lasting
42 professional bonds and resources that I still use to this day.

1 In 2010, I was hired by the Town of Blackstone, where my professional
2 career continued. During my years spent to this point in Blackstone, I
3 have assisted in the apprehension of wanted inner-state fugitives, solved
4 commercial and residential breaking and entering cases and conducted
5 operations with federal agencies, etc. Although I feel my most important
6 achievement to date, has been forging a strong and successful
7 relationship with the Town and administration while serving as President
8 to the Blackstone Police Patrolman's Union for the past three years. ...

9 Hurwitz also attached an updated version (2016 resume) of the resume that he
10 used to apply for the patrol officer position in 2010 (2010 resume). Hurwitz had revised
11 his 2016 resume to include his six years of employment with the Town. He noted that
12 he was: a certified sexual assault investigator, a field training officer, and liquor
13 enforcement agent for the state Alcohol Beverage and Control Commission. He pointed
14 out that he was trained in taser use, Krav Maga Defensive Tactics, active shooter
15 training, and FBI-LEOKA officer survival training. He also described how he been Union
16 president since 2013. Similar to his 2010 resume, Hurwitz's 2016 resume contained no
17 reference to his prior employment with FSC.

18 On April 27, 2017, Atstupenas sent an email message to all of the Town's police
19 officers that stated in pertinent part:

20 I have attached a consent to background check [April 27, 2017 consent]
21 for all officers who are taking the sergeants test. I need this fill[ed] out and
22 handed back to me before the test date.

23 The April 27, 2017 consent read as follows:

24 I hereby authorize the Blackstone Police Department of Blackstone,
25 Massachusetts and/or its agents to make investigation of my background,
26 references, character, past employment, consumer reports, education,
27 and criminal history, record information which may be in any state or local
28 files, including those maintained by both public and private organizations,
29 for the purpose of confirming the information contained on my application
30 and/or obtaining other information which may be material to my
31 qualification for employment. A telephone facsimile (fax) or xerographic
32 copy of this consent shall be considered as valid as the original consent.

1 I hereby consent to the Blackstone Police Department's verification of all
2 the information I have provided on my application form. I also agree to
3 execute as a condition of employment or condition of continued
4 employment any additional written authorization necessary for the
5 Blackstone Police Department to obtain access to and copies of records
6 pertaining to this information. I also hereby authorize the Blackstone
7 Police Department's access to any medical histories or records pertaining
8 to me. With regard to the foregoing disclosures, I hereby agree to release
9 any person, company, agency or other entity from any and all causes of
10 action that otherwise might arise from supplying the Blackstone Police
11 Department with information it may request pursuant to this release. I
12 understand that any false answers or statements, or misrepresentations
13 by omission, made by me on this application or any related document, will
14 be sufficient for rejection of my application or for my immediate discharge
15 should such falsifications or misrepresentations be discovered after I am
16 employed.

17 On that same day, Hurwitz met with Atstupenas regarding the April 27, 2016
18 consent. Hurwitz informed Atstupenas that the April 27, 2016 consent was too
19 threatening and too invasive, and that he advised his unit members not to execute it.
20 Hurwitz perceived Atstupenas as being unhappy with Hurwitz's comments. Atstupenas
21 responded that if employees did not want to sign the April 27, 2016 consent, they would
22 not be in the process. At the end of the meeting, Atstupenas had not agreed to any
23 changes to the April 27, 2016 consent. However, the next day, Atstupenas agreed to
24 an amended consent to background check.²⁸ In an email message to Hurwitz dated
25 April 28, 2016 at 9:50 AM, Atstupenas stated in relevant part:

26 I have made changes per our conversation yesterday. I am letting you
27 know that the following is going to be sent out to all candidates for the

²⁸ Atstupenas contended that he had a second meeting with Hurwitz after he agreed to amend the consent to background check. Atstupenas asserted that it was at the second meeting where he made the comment that if employees did not want to sign the consent, they would not be considered for promotion rather than at the April 27, 2016 meeting as Hurwitz had claimed. However, I credit Hurwitz's testimony on this point as it is consistent with the April 28, 2016 email messages that Atstupenas and Hurwitz exchanged, which are reprinted subsequently in the text of the decision.

1 sergeants' test. Let me know if you have any concerns before this goes
2 out.

3
4 Note to All Candidates for the Sergeant's Promotional Process:

5
6 Yesterday, I sent a Consent to Background Check form to all officers
7 interested in participating in the upcoming Sergeant's promotional
8 process.

9
10 I was advised that there was some concern with certain portions of that
11 form. In particular, there was concern that the background check would
12 be used to obtain medical records. I spoke with your Union President to
13 address this concern and have assured him that the form would not be
14 used to obtain medical records. I have also removed any reference to
15 medical records from the Consent to Background Check form to allay any
16 further concerns. In particular, the following sentence was deleted from
17 the form:

18
19 *I also hereby authorize the Blackstone Police Department's*
20 *access to any medical histories or records pertaining to me.*
21 *[Emphasis in the original].*
22

23 In addition, the Union President advised me that there was concern with
24 respect to the last sentence of the form which read[s] as follows:

25
26 *I understand that any false answers or statements or*
27 *misrepresentations by omission, made by me on this*
28 *application or any related document, will be sufficient for*
29 *rejection of my application or for my immediate discharge*
30 *should such falsification or misrepresentation be discovered*
31 *after I am employed.*
32

33 The last sentence has also been deleted.

34
35 I have attached a new Consent to Background Check form to this email.
36 As I advised the Union President during our conversation, and as all
37 candidates for the position of Sergeant have been previously advised, the
38 requirement that all candidates for the position of Sergeant pass a
39 background check was one of the bargained-for criteria in the promotional
40 process. As a result, all officers interested in the Sergeant's promotional
41 process are advised that failure to fulfill the background check criteria, by
42 signing and returning the attached form no later than the start of the
43 written test on May 6, 2016, will result in the withdrawal of your
44 consideration for the position of Sergeant.

45
46 Should you have any questions please do not hesitate to contact me.

1 Five minutes later, Hurwitz responded via email.²⁹

2 Absolutely perfect!!!! Thanks much Chief, I don't expect any type of push
3 back after that email, and I heavily thank you for that. If there is push
4 back, the individual candidates will be on their own.

5 Thereafter, Hurwitz and the other five candidates signed the revised consent.

6 Assessment Center

7 On Thursday, May 6 and Friday, May 7, 2016, Hurwitz and the other five
8 candidates for promotion participated in an Assessment Center, which the firm Public
9 Safety Consultants conducted.³⁰ The purpose of the assessment center was to
10 appraise the candidates' performance in various exercises that examined specific skills,
11 knowledge and abilities. On May 6, the six candidates took a written exam concerning
12 policy issues. The candidates then received a take home exam which involved a
13 tactical exercise concerning a motor vehicle homicide. They submitted that exam at
14 7:30 AM on May 7, 2016. The candidates were asked to describe what supervisory
15 tasks or tactics they would undertake within the first sixty minutes of arriving at the
16 incident scene. On May 7, 2016, the candidates participated in two scenarios involving

²⁹ Hurwitz indicated at hearing that he had consulted with the other candidates before he sent his response.

³⁰ Approximately three weeks earlier, Wayne Sampson (Sampson), the principal for Public Safety Consultants, met with Astupenas to finalize the topics on which Atstupenas wanted the candidates to be evaluated. Sampson recommended a written exam, a tactical exercise, scenarios involving citizen complaints and employee counseling, and a panel interview, and Atstupenas agreed.

On that same day, Sampson conducted an orientation for the six candidates where he explained the assessment center process. He explained that the assessors did not know any of them personally and would not know anything about them. He also handed out a list of fictitious names and each candidate selected a pseudonym. Because the candidates used those pseudonyms during the assessment center process, the assessors did not know the actual names of the candidates. Hurwitz used the pseudonym Sergeant Fox.

1 citizen complaints and employee counseling. Each candidate also attended a panel
2 interview where they were presented with certain supervisory exercises and asked
3 questions about those exercises.

4 Each of the exercises had three assessors evaluating the candidates and at the
5 end of each candidate's participation in an exercise, the assessors graded the
6 candidate.³¹ The assessors individually graded the candidate and then they started
7 over, conferred and agreed upon a consensus score for each candidate. Then the
8 scores from the five exercises were added together for a blended average score. On
9 Monday, May 9, 2017, Sampson sent an email message to Atstupenas with the
10 candidates' scores as follows: Mantoni was the highest scorer at 89; then Luis was
11 second at 88, Brodeur and Hurwitz were tied for third at 87, Haynes was fifth at 81 and
12 Lungarini was sixth at 79. Because those scores comprised seventy percent of the
13 points that the candidates earned as part of the promotional process, Mantoni earned
14 63.3 points, Luis earned 61.6 points, Brodeur and Hurwitz each earned 60.9 points,
15 Haynes earned 56.7 points, and Lungarini earned 55.3 points. Thereafter, Public Safety
16 Consultants had no further role in the promotional process.

17 Police Chiefs' Oral Board

18 On Monday, May 9, 2016, the candidates participated in the second part of the
19 promotional process, the oral board. Atstupenas had asked three police chiefs that he
20 knew, Chief Sam Albert (Albert) of Westminster, Chief Larry Barnett (Barnett) of
21 Ashburnham and Chief Steve Wojnar (Wojnar) of Dudley to participate on the board.

³¹ The assessors graded a candidate at the end of each exercise in order to avoid confusion about how a candidate performed in a prior exercise or confusion among candidates.

Atstupenas provided the board members with the following written questions that he wanted them to ask:

1. Please tell us about yourself personally and professionally, include your short term and long term goals.³²
2. Explain what the role of a sergeant in the Blackstone Police Department should be.
3. As a sergeant, you will have to make decisions that your subordinates may not like or agree with. How would you handle this? Give examples.
4. Most supervisors think that subordinates feel free to communicate upwards to them when in fact most fear such communications. How would you overcome this communication barrier?
5. You have heard of pro-active and re-active police work. Explain the difference between a pro-active and re-active supervisor. Explain which role you will fit in and the benefit that this role will give the department?
6. Police and procedures are generally encompassed into a single document. What is the difference between the two terms? Is it ever appropriate to deviate from policies and procedures?

The individual panelists gave the candidates a score of zero to five³³ on each of the five questions plus their resume and letter of intent with those six scores added together for a total score from each panelist. Those total scores were added together and multiplied by 30% for the total number of points that each candidate earned from the oral board. Atstupenas did not instruct the panelists to ask only the questions he provided or to feel free to ask any additional questions that they wanted.

The interviews took place at the Town's Public Library, and the candidates were scheduled to appear before the panel at half-hour intervals in the following order:

³² The candidates did not receive any points for their answers to this question.

³³ Five was the highest score. Ultimately, the candidates earned the following scores on the oral board: Luis-23.83, Mantoni-23.33, Hurwitz-17.00, Haynes-16.70, Brodeur-13.33, and Lungarini-12.67.

1 Brodeur at 8:30 AM, Luis at 9:00 AM, Lungarini at 9:30 AM, Hurwitz at 10:00 AM,
2 Mantoni at 10:30 AM and Haynes at 11:00 AM. Atstupenas escorted each of the
3 candidates into the interview room, introduced them to the panelists, gave the panelists
4 copies of the candidates' resumes, and left the room. Atstupenas did not identify
5 Hurwitz or Haynes as Union officers when he introduced them to the panelists.

6 Hurwitz gave Atstupenas his cellphone and keys to hold while he was interviewed.
7 Towards the end of Hurwitz's interview, the middle panelist, whose name Hurwitz could
8 not recall, asked Hurwitz if he would remain as Union president if he were promoted to
9 sergeant. Hurwitz was shocked and surprised at the question. Hurwitz first responded
10 that he took pride in being a union officer, that he had fallen into the position, and that
11 the Union did a lot of community activism. He then stated that in the event that he was
12 promoted, he would go to his union body. He would ask his members whether they
13 were comfortable that he could still fulfill his job as president while being a supervisor,
14 and if they did not feel that he could, he would consider stepping down.

15 After the oral board ended, Hurwitz retrieved his keys and cellphone from
16 Atstupenas in the lobby. Atstupenas asked him how the oral board went. Hurwitz
17 replied that it was a very good process, a fair process. Hurwitz did not inform
18 Atstupenas about the middle panelist's question about whether he would remain Union
19 president if he were promoted.³⁴

³⁴ The Employer in its post-hearing brief challenged whether Hurwitz actually was questioned about whether he would remain as Union president if promoted because he did not immediately bring the disputed question to Atstupenas' attention. The Employer argued that such conduct was inconsistent with Hurwitz's past behavior of raising issues with Atstupenas immediately. However, Hurwitz testified credibly about the question, and the Town did not call any of the three police chiefs, who sat on the oral board, to testify and potentially contradict Hurwitz's testimony.

1 Other Events in May 2016

2 FSC

3 At some point, prior to May 12, 2016, two unit members, Tappan and David
4 Laudon (Laudon) informed Atstupenas about Hurwitz's employment at FSC. They had
5 learned about Hurwitz's employment from an FSC campus police officer Christopher
6 Hallisey (Hallisey).³⁵ Atstupenas reviewed Hurwitz's 2010 resume and his 2016 resume
7 and observed that neither of the resumes referenced Hurwitz's employment at FSC.
8 Thereafter, Atstupenas contacted FSC³⁶ seeking information about Hurwitz.³⁷
9 Atstupenas did not require any of the candidates to undergo psychiatric examinations
10 as part of the promotional process. Atstupenas reasoned that all of the candidates were
11 internal candidates who underwent psychological examinations when the Town hired
12 them.

13 On May 12, 2016, FSC responded with the dates that Hurwitz began and ended
14 his employment with FSC. On May 16, 2016, Atstupenas sent a letter (May 16, 2016
15 letter) to Adelina Mora (Mora) of FSU's Human Resources Office that stated in pertinent
16 part:

17 I received a faxed copy from you on a Maxwell Hurwitz dated 05/12/2016
18 in reference to his hire date and date he left.

19
20 At the bottom you stated that he was hired on 10/16/2006 but under that
21 you stated his resignation date was 06/26/15. I think that was in error.

³⁵ The record does not indicate when Hallisey told Tappan and Laudon about Hurwitz's employment at FSC and when they informed Atstupenas about it.

³⁶ The record does not reveal when Atstupenas made that request to FSC.

³⁷ Atstupenas reviewed parts of the personnel files of all the candidates seeking promotion but did not conduct any further background investigations on any other candidate but Hurwitz.

1 Could you check your records for me and provide me with the last date he
2 worked for Framingham State. I have paperwork stating it was in 2007.
3 Also, instead of faxing, would you be able to email me the information.
4 M[y] email is ____.

5
6 I have also attached your paperwork and also a release form again.

7 Mora responded on May 17, 2016 by hand writing the notation "Hire 10/16/2006" and
8 "Resignation 06/13/2007" along with her signature and the date.

9 Notification to Keyes of Candidates Scores

10 On May 13, 2016, Atstupenas sent a memo to Keyes entitled "Candidates for
11 Sergeant Ranking of Scores" containing the following names and scores: Mantoni-
12 86.63, Luis-85.43, Hurwitz-77.9, Brodeur-74.23, Haynes 73.40 and Lungarini-67.97. At
13 that time, the Employer had not notified the six candidates of their final scores and their
14 ranking in the promotional process.

15 Hurwitz's Resignation as Union President

16 On May 20, 2016, Hurwitz³⁸ met with Atstupenas and informed him that he was
17 resigning as Union president. Hurwitz stated that he was resigning because there had
18 been a backlash from the Union membership due to the fact that he was a candidate for
19 sergeant, and that some of the Union membership thought that he was too close to
20 Atstupenas. Hurwitz did not inform Atstupenas about the other reasons for his
21 resignation which were: the middle panelist's question at the May 9, 2016 oral board as
22 to whether he would remain Union president if he were promoted and his desire to have
23 what he perceived as a fair shot for promotion. On May 21, 2016, he sent an email
24 message to the Union membership stating:

25

³⁸ Hurwitz still was unaware of his final score and ranking in the promotional process.

1 Gentlemen[:]

2
3 I am writing this email to inform you all that effective today, I am stepping
4 down as Union President. Gregory Haynes is now the acting president,
5 until an election is held. If anyone would like to know why I am stepping
6 down, I suggest that you ask me directly.

7 Also, on that same date, he forwarded a copy of that email message to Atstupenas.

8 Events in June 2016

9 *Hurwitz's Placement on Administrative Leave*

10 On June 6, 2017, while Hurwitz was on vacation, Atstupenas asked him to come
11 to the police station. Hurwitz said that he could not do so because he was on Cape
12 Cod. Atstupenas then informed him that he was placing him on administrative leave
13 effective immediately because of FSC,³⁹ that a hearing would take place on June 13,
14 2016, and that the notice placing him on administrative leave (administrative leave
15 notice) would be placed in his mailbox at the police station. Hurwitz then called Laudon
16 as the Union president⁴⁰ and asked him to go to the police station and retrieve the
17 administrative leave notice from Hurwitz's mailbox. Laudon arrived at the police station
18 ten or fifteen minutes later and retrieved it. The administrative leave notice stated in
19 pertinent part:

20 Effective June 06, 2016, you are placed on administrative leave with pay
21 pending an investigation regarding paperwork submitted by you to the Town
22 of Blackstone for: a) employment as police officer and b) promotion to the
23 position of sergeant.

³⁹ Hurwitz testified that Atstupenas asked him if he worked at FSC, and he answered affirmatively. Alternatively, Atstupenas denied that he asked whether Hurwitz worked at FSC before he gave the reason for the administrative leave. However, I need not reconcile this contradictory testimony because it is not material to the outcome of the case.

⁴⁰ The Town hired Laudon as a police officer in 2014. He became secretary-treasurer for the Union in 2015 and succeeded Hurwitz as Union president.

1 You are asked to appear in the office of the Town Administrator on June 13,
2 2[01]6 at 10:00 am for questioning regarding this investigation. You are
3 welcome to bring a union representative. ...⁴¹

4 *Laudon's Discussion with Atstupenas*

5 After Laudon retrieved the administrative leave notice, he went to Atstupenas'
6 office and informed the Police Chief that Hurwitz had called him. Atstupenas, who knew
7 that Laudon was a Union official, informed him that he intended to notify the candidates
8 who were being promoted, that he was bypassing one of the top three candidates for
9 promotion, and that everyone else was being promoted in succession. Laudon then
10 asked whether Hurwitz was being bypassed, and Atstupenas responded affirmatively.
11 Laudon then gestured to the administrative leave notice and asked if that was the
12 reason that Hurwitz had been bypassed, which Atstupenas confirmed.⁴² The meeting
13 between Laudon and Atstupenas took approximately five minutes.

14 Shortly thereafter, Laudon then called Hurwitz and told him that he was being
15 bypassed because of the administrative investigation. Laudon and Hurwitz
16 subsequently spoke with their MCOP business agent and legal counsel.

17 *Hurwitz's Receipt of his Promotional Score*

18 Approximately ninety minutes after Atstupenas spoke with Hurwitz, Hurwitz
19 received an email message from the police chief stating in pertinent part:

⁴¹ For reasons that are unclear, the copy of the administrative leave notice that was entered into the record as Charging Party Exhibit #6 was the amended notice and dated June 8, 2016.

⁴² Atstupenas denied that he discussed the promotional process with Laudon, which included referring to Hurwitz's bypass and the administrative leave as the reason for the bypass. However, I credit Laudon's testimony on this point because Laudon reported the conversation to Hurwitz and his MCOP representatives shortly thereafter. Hurwitz also credibly testified about being contacted by Laudon after Laudon's conversation with Atstupenas. Moreover, Laudon's version of events is plausible when viewed in the light of Morgan's and Pfaff's June 8, 2016 email messages, which are reprinted below.

1 Off. Hurwitz:

2
3 I know it's been a few weeks since you all took the Sergeants test.
4 Because of the town meeting and the new budget, the Town Administrator
5 wanted me to hold off just in case the budget didn't pass and also an
6 administrative issue that needed to be addressed.

7 **Here is your total score. 77.9%** (emphasis in the original).

8 *Atstupenas' Request for Additional Information from FSC*

9 On June 7, 2016, Atsutpenas sent the following letter to Mora at FSC:

10 On May 16, 2016 I requested information on the fire date of the following
11 person Maxwell Hurwitz who worked for the college.

12
13 I want to thank you for the hire date that you sent me. I forgot to ask if he
14 was part-time o[r] a full-time employee.

15
16 Thank you in advance in reference to this matter and also I have attached
17 a signed w[ai]ver from Maxwell Hurwitz.

18 On that same date, Mora responded that Hurwitz was a full-time employee.

19 *Email Exchange between Counsels*

20 On June 8, 2016, Morgan and Pfaff engaged in an email exchange regarding

21 Hurwitz. In a 12:36 PM message, Pfaff stated:

22 Kareem-In response to your letter to the Chief of yesterday, please see
23 attached. While not Hurwitz's complete personnel file, it contains the
24 information you requested associated with his initial employment and his
25 promotion material. The amended notice regarding next week's
26 investigation is attached as well.

27 At 3:38 PM, Morgan responded:

28 Thanks for the prompt response. One question-you mentioned yesterday
29 that the final decisions with respect to the sergeant's promotion have *not*
30 been made? Just wanted to make sure that was accurate.

31 Seven minutes later, Pfaff replied: "That is what I understand, but I will check."

32 At 4:06 PM, Pfaff sent a message stating:

33 Correction ... they have been made. #1, 2 and 4 off the list were selected.
34 Your guy was #3. But my guess is you probably already knew that ...

1 Pfaff's 4:06 PM message was consistent with what Atstupenas described at hearing as
2 "his thoughts" at that time that he would promote Manton and Luis, bypass Hurwitz, and
3 promote Brodeur.

4 *Investigation Interview and the Outcome*

5 On June 13, 2016, Hurwitz, Morgan, Atstupenas, and Pfaff attended Hurwitz's
6 investigative interview.⁴³ At that interview, the Union submitted a copy of the WRRS
7 form, which Hurwitz had completed on August 25, 2010, that twice listed FSC as one of
8 his prior public employers. The Union also pointed out that Gilmore's August 14, 2010
9 memorandum referenced Hurwitz working for the FSC Campus Security. During that
10 meeting, which was recorded, Atstupenas referred to Hurwitz as a "top performer."
11 Also, at that meeting, Hurwitz discussed an incident that had taken place at FSC on
12 June 7, 2007 in which he had gotten into a verbal dispute with his then shift supervisor
13 Sergeant Kelley.

14 On June 16, 2016, Atstupenas issued a memorandum to Hurwitz stating:

15 The investigation into paperwork submitted by you to the Town of
16 Blackstone for: a) employment as a police officer, and b) promotion to the
17 position of sergeant is at this time completed. I find no discipline
18 warranted. Effective immediately, you are removed from administrative
19 leave with pay, and are hereby ordered to return to duty today, June 16,
20 2016 for your 4pm shift.

21 As ordered, Hurwitz returned to work on that same date. At hearing, Atstupenas noted
22 that if he had seen the WRRS form before June 16, 2016, he would not have placed
23 Atstupenas on administrative leave. He also opined that Hurwitz was trying to hide his
24 prior employment at FSC.

⁴³ It is unclear whether the Town or the Union had any other representatives at that meeting.

1 *Documents from Hurwitz's Personnel File at FSC*

2 On or about June 13, 2016, the Town requested that Hurwitz sign a waiver
3 allowing the Town to obtain information from his FSC personnel file. Hurwitz instead
4 went to FSC and obtained a copy of his personnel file and Morgan provided copies of
5 documents in the file to Pfaff. The documents that Morgan provided to Pfaff several
6 days later included: a) a March 20, 2007 performance evaluation that Hurwitz received
7 at FSC, b) a three page internal affairs investigation report from Lieutenant Pamela
8 Curtis (Curtis) concerning the June 7, 2007 incident, and c) a June 18, 2007 memo from
9 Sherrie Prairie of FSC's Human Resources Office confirming Hurwitz's resignation
10 effective June 13, 2007. The March 20, 2007 evaluation, which was undertaken at the
11 conclusion of Hurwitz's three month probationary period, stated in pertinent part:⁴⁴

12 Comments of Departmental Supervisor-Hurwitz works best with
13 supervision and needs to learn how to listen to fellow co-workers.
14

15 Supervisor's Comments: Hurwitz is learning how to adapt from a municipal
16 style police officer with wide jurisdiction. He has shown a willingness to
17 learn Massachusetts Laws and the responsibilities of a police officer at
18 Framingham State.
19

20 Comments of Intermediate Supervisor or Personnel Officer

21
22 Officer Hurwitz must learn to adapt to department policy and expectations
23 without making his own personal adjustments to the same. Officer Hurwitz
24 must learn to work with his co-workers and take their lead when they are
25 attempting to assist him in learning the expected protocols handling calls
26 in our community. Officer Hurwitz has a great deal of experience that will
27 be helpful in handling police calls, but must make certain to operate within
28 the guidelines set forth by the Administration and the College.⁴⁵

⁴⁴ The name of the evaluator is unable to be determined from his/her signature.

⁴⁵ The March 20, 2007 evaluation also contained a handwritten note stating that Hurwitz had declined to sign his evaluation at that time.

1 Curtis in her internal affairs investigation report (FSC IA report)⁴⁶ stated in
2 pertinent part:

3 On June 7, 2007 at approximately 7:12 am, I received a phone call on my
4 police department issued NEXTEL from Officer Maxwell Hurwitz. Officer
5 Hurwitz stated that he was contacting me as a result of an issue that he
6 had with his immediate supervisor, Sergeant William Kelley. Officer
7 Hurwitz stated that he had asked Sgt. Kelley to address the issue that he
8 (Hurwitz) felt that the midnight shift had left prior to his being ready
9 (dressed and seated at dispatch). Officer Hurwitz went on to tell me that
10 he felt that Sgt. Kelley had responded to his request in a "condescending
11 manner" and that he "could not work with someone who talked down to
12 him." Officer Hurwitz stated that he and Sgt. Kelley had, "gotten into it"
13 and also stated, "I can't work with him, that's why I changed out of my
14 uniform and into street clothes and I'm calling you from personal vehicle in
15 the parking lot."

16
17 Officer Hurwitz was asked if it was just he and Sgt. Kelley on duty at the
18 time, to which time he replied that I was correct. I then specifically asked
19 Officer Hurwitz if Sgt. Kelley was the only officer working on campus, to
20 which he replied, "Yes, he's (Kelley) in the station and that's why I'm out
21 here." I immediately informed Officer Hurwitz that it was inappropriate
22 under any circumstances for a police officer to abandon their post (shift)
23 knowingly and willingly as he had done. I strongly suggested that Officer
24 Hurwitz immediately return to the police station and not leave the campus
25 without appropriate police coverage. Officer Hurwitz was instructed to
26 contact the chief of police as I was currently out of the state and expected
27 to report to in-service training as well. I informed Officer Hurwitz that I
28 would not be available to immediately respond to handle the matter
29 personally and in a timely fashion. Officer Hurwitz was put on notice that
30 abandonment of his position was absolutely unacceptable and that he
31 would be facing serious disciplinary action, up to possible termination of
32 employment for taking such action.⁴⁷

33 Officer Hurwitz informed me that he would return to the station; get back in
34 his uniform and contact the chief of police as directed.

35
36 Chief Medeiros contacted me a short while later and ordered me in to
37 work to start an internal affairs investigation regarding Officer Hurwitz
38 leaving his post and allegations that he had brought forth against Sgt.
39 Kelley. ...

⁴⁶ The FSC IA report is undated.

⁴⁷ Hurwitz on cross-examination denied that Curtis told him that he was facing serious disciplinary action. Curtis did not testify at the hearing.

1 CONCLUSION OF MY FINDINGS ARE AS SUCH:
2

3 I find that Officer Hurwitz's actions of abandoning his shift knowingly and
4 willing (the act of removing himself from his assigned duties, changing out
5 of his uniform into street clothes, departing the police station) is absolutely
6 unacceptable. Officer Hurwitz has shown that he lacks the capability of
7 handling/resolving conflict in an appropriate manner. Officer Hurwitz was
8 insubordinate in showing complete lack of respect for Sgt. Kelley's rank as
9 well as for that of our community by walking off the job. Officer Hurwitz's
10 actions on 06/07/07 mirror the repetitive cycle in which he continues to
11 question rank and challenge policy and procedures, showing a lack of
12 respect that he verbally demands from others.

13
14 Officer Hurwitz has been reprimanded on previous occasions both verbally
15 and in writing for infractions of policy and procedures. He often shows
16 improvement for a short period of time and then falls back into his old
17 ways.

18
19 Officer Hurwitz's actions of leaving his post/shift left the campus
20 defenseless and endangered the safety and welfare of everyone within
21 our community. I believe his actions on the morning of 06/07/07 speak
22 volumes as to his lack of respect for the department, the job and our
23 community.

24
25 Per AFSCME Contract 2005-2008, Article 28; Section 2, I find that Officer
26 Hurwitz, by walking off the job, acted in a manner in which [he] showed
27 "willful neglect or non-performance of duties." He also "demonstrated
28 behavior that seriously interfered with normal operations," as Sgt. Kelley
29 was left alone for a period of time, unable to respond to calls as he was
30 left to mind dispatch upon Officer Hurwitz's departure, as well as my being
31 pulled from mandatory training to report for duty because of the incident.
32 Officer Hurwitz was also "insubordinate" showing a complete lack of
33 respect for our department's mission in abandoning his shift, therefore
34 leaving the campus virtually unprotected.

35 Curtis's report also had a handwritten post-it note attached to it. The post-it note stated:

36 This form has not been served to Maxwell Hurwitz-nor has the formal I.A.
37 investigation.

38
39 Just so you have a copy of what he will be served with on Wed. 07/13/07
40 upon his return from days off. He stated that he was unable to come in
41 tomorrow and meet with me.

42 Lt. Curtis

1 Hurwitz had not seen Curtis' report prior to retrieving it from his personnel file at FSC in
2 June 2017. He had returned from a previously scheduled vacation on June 13, 2007
3 and tendered his resignation to FSC that day.⁴⁸

4 At hearing, Atstupenas commented that he could not discipline Hurwitz for his
5 actions at FSC, but he probably would not have hired him if he had known about the
6 incident involving Kelley. He also noted that he had not tried to contact Curtis to speak
7 with her about the report.

8 *Gilmore's Recommendation*

9 Atstupenas contended that he sent Gilmore⁴⁹ an email on or about June 18, 2016
10 asking whether he should promote Hurwitz or Brodeur. Atstupenas claimed that he
11 wanted to make sure that he was selecting the right candidate, and that Gilmore
12 previously had worked with both employees on the night shift.⁵⁰ Gilmore did not review
13 either employee's personnel file before he made his recommendation. Gilmore
14 recommended Brodeur because Brodeur had: a) no citizen complaints filed against him,
15 b) fewer letters of verbal warning⁵¹ than Hurwitz, c) an outstanding record on the drug

⁴⁸ The record is silent about the discrepancy between the date of July 13, 2017 on the post-it note and the June 13, 2017 date of Hurwitz's resignation.

⁴⁹ Gilmore had worked for the Employer's police department for seventeen years and had been promoted from patrol officer to lieutenant in 2005.

⁵⁰ On cross-examination, Gilmore reviewed a printout of data compiled by the Town's Records Management System and acknowledged that it showed that Hurwitz had made many more arrests and issued many more traffic citations and warnings than Brodeur had.

⁵¹ The record does not reveal how many, if any, letters of verbal warning that Brodeur had received or whether he had received any other forms of discipline.

1 task force,⁵² d) better interpersonal skills than Hurwitz, and e) longer tenure with the
2 Employer's police department than Hurwitz. Gilmore related how Hurwitz came off as
3 arrogant and rubbed people the wrong way although he provided no examples of
4 Hurwitz's behavior.

5 *Atstupenas' Recommendation to the Town Administrator*

6 On or about June 20, 2016, Atstupenas informed the Town Administrator that he
7 was recommending Mantoni, Luis and Brodeur for promotion to sergeant because they
8 were the best candidates.⁵³ Atstupenas indicated at hearing that he looked at
9 everything when he decided which candidates to promote. When asked various times
10 by both counsels why he bypassed Hurwitz in favor of Brodeur, Atstupenas cited: a)
11 Hurwitz's lack of growth, b) citizen complaints against Hurwitz, c) Hurwitz's interactions
12 with other officers and members of the public,⁵⁴ d) the administrative investigation into
13 Hurwitz's failure to disclose his prior employment at FSC when he was hired by the
14 Town, e) Gilmore's recommendation, f) Brodeur's greater seniority with the Employer's

⁵² The record does not show how long Brodeur was a member of or any details about his service on the drug task force.

⁵³ Atstupenas also informally notified Mantoni, Luis and Brodeur of his recommendation that they be promoted although the record does not reveal when that notification occurred.

⁵⁴ Atstupenas did not provide details about these undocumented interactions with the public and other officers and described them as not having been documented.

1 police department,⁵⁵ and g) the FSC IA report and evaluation of Hurwitz. Atstupenas
2 denied that he bypassed Hurwitz for promotion in order to discipline him for not
3 including his employment at FSC on his 2007 and upgraded resumes.

4 *Union's Inquiry about the Status of the Promotional Process*

5 On June 20, 2016, Morgan sent a letter via email to Atstupenas at 1:29 PM with
6 copies to Pfaff and Hurwitz that stated:

7 By letter dated June 16, 2016. Officer Hurwitz was informed that the
8 administrative investigation regarding his employment and promotion to
9 the position of sergeant is complete. He was further notified that no
10 discipline is warranted. Thank you for the update.

11
12 I am also requesting an update with respect to Officer Hurwitz's promotion
13 to sergeant within the Blackstone Police Department. Given the
14 unsubstantiated investigation where he was cleared of any wrongdoing, as
15 well as his score on the recent sergeant's exam, it is my understanding
16 that Officer Hurwitz is eligible and entitled to become a sergeant. You in
17 fact referred to Officer Hurwitz as a top performer at our June 13 interview.
18 Therefore, I am respectfully requesting his immediate promotion to
19 sergeant.

20 Please let me know if you have any questions. Thank you in advance for
21 your cooperation.

22 On 4:54 PM on that same date, Pfaff responded that:

23
24 I am replying to your email to Chief Atstupenas of today re: letter
25 regarding Officer Hurwitz. The hiring process for Sergeant is now closed,
26 and it is the Chief's discretion to select a person(s) for the position. Officer
27 Hurwitz was not selected for a Sergeant's position this time, but is invited
28 and encouraged to apply for any future opening for the position of
29 sergeant.

30 Kindly inquire with me if there are any questions regarding this issue.
31

⁵⁵ Atstupenas acknowledged that he only considered Brodeur and Hurwitz's length of service with the Town's police department and did not consider the fact that Hurwitz had more overall law enforcement experience than Brodeur. Atstupenas also acknowledged that Luis also had less seniority than Brodeur because he was hired only one day before Hurwitz but indicated that Luis's second-place score was more significant than his seniority date.

1 On or about, June 22, 2016, Keyes notified the five-member Board of Selectmen
2 that Atstupenas had recommended the promotions of Mantoni, Luis and Brodeur to the
3 rank of sergeant. Pursuant to the Town's Charter, the Board of Selectmen is the
4 appointing authority for the police department's sergeants.⁵⁶ On June 23, 2016, Morgan
5 sent a letter to the Board of Selectmen stating in pertinent part:

6 The undersigned is counsel to the Blackstone Police Union, Local 442,
7 Massachusetts Coalition of Police, AFL-CIO. It is in that regard that I write
8 you. On behalf of Officer Maxwell Hurwitz, I am formally requesting a
9 meeting with the Select Board to discuss his recent bypass for promotion
10 to sergeant with the Blackstone Police Department. I make this request
11 pursuant to Blackstone bylaw §33-19 and Article 4 of the collective
12 bargaining agreement between the Town of Blackstone and the
13 Blackstone Police Union.

14
15 I was notified on June 20, 2016, through counsel, that Officer Hurwitz was
16 not being selected for one of the three sergeant's positions, despite his
17 third place performance on the sergeant's exam and a recent
18 administrative investigation which was unsubstantiated. Furthermore, it
19 was during this administrative investigation where Chief Atstupenas stated
20 on the record that Officer Hurwitz was a "top performer" in the department.
21 Given that, we are understandably confused and distraught over the
22 decision to bypass Officer Hurwitz with respect to the third Sergeant's
23 position.

24
25 Pursuant to §33-19 and Article 4 of the CBA, we are inquiring into the
26 Appointing Authority's decision and rationale not to promote Officer
27 Hurwitz to sergeant. We are respectfully requesting a meeting to hold this
28 discussion. Furthermore, I am requesting the Board stay the official
29 swearing-in ceremony for the promoted sergeants, which as I understand
30 it, is currently scheduled for June 28, 2016.

31
32 Lastly, please be on notice that Officer Hurwitz and the Blackstone Police
33 Union fully intends to seek appropriate legal action, including but not
34 limited to claims under M.G.L. c.150E, Blackstone bylaw § 33-19, Article 4
35 of the CBA, and personal tort if this matter cannot be resolved.

36
37 Please let me know if you have any questions. Thank you in advance for
38 your cooperation.

⁵⁶ Also, pursuant to the Town Charter, the town administrator appoints the police chief, and the police chief appoints the lieutenant.

1 On June 27, 2016, Pfaff sent a letter to Morgan stating:

2 Please accept this letter as a response to your June 23, 2016 letter to the
3 Board of Selectmen. Kindly direct all communications regarding this issue
4 to me in the future.

5
6 As indicated in my previous communications with you via e-mail and
7 telephone, the process for hiring sergeants with the Blackstone Police
8 Department has been completed. The Chief has recommended three
9 patrolmen for the position, and the Board of Selectmen, as Appointing
10 Authority for the Town of Blackstone, is meeting on June 28, 2016 to vote
11 on Chief Atstupenas' recommendations. Officer Hurwitz was not selected
12 for a sergeant's position at this time, but is invited and encouraged to
13 apply for any future opening for the position of sergeant.

14
15 Please be advised that there is no provision in Town of Blackstone By-law
16 § 33-19 nor Article IV of the Collective Bargaining Agreement between the
17 Town of Blackstone and the Blackstone Police Union providing for a
18 meeting with the Board of Selectmen.

19
20 Please let me know if you have any questions. I thank you in advance for
21 your cooperation.

22 *Board of Selectmen's Meeting*

23 On June 28, 2016, the Board of Selectmen meeting took place. As was their
24 usual practice, the Board of Selectmen held what Chairman Robert Dubois (Dubois)⁵⁷
25 characterized as its "workshop" to discuss pending issues at 7:00 PM. At 7:30 PM, a
26 local cable television began to broadcast the proceedings. As part of the workshop,
27 Atstupenas informed the selectmen about his recommendation for the sergeant
28 promotions. The only reference to Hurwitz occurred when a selectman asked about

⁵⁷ Dubois had been a selectman for an aggregate of twenty-seven years and had been chairman fourteen or fifteen times.

1 Morgan's June 23, 2016 letter.⁵⁸ Atstupenas explained that he had selected Brodeur,
2 who scored fourth in the promotional process, to fill the third promotional vacancy rather
3 than Hurwitz who had scored third. The selectmen deferred to Atstupenas⁵⁹ and
4 approved his recommendation without reviewing any further information about the
5 candidates. At 7:30 PM, the selectmen swore in Mantoni, Luis and Brodeur, whose
6 families were present for the ceremony, as sergeants for one-year terms.

7 Opinion

8 A public employer that retaliates or discriminates against an employee for
9 engaging in activity protected by Section 2 of the Law violates Section 10(a)(3) of the
10 Law. Southern Reg. Voc. School District v. Labor Relations Commission, 388 Mass.
11 414 (1982); School Committee of Boston v. Labor Relations Commission, 40 Mass.
12 App. Ct. 327 (1996). To establish a prima facie case of discrimination, a charging party
13 must show that: 1) an employee was engaged in activity protected by Section 2 of the
14 Law; 2) the employer knew of that conduct; 3) the employer took adverse action against
15 the employee; and 4) the employer took the adverse action to discourage the protected
16 activity. Quincy School Committee, 27 MLC 83, 92, MUP-1986 (December 29, 2000);
17 Town of Clinton, 12 MLC 1361, 1365, MUP-5859 (November 9, 1985).

18 Protected Activity and Employer Knowledge

19 Here, it is undisputed that Hurwitz engaged in protected, concerted activities, and
20 that the Employer had knowledge of those activities. Hurwitz was an active Union

⁵⁸ Atstupenas testified that he explained the reasons why he had bypassed Hurwitz to the Board of Selectmen. However, I credit Dubois' testimony that Atstupenas only gave his recommendation without any reasons because it is more likely that Dubois, as the chairman who was responsible for running the meeting, would have recalled specifically what Atstupenas said that evening.

⁵⁹ Many years had passed since the Town had promoted a sergeant.

1 president who spoke out at Town Meeting on matters that pertained to unit members'
2 terms and conditions of employment, including the installation of GPS devices in police
3 cruisers. He also negotiated with the Employer over issues concerning compensatory
4 leave, the impacts on unit members of requiring them to carry Narcan, and in six
5 instances to reduce or remove discipline that a unit member previously incurred.

6 Further, Hurwitz was involved in concerted, protected activity in the months prior
7 to the Employer's decision to bypass him for promotion. See Sheriff's Office of Plymouth
8 County, 39 MLC 41, 55, MUP-05-4475 (September 10, 2012) (finding that a
9 discriminatee was involved in concerted, protected activities in the months prior to his
10 unlawful demotion). He represented the Union in successor contract negotiations with
11 the Employer's agent Atstupenas in January and February 2016, which resulted in the
12 2016-2019 CBA. Beginning in January 2016, Hurwitz also attended the four to six
13 meetings in which the Employer and the Union successfully negotiated over the two-
14 part promotional process to fill the three vacancies for sergeant. Additionally, Hurwitz
15 met with Atstupenas to protest the April 27, 2016 consent, which Atstupenas proposed
16 that unit members execute as part of the promotional process. Hurwitz characterized
17 the April 27, 2016 consent as too threatening and too invasive and informed Atstupenas
18 that he had advised his unit members not to execute it.

19 Adverse Action

20 The Commonwealth Employment Relations Board (CERB) has consistently
21 defined adverse action as an adverse personnel action, such as a suspension,
22 discharge, involuntary transfer or reduction in supervisory authority, City of Boston, 35
23 MLC 289, 291, MUP-04-4077 (May 20, 2009). The Union contends that the Employer's

1 bypass of Hurwitz for promotion to sergeant constitutes an adverse action. Conversely,
2 the Employer argues that Hurwitz suffered no adverse impact because his terms and
3 conditions of employment remained the same. He received no discipline, no reduction
4 of authority, or no loss of wages.

5 An adverse employment action must materially disadvantage the affected
6 employee in some way. City of Boston, 35 MLC at 91. Material disadvantage arises
7 when objective aspects of the work environment are affected. See King v. City of
8 Boston, 71 Mass. App. Ct. 460, 468 (2008) (failing to provide female superior officers
9 with rank-specific locker rooms rises to the level of an adverse action). Because there
10 must be real harm, subjective feelings of disappointment and disillusionment will not
11 suffice. See MacCormack v. Boston Edison Co., 423 Mass. 652, 663-664 (1996)
12 (former employee's claims of adverse action were based upon subjective feelings of
13 disappointment and disillusionment rather than objective evidence that he had been
14 disadvantaged in terms of conditions of employment); see also City of Holyoke, 35 MLC
15 153, 156, MUP-05-4503 (January 9, 2009) (co-workers' subjective opinions and office
16 banter do not render as adverse a previously requested transfer). Even in the absence
17 of discipline and other changes to Hurwitz's terms and conditions of employment,
18 bypassing him for promotion to sergeant adversely affected his employment. See Town
19 of Mashpee, 36 MLC 163, 171, MUP-02-3653 (April 15, 2010) (failing to promote a
20 patrol officer to the rank of sergeant was an adverse action).

21 Animus

22 A charging party may proffer direct or indirect evidence of discrimination in
23 support of its claim. See Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1,

1 2002), aff'd sub nom. Town of Brookfield v. Labor Relations Commission, 443 Mass.
2 315 (2005). Direct evidence is evidence that, "if believed, results in an inescapable or
3 at least highly probable inference that a forbidden bias was present in the workplace."
4 Wynn v. Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass.
5 655, 667 (2000) (citing Johansen v. NCR Comten, Inc., 30 Mass. App. Ct, 294, 300
6 (1991)). Stray remarks in the workplace, statements by people without the power to
7 make employment decisions, and statements made by decision makers unrelated to the
8 decisional process do not suffice to satisfy a charging party's threshold burden. Id. at
9 667 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989)). Here, the Union
10 cites to: a) Atstupenas' remarks at the April 27, 2016 meeting with Hurwitz that if
11 employees did not want to sign the April 27, 2016 consent, they would not be in the
12 process; and b) the May 9, 2016 question during the promotional process from the
13 unidentified middle board member as to whether Hurwitz would remain as Union
14 president if he were promoted to sergeant as direct evidence of animus. However, I do
15 not need to decide whether the cited comments constitute direct evidence of animus
16 towards Hurwitz's protected activity, because, as more fully discussed below, even if I
17 apply the higher burden of proof set forth in Trustees of Forbes Library v. Labor
18 Relations Commission (Trustees of Forbes Library), 384 Mass. 559 (1981), I find that
19 the Union has met its burden of establishing that, but for Hurwitz's concerted, protected
20 activity, the Town would not have bypassed him for promotion to sergeant.

21 Absent direct evidence of unlawful motivation, unlawful motivation may be
22 established through circumstantial evidence and reasonable inferences drawn from that
23 evidence. Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4,

1 2001). Circumstantial factors may include: shifting and inconsistent reasons for an
2 employer's action, Everett Housing Authority, 13 MLC 1001, 1006, MUP-565 (June 4,
3 1986); the insubstantiality of the reasons given for the adverse action, Commonwealth
4 of Massachusetts, 14 MLC 1743, 1749, SUP-3081 (May 19, 1988); the timing of the
5 adverse action in relation to the protected activity, Town of Somerset, 15 MLC 1523,
6 1529, MUP-6404 (March 9, 1989); and the employer's divergence from longstanding
7 practices, Town of Mashpee, 36 MLC at 171.

8 Atstupenas first announced that he was bypassing Hurwitz for promotion during
9 his June 6, 2016 conversation with Laudon, which was approximately five weeks after
10 Hurwitz protested the April 27, 2016 consent. Although the Town claims that it is not
11 credible that Atstupenas made those comments, for the reasons referenced in footnote
12 42, I have credited Laudon's testimony on this point. Further, Atstupenas told Laudon
13 that he was bypassing Hurwitz because of the administrative investigation into whether
14 Hurwitz failed to disclose his prior employment at FSC when he was hired by the Town.
15 However, at hearing, Atstupenas gave seven reasons why he bypassed Hurwitz in favor
16 of Brodeur, only one of which was the administrative investigation. Further, Atstupenas
17 on cross-examination explicitly denied that he bypassed Hurwitz for promotion to
18 discipline him for not including his FSC employment on his 2010 and 2016 resumes.
19 The close timing of the promotional bypass to Hurwitz's concerted, protected activity
20 coupled with the inconsistent and shifting reasons that the Employer gave as the
21 reasons for Hurwitz's bypass leads me to conclude that the Employer's decision to
22 suspend Hurwitz was motivated by animus towards his protected activity. See Everett
23 Housing Authority, 13 MLC at 1006-1007 (inferring animus when shifting and

1 inconsistent reasons were coupled with timing). Thus, the Union has established the
2 four elements of its prima facie case.

3 Employer's Burden of Production

4 Under the three-part Trustees of Forbes Library analysis, once a charging party
5 establishes a prima facie case of retaliation, it is the employer's burden to produce a
6 legitimate, non-discriminatory reason for taking the adverse action. The employer's
7 burden to produce a legitimate, non-discriminatory reason for taking the adverse action
8 is more than simply stating an unsubstantiated allegation. Commonwealth of
9 Massachusetts, 25 MLC 44, 46, SUP-4128 (August 24, 1998). The employer must
10 state a lawful reason for its decision and produce supporting facts indicating that the
11 lawful reason was actually a motive in the decision. Trustees of Forbes Library, 384
12 Mass. at 566; Quincy School Committee, 27 MLC at 92; Commonwealth of
13 Massachusetts, 25 MLC at 46. Here, Atstupenas cited: a) Hurwitz's lack of growth, b)
14 citizen complaints against Hurwitz, c) Hurwitz's interactions with other officers and
15 members of the public, d) Hurwitz's placement on administrative leave while the Town
16 investigated his failure to disclose his prior employment at FSC, e) Gilmore's
17 recommendation, f) Brodeur's greater seniority with the Employer's police department,
18 and g) the FSC IA report and evaluation of Hurwitz. I turn to consider those factors in
19 seriatim.

20 First, although Atstupenas made the broad statement that Hurwitz had shown a
21 lack of growth, he provided no examples in support of his claim. Boston School
22 Committee, MUP-9067 (slip op. March 2, 1994), aff'd sub nom. School Committee of
23 Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327 (1996) (failing to

1 produce budgetary data showing that prevailing conditions actually motivated its
2 decision to lay off employees rather than anti-union animus). Moreover, Atstupenas
3 referred to Hurwitz as a top performer during the June 13, 2016 investigative interview.
4 Also, Hurwitz's ranking as the third highest scorer out of the six candidates based upon
5 the results from the assessment center and the oral board undercuts the Employer's
6 claim about Hurwitz's lack of professional growth.

7 Next, although Atstupenas referred to citizen complaints that had been filed
8 against Hurwitz, he also acknowledged that those complaints were found to be
9 unsubstantiated. The Employer cannot rely upon complaints, which it previously
10 dismissed as unfounded, as a legitimate reason for a promotional bypass. See Town of
11 Brookfield, 28 MLC at 329 (discounting an employer's reasons for discharge when it
12 relied on a discriminatee's domicile, where the employee had listed his domicile on tax
13 forms that the employer previously received).

14 Third, although Atstupenas made the bare claim that Hurwitz's interactions with
15 other officers and members of the public was a reason why Hurwitz was not promoted,
16 he provided no details in support of his claim. Further, he acknowledged that those
17 interactions were not documented. In the absence of any information about the
18 identities of the individuals whom Hurwitz allegedly interacted, the nature of his dealings
19 with them, and when those interactions allegedly took place, I do not find the cited claim
20 to be a legitimate reason for Hurwitz's bypass.

21 Additionally, Atstupenas cited to Hurwitz's placement on administrative leave
22 while the Town investigated Hurwitz's failure to disclose his prior employment at FSC
23 when he was hired by the Town as a reason for Hurwitz's bypass. However,

1 Atstupenas admitted that if he had looked at the WRRS form in Hurwitz's personnel file,
2 where Hurwitz twice referenced his prior employment at FSC, that he would not have
3 placed him on administrative leave. Further, Atstupenas noted in his June 16, 2016
4 memorandum to Hurwitz that the investigation revealed that no discipline was
5 warranted.

6 Next, Atstupenas contended that he relied upon Gilmore's recommendation that
7 the Town promote Brodeur rather than Hurwitz. While explaining his recommendation
8 at hearing, Gilmore made broad and conclusory statements that Brodeur had: a) no
9 citizen complaints filed against him; b) fewer letters of verbal warning than Hurwitz; c)
10 an outstanding record on the drug task force, d) better interpersonal skills than Hurwitz,
11 and e) longer tenure with the Town's police department. First, Gilmore made no
12 attempt to reconcile his statement about Brodeur's lack of citizen complaints and the
13 fact that the citizen complaints filed against Hurwitz were unsubstantiated. Also,
14 although he claimed that Brodeur had fewer letters of verbal warning than Hurwitz, he
15 did not explain the source of his knowledge, as he admittedly did not review either
16 employee's personnel file before he made his recommendation. Also, Gilmore did not
17 provide any information about how many letters of warning that Brodeur had actually
18 received, when he received those his verbal warnings, and whether Brodeur had
19 received any other forms of discipline. Although Gilmore cited Brodeur's outstanding
20 record on the drug task force, he provided no rationale for that assertion, especially in
21 light of the fact that he did not review Brodeur's personnel file. Also, although Gilmore
22 claimed that Brodeur had better interpersonal skills and that Hurwitz came off as
23 arrogant and rubbed people the wrong way, he provided no specific information in

1 support of either those statements. Finally, although Gilmore cited to the fact that
2 Brodeur had greater departmental seniority than Hurwitz as a basis for his
3 recommendation, he never contended that he recommended Brodeur solely because of
4 his seniority. Therefore, I do not find that Gilmore's recommendation was a legitimate
5 reason for Atstupenas to bypass Hurwitz for promotion.

6 Despite concluding that the five above-referenced rationales were not legitimate
7 reasons for Hurwitz's bypass, I find that the other two reasons that Atstupenas cited for
8 Hurwitz's bypass, namely Brodeur's greater seniority and the FSC IA report and
9 evaluation, were legitimate reasons. It is undisputed that Brodeur had the longer tenure
10 with the Town's police department, although Hurwitz had greater overall police
11 experience. Also, Atstupenas pointed to the FSC IA report and evaluation as a basis for
12 his decision, even though he also noted that he could not dismiss Hurwitz for events
13 that took place at FSC. However, he also stated that he probably would not have hired
14 Hurwitz if he been aware of the FSC IA report and evaluation. Consequently, the City
15 has met its burden of production.

16 "But For" Analysis

17 Once an employer produces evidence of a legitimate, non-discriminatory reason
18 for taking the adverse action, the case becomes one of "mixed motives." Under the
19 Trustees of Forbes Library analysis, the CERB considers whether the employer would
20 have taken the adverse action but for the employee's protected activities. Suffolk
21 County Sheriff's Department, 27 MLC at 160; Quincy School Committee, 27 MLC at 92.
22 The charging party bears the burden of proving that, but for the protected activity, the
23 employer would not have taken the adverse action. Athol-Royalston Regional School

1 Committee, 28 MLC 204, 214, MUP-2279 (January 14, 2002); Town of Athol, 25 MLC
2 208, 211, MUP-1448 (June 11, 1999).

3 As the Town points out in its post-hearing brief, Atstupenas and Hurwitz at times
4 had a positive and productive relationship, including on or about January and February
5 of 2016, when they negotiated the 2016-2019 CBA. However, Atstupenas learned of
6 Hurwitz's prior employment at FSC, employment which Atstupenas believed Hurwitz
7 deliberately had concealed from the Town, on or about the time that Hurwitz was
8 engaging in concerted, protected activity as Union president by protesting the consent
9 to background check. Thus, a so-called perfect storm was created when Hurwitz
10 engaged in concerted, protected activity about an issue; i.e. information about the
11 promotional candidates' backgrounds, over which he already had raised the Police
12 Chief's ire. For the following reasons, I find that the Town would not have bypassed
13 Hurwitz for promotion if he had not engaged in concerted, protected activity.

14 Although the Town relied upon Brodeur's longer tenure with the Town as a
15 reason for bypassing Hurwitz, the Town also promoted Luis, who only had one more
16 day of seniority than Hurwitz. When asked on cross-examination about Luis' promotion,
17 Atstupenas indicated that Luis' second place score was more significant than his
18 seniority date. However, the Town failed to explain why Hurwitz's third place score,
19 3.67 points ahead of Brodeur, was not more significant than Hurwitz's seniority date,
20 especially in light of the fact that it was nearly identical to Luis' seniority date.
21 Furthermore, Atstupenas did not address the fact that although Brodeur and Hurwitz
22 were tied after the assessment center, Brodeur scored several points lower at the oral
23 board.

1 Furthermore, although the Town has contended that the FSC IA report and
2 evaluation were additional reasons for bypassing Hurwitz, those documents were not
3 the reason for the bypass. As of June 6, 2016, Atstupenas already had decided to
4 bypass Hurwitz for promotion, more than a week before the Union turned over those
5 documents to the Employer. Laudon's testimony and the exchange of emails between
6 the parties' attorneys confirmed that the decision had been made on or about that date.
7 Atstupenas contended that he had second thoughts and asked Gilmore for his
8 recommendation, but, as was discussed above, I have discounted that recommendation
9 as not being made for legitimate reasons. Thus, Atstupenas made his decision to
10 bypass Hurwitz on or about June 6, 2016, and the FSC IA report and evaluation could
11 not have played a role in that decision because Atstupenas was unaware of the
12 existence of those documents at that time.⁶⁰

CONCLUSION

13 Based on the record and for the reasons stated above, I conclude that the Town
14 violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by discriminating
15 against Hurwitz for engaging in concerted, protected activities.

ORDER

16 WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the
17 Town shall:

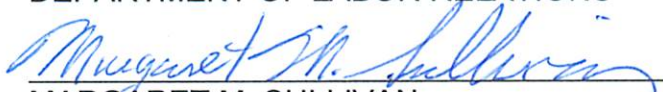
- 18 1. Cease and desist from:

⁶⁰ The Board of Selectmen deferred to Atstupenas' recommendation and voted to appoint Manton, Luis and Brodeur as sergeants thereby bypassing Hurwitz. See Trustees of Forbes Library, 384 Mass. at 569 (where decision makers relied on the recommendation of supervisors, the motives of the supervisors should be treated as the motives for the decision).

- 1 a. Discriminating against Hurwitz for engaging in concerted, protected
2 activities.
3
4 b. In any like manner, interfering with, restraining and coercing its employees
5 in any right guaranteed under the Law.
6
7 2. Take the following action that will effectuate the purposes of the Law:
8
9 a. Offer Hurwitz the position of sergeant in the Town's police department,
10 which position he shall be deemed in terms of seniority, benefits, and all
11 rights and privileges to have been held since the day the vacancies for
12 sergeant were filled on June 28, 2016.
13
14 b. Make Hurwitz whole for all economic losses he suffered, if any, as a result
15 of the discriminatory denial of his promotion. He shall be paid a sum
16 equal to the difference between what he would have earned as a sergeant
17 and his salary as a patrol officer from the date of June 28, 2016 to the
18 date of compliance with this order, plus interest on all sums owed at the
19 rate specified in M.G.L. c.231, Section 6I, compounded quarterly.
20
21 c. Post immediately in all conspicuous places where members of the patrol
22 officers' bargaining unit usually congregate or where notices are usually
23 posted, including electronically, if the Town customarily communicates
24 with these unit members via intranet or email and display for a period of
25 thirty (30) days thereafter, signed copies of the attached Notice to
26 Employees.
27
28 d. Notify the DLR in writing of steps taken to comply with this decision within
29 then (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS


MARGARET M. SULLIVAN
HEARING OFFICER

APPEAL RIGHTS

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

decision. If a Notice of Appeal is not filed within ten days, this decision shall become final and binding on the parties.



NOTICE TO EMPLOYEES

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

A hearing officer of the Massachusetts Department of Labor Relations (DLR) has held that the Town of Blackstone (Town) violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by discriminating against Blackstone Police Union, MCOP, Local 442, AFL-CIO unit member Maxwell Hurwitz (Hurwitz) for engaging in concerted activities protected by Section 2 of the Law when it bypassed him for promotion to sergeant.

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

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

WE WILL NOT discriminate against Hurwitz for engaging in concerted, protected activities;

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

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

- Offer Hurwitz the position of sergeant in the Town's police department, which position he shall be deemed in terms of seniority, benefits, and all rights and privileges to have held since the day the vacancies for sergeant were filled on June 28, 2016.
- Make Hurwitz whole for all economic losses he suffered, if any, as a result of the discriminatory denial of his promotion, paying him a sum equal to the difference between what he would have earned as a sergeant and his salary as a patrol officer from the date of June 28, 2016 to the date of compliance with the order, plus interest on all sums owed at the rate specified in M.G.L. c.231, Section 6I, compounded quarterly.

Town of Blackstone

Date

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).