

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

TOWN OF BLACKSTONE

and

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

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Case No.: MUP-17-5940

Date Issued: November 25, 2019

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Kareem A. Morgan, Esq. - Representing the Blackstone Police
Union, Local 442, MASSCOP, AFL-CIO

Stephen C. Pfaff, Esq. - Representing the Town of Blackstone

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the Town of Blackstone (Town) violated Section
2 10(a)(3) and, derivatively, Section 10(a)(1) of G.L. c.150E (the Law) by retaliating against
3 Maxwell Hurwitz (Hurwitz) for engaging in concerted activity protected by Section 2 of the
4 Law. For the reasons explained below, I find that the Town did not violate Section 10(a)(3)
5 and, derivatively, Section 10(a)(1) of the Law as alleged.

STATEMENT OF THE CASE

7 On August 25, 2017, the Blackstone Police Union, Local 442, AFL-CIO (Union)
8 filed a Charge of Prohibited Practice (Charge) with the Department of Labor Relations
9 (DLR) alleging that the Town had engaged in prohibited practices within the meaning of

1 Section 10(a)(5), and, derivatively, Section 10(a)(1) of the Law. On September 26, 2017,
2 the Union filed an Amended Charge with the DLR, alleging that the Town had engaged
3 in prohibited practices within the meaning of Section 10(a)(3) and, derivatively, Section
4 10(a)(1) of the Law, in addition to the initial Section 10(a)(5) allegation. On November 8,
5 2017, a DLR Investigator issued a two-count Complaint of Prohibited Practice
6 (Complaint), alleging that the Town had violated Sections 10(a)(5), 10(a)(3) and,
7 derivatively, Section 10(a)(1) of the Law. Count I of the Complaint alleged that the Town
8 had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by
9 unreasonably delaying in providing the Union with information that is relevant and
10 reasonably necessary for the Union to execute its duties as the exclusive collective
11 bargaining representative.¹ Count II of the Complaint alleged that the Town had violated
12 Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by notifying the District
13 Attorney's (DA) office about an Internal Affairs (IA) investigation concerning Hurwitz that
14 related to a finding of untruthfulness and conduct unbecoming an officer which the Town
15 sent in retaliation for Hurwitz's concerted activity protected by Section 2 of the Law.

16 On July 17, 2018, the Union filed a Motion in Limine to Preclude Evidence (Motion
17 I). The Town filed its response to Motion I on July 23, 2018; and, based on the Town's
18 response, the Union withdrew Motion I on July 25, 2018. On August 15, 2018, the Union
19 filed a Motion in Limine to Compel Production of Records (Motion II), seeking certain
20 documents in the Town's possession. The Town did not file a response to Motion II. On

¹ At the hearing on September 7, 2018, the Union withdrew its Section 10(a)(5) allegation after reaching a settlement agreement with the Town on that matter.

1 August 23, 2018, I issued a Ruling denying Motion II and directed the Union to utilize DLR
2 Rules and Regulations 456 CMR 13.14 regarding subpoenas. On August 28, 2018, the
3 Town filed a Motion for Summary Judgment (Motion III). On August 28, 2018, the Union
4 filed its opposition to Motion III. By telephone conference on August 29, 2018, I notified
5 the parties that I was holding Motion III under advisement. By e-mail on December 18,
6 2019, the Town renewed Motion III; and, by reply e-mail on December 19, 2018, the Union
7 renewed its opposition to Motion III. Because I have rendered a decision herein based
8 upon my consideration of the entire record, I deny Motion III. On September 6, 2018, the
9 Town filed a Motion in Limine to Exclude Testimony of Lt. Greg Gilmore (Motion IV). On
10 September 11, 2018, the Union filed its Response to Motion IV. By Ruling on September
11 14, 2018, I granted Motion IV, in part, by excluding testimony related to certain incidents
12 that occurred in June or July of 2018. However, I denied Motion IV to the extent that it
13 sought exclusion of testimony related directly to allegations raised in the Complaint.

14 On September 7, October 19, and November 30, 2018, I conducted three days of
15 hearing at which both parties had a full opportunity to be heard, to examine and cross-
16 examine witnesses, and to introduce evidence. On the first day of hearing, the Union
17 made a Motion to Take Notice of Administrative Findings of the hearing officer decision
18 issued in DLR case no. MUP-16-5329 (Motion V). The Town objected to Motion V as
19 irrelevant and immaterial. I held Motion V under advisement. On the third and final day
20 of hearing on November 30, 2018, the Union successfully offered that decision into

1 evidence through witness testimony.² Because MUP-16-5329 is part of the record as an
2 exhibit, I need not rule on the merits of Motion V. The Union and the Town filed their post-
3 hearing briefs on February 6 and 8, 2019, respectively.

4 STIPULATION OF FACTS

5 The parties stipulated to the following facts:

- 6 1. The Town is a public employer within the meaning of Section 1 of the Law.
- 7
- 8 2. The Union is an employee organization within the meaning of Section 1 of the Law.
- 9
- 10 3. The Union is the exclusive bargaining representative for certain police officers
- 11 employed by the Town at the Blackstone Police Department [(Department)].
- 12
- 13 4. At all relevant times, Ross A. Atstupenas [(Atstupenas)], the Chief of the Police of
- 14 the Town's Police Department, was an agent of the Employer.
- 15
- 16 5. Maxwell Hurwitz has been employed as a patrol officer in the Town's Police
- 17 Department since 2010 and is a member of the bargaining unit [described in
- 18 paragraph 3].
- 19
- 20 6. Hurwitz also served as Union president for approximately three years, from 2013
- 21 until mid-May of 2016.
- 22
- 23 7. In his capacity as Union president, Hurwitz filed grievances and raised issues with
- 24 management on behalf of the Union.
- 25
- 26 8. Hurwitz is currently the secretary/treasurer of the Union.
- 27
- 28 9. In his capacity as [Union] secretary/treasurer, Hurwitz has filed grievances and
- 29 raised issues with management on behalf of the Union.
- 30
- 31 10. On June 28, 2016, the Union filed a charge of prohibited practice alleging the Town
- 32 violated Sections 10(a)(3) and 10(a)(1), derivatively, of the Law, docketed as MUP-
- 33 16-5329.
- 34

² At the hearing on November 30, 2018, the Town renewed its objection to this document. I overruled the objection, finding that the document is relevant and material to this case.

- 1 11. The Union alleged the Town violated the Law in MUP-16-5329 by failing to promote
2 Hurwitz to sergeant based on his "association, advocacy, and activity" with the
3 Union.
4
- 5 12. A complaint issued in MUP-16-5329 on August 9, 2016.
6
- 7 13. A full evidentiary hearing was held in MUP-16-5329 on November 14 and 16, 2016.
8
- 9 14. Both Hurwitz and Chief Atstupenas testified during the hearing.
10
- 11 15. On December 29, 2016, Hurwitz received notice from Chief Atstupenas that he
12 was the subject of an Internal Affairs [(IA)] investigation concerning his interaction
13 with Town resident Christopher Halacy on or about June 16, 2016, following a
14 complaint filed by Halacy on or about December 5, 2016 with Chief Atstupenas
15 about Hurwitz.
16
- 17 16. Thereafter, Chief Atstupenas commissioned private investigator Paul White
18 [(White)] to investigate the June 16, 2017 interaction between Halacy and Hurwitz.
19
- 20 17. White's findings and recommendations are dated February 13, 2017.
21
- 22 18. On April 18, 2017, the Town placed Hurwitz on administrative leave.
23
- 24 19. On April 18, 2017, the Town gave Hurwitz notice of a disciplinary hearing that it
25 was holding concerning him on April 25, 2017.
26
- 27 20. On April 20, 2017, the Union made a request for information from the Town for all
28 materials which the Town intended to produce at the disciplinary hearing
29 concerning Hurwitz on April 25, 2017, including the investigation report and
30 findings, witness statements, interview transcripts, policies, records, witness lists,
31 and all other relevant material.
32
- 33 21. On April 21, 2017, the Union made a second request of the Town for the
34 information described in paragraph 21.
35
- 36 22. On April 21, 2017, the Town refused to give the Union any of the materials it had
37 requested until the disciplinary hearing on April 25, 2017.
38
- 39 23. The information referred to in paragraph 22 of the "Stipulated Facts" is relevant
40 and reasonably necessary to the Union's performance of its duties as the exclusive
41 collective bargaining representative.
42
- 43 24. Following the disciplinary hearing held on April 25 and May 2, 2017, Chief
44 Atstupenas made a recommendation to the Blackstone Board of Selectmen, based

1 on White's findings and recommendations, to terminate Hurwitz's employment.
2 The Town's Board of Selectmen did not accept Chief Atstupenas' recommendation
3 and issued no discipline to Hurwitz.
4

- 5 25. On or about May 16, 2017, Chief Atstupenas notified the Worcester County District
6 Attorney's Office of the [IA] investigation report related to a concern for the
7 truthfulness of Hurwitz for possible distribution to defense attorney's in criminal
8 cases.
9

10 ADMISSION OF FACTS

11 In its Answer, the Town admitted to the following facts:³

- 12 1. The Town is a public employer within the meaning of Section 1 of the Law.
13
14 2. The Union is an employee organization within the meaning of Section 1 of the Law.
15
16 3. The Union is the exclusive bargaining representative for police officers employed
17 by the Town.
18
19 4. On April 18, 2017, the Town gave bargaining unit member...[Hurwitz] notice of a
20 disciplinary hearing that it was holding concerning him on April 25, 2017.
21
22 5. On April 20, 2017, the Union made a request for information from the Town for all
23 materials which the Town intended to produce at the disciplinary hearing
24 concerning Hurwitz on April 25, 2017, including the investigation report and
25 findings, witness statements, interview transcripts, policies, records, witness lists,
26 and all other relevant material.
27
28 6. On April 21, 2017, the Union made a second request of the Town for the
29 information described in paragraph 5.
30
31 7. Hurwitz is an officer in the Union.
32
33 8. On June 16, 201[6], Hurwitz had an interaction with Town resident Christopher
34 Halacy (Halacy).
35
36 9. On December 5, 2017, Halacy filed a complaint with...[Chief Atstupenas] about his
37 June 16, 201[6] interaction with Hurwitz.
38

³ In its Answer, the Town made full and partial admissions of fact. This section of my decision reflects only the Town's full admissions of fact.

1 10. Thereafter, [Chief] Atstupenas commissioned private investigator...[White] to
2 investigate the June 16, 2016[6] interaction between Halacy and Hurwitz.
3

4 11. On February 13, 2017, White issued a report in which he found, in part, that Hurwitz
5 had been untruthful during his investigation in violation of the Rules and
6 Regulations of the...[Department].
7

8 FINDINGS OF FACT 9

10 **Background**

11 The Union and the Town are parties to a collective bargaining agreement that was
12 effective from July 1, 2016 until June 30, 2019 (Agreement). Article 25 of the Agreement
13 pertained to "Grievance Procedure" which consisted of three steps and allowed both
14 parties to hold a meeting by agreement at any step of the grievance procedure.

15 In September of 2010, the Town hired Hurwitz as a patrol officer. In March of 2018,
16 the Town promoted Hurwitz to sergeant.⁴ At all relevant times, Hurwitz was a member of
17 the bargaining unit. Between 2012 and 2016, Hurwitz was Union president. At all relevant
18 times, the Town has employed David Laudon (Laudon) as a patrol officer. Beginning in
19 2016, Laudon succeeded Hurwitz as Union President. At that time, Hurwitz became
20 Union Secretary/Treasurer.

21 **1. The Truthfulness in Law Enforcement Bulletin**

⁴ As noted in the stipulations of fact, Hurwitz applied for a promotion to the position of sergeant in the spring of 2016, but the Town bypassed his application in favor of another candidate. In response, the Union filed an unfair labor practice charge with the DLR on June 28, 2016 in case no. MUP-16-5329. After two days of hearing on November 14 and 16, 2016, the hearing officer issued her decision on March 14, 2018, finding that the Town had violated the Law when it bypassed Hurwitz for promotion to sergeant in the spring of 2016.

1 On April 4, 2017, the Massachusetts Chiefs of Police Association, Inc. (MCPA)
2 issued a Truthfulness in Law Enforcement bulletin (Bulletin),⁵ which stated, in relevant
3 part:

4 Law enforcement professionals are held to a higher standard than the
5 citizens they have sworn to protect and serve. In times when law
6 enforcement legitimacy is being criticized and officers find themselves
7 under a societal microscope, it is important to ensure that law enforcement
8 professionals adhere to a strict code of truthfulness. As many already know,
9 requiring truthfulness of officers not only comports with public policy, ethics
10 and notions of morality, but also the law.

11

12
13 Some Chiefs may find it easier to think of untruthfulness like a continuum or
14 spectrum. On the one end of the continuum is intentional, malicious,
15 deceptive conduct that will take one of three forms:...

16
17 Deceptive action in a formal setting, such as testifying in court or
18 during an internal affairs investigation[.]

19
20 Failure to bring forward information involving criminal action by other
21 officers, also known as observing the so-called "code of silence"[.]

22
23 Creation of false evidence that tends to implicate another in a
24 criminal act[.]

25
26 Naturally, any officer engaging in such untruthfulness should be terminated
27 or permanently removed from any possible activity where the officer would
28 be called upon to be a witness in any action.

29
30 On the other end of the continuum, however, are white lies, humorous lies[.]
31 and lies justified by investigative necessity. Officers engaging in such
32 behavior are not usually subject to discipline and are excusable, if not
33 acceptable.

34
35 In some instances, however, an officer's conduct may not be clearly on one
36 end of the continuum or the other. It may fall into a "gray area," somewhere
37 in the middle of the continuum. In those instances, it is contingent upon the
38 Chief to "balance the need of the department and community to have

⁵ Eric R. Atstupenas, Esq. is employed in the MCPA's Office of General Counsel and authored the Bulletin. He is the son of Chief Atstupenas.

officers that are beyond reproach against the recognition that all officers are human beings and that they have human failings..."

....

In addition to the fact that an officer's untruthfulness must be disclosed in any criminal proceeding in which the officer is involved, a strong history of public policy disfavors officers who are untruthful....

....

It is clear that under prevailing case law, and the rules governing criminal procedure before both state and federal courts, the prosecution must disclose exculpatory information, including information which bears upon the credibility of any witness (e.g. police witnesses), to the defendant even if no specific request for that information is made. Failure to do so could result in a new trial..... [Emphasis in original.]

....

Brady v. Maryland⁶

The U.S. Supreme Court ruled that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution.... [De-emphasized from original.]

Giglio v. U.S.⁷

The U.S. Supreme Court extended the obligation to share exculpatory information with the defendant to include information concerning the credibility of government witnesses. The Court applied the "collective knowledge doctrine" to rule that any exculpatory information known by the government will be known by all governmental agencies....[De-emphasized from original.]

....

Furthermore, the rules applicable to criminal proceedings before the Massachusetts state and federal courts require that the prosecution disclose evidence bearing on a witnesses["] credibility to a defendant.

⁶ 373 U.S. 83, 87 (1963).

⁷ 405 U.S. 150 (1972).

1

2
3 Note on Unsubstantiated Claims

4 Departments must provide the
5 prosecution with any allegations
6 against the officer which bear
7 upon the officer's truthfulness.
8 This is regardless of whether the
9 claims are unsubstantiated, not
10 credible or[,] the officer is
11 exonerated. The prosecution
12 must then go through the
13 information and determine what
14 must be disclosed. This is the role
15 of the prosecution; not the
16 individual departments. [De-
17 emphasized from original.]

18
19 Note on Conduct Unbecoming an Officer

20 The phrase "conduct unbecoming an officer" is a catchall provision
21 in the management of law enforcement employees. The
22 Massachusetts courts have made clear that[:]

23
24 Police officers must comport themselves in accordance with
25 the laws that they are sworn to enforce *and* behave in a
26 manner that brings honor and respect for rather than public
27 distrust of law enforcement personnel. They are required to
28 do more than refrain from indictable conduct. Police officers
29 are not drafted into public service; rather, they compete for
30 their positions. In accepting employment by the public, they
31 implicitly agree that they will not engage in conduct which calls
32 into question their ability and fitness to perform their official
33 responsibilities.... [Emphasis in original.]

34

35
36 Oftentimes the issue of untruthfulness arises during the course of Internal
37 Affairs investigations. This is because officers are required to provide
38 truthful answers during the course of an internal affairs investigation and
39 cannot remain silent, unless the answer may incriminate the officer in a
40 criminal matter.

41

42
43 **2. The Sergeant Position**

1 In the spring of 2016, the Town accepted applications and conducted interviews
2 for a vacant sergeant position in the Department. During this time, the Town interviewed
3 Hurwitz for the vacant position, but later decided to bypass him for promotion to sergeant.
4 Shortly thereafter, the Town also placed Hurwitz on paid administrative leave pending the
5 outcome of an investigation into his employment history at Framingham State University
6 (FSU). At the conclusion of its investigation, the Town decided not to discipline Hurwitz,
7 and he returned to work on June 16, 2016.

8 **3. The June 16, 2016 Incident**

9 The Department is located within the Town's Municipal Building where the Town
10 Hall is also located. The Municipal Building has a front parking lot that has restricted
11 parking after business hours. At 5:57 p.m. on June 16, 2016, after Town Hall had closed,
12 but while the Department was still open, Halacy parked his car in the front parking lot of
13 the Municipal Building and entered the building to hand-deliver an application for a patrol
14 officer position in the Department.

15 After Halacy had entered the building, Hurwitz noticed Halacy's car which he
16 believed was parked illegally. Hurwitz immediately accessed the Department's Criminal
17 Justice Information System (CJIS) to inquire about the Halacy's vehicle registration
18 information; and, within seconds, CJIS responded that there were no issues with Halacy's
19 registration. Soon after Hurwitz had received the CJIS response, Halacy exited the
20 Municipal Building and returned to his car. At that point, Hurwitz approached Halacy, and
21 asked⁸ if Halacy knew Hurwitz and if he knew about Hurwitz's former employment at

⁸ The record is unclear about how Halacy responded to Hurwitz's questions.

1 FSU.⁹ During their interaction, Hurwitz also informed Halacy that he had returned from
2 administrative leave on that day, and Halacy informed Hurwitz that he had applied for the
3 vacant patrol officer position. At the end of their interaction, Hurwitz wished Halacy luck
4 with his application and ended the conversation.

5 On November 29, 2016, the Town's Board of Selectmen conducted a meeting and
6 voted unanimously, and without discussion, to hire Christopher Johnson (Johnson) as the
7 Department's new patrol officer. On December 5, 2016, Halacy filed a citizen's
8 complaint¹⁰ against Hurwitz for acting "in an unprofessional and inappropriate manner"
9 during their June 16, 2016 interaction.

10 **Hurwitz's Concerted, Protected Activity**

11 **1. The DLR Proceedings**

12 On June 28, 2016, the Union filed a charge of prohibited practice with the DLR
13 (MUP-16-5329), alleging that the Town had violated Section 10(a)(3) and, derivatively,
14 Section 10(a)(1) of the Law by bypassing Hurwitz for promotion in retaliation against his
15 concerted, protected activity. Hurwitz participated in the DLR's investigation into that
16 charge on July 26, 2016; and, when a DLR investigator issued a complaint of prohibited
17 practice, he testified as a witness during the hearing on November 14 and 16, 2016.

18 **2. The Grievances**

⁹ On cross-examination, Atstupenas testified that on or about June 16, 2016, Halacy had spoken with two other officers about Hurwitz's previous employment at FSU. Atstupenas also testified that it was Halacy's conversation with those two officers that prompted the Town to investigate Hurwitz's employment at FSU. Halacy did not testify, and the Union did not rebut Atstupenas' testimony on these facts.

¹⁰ Neither party offered into evidence a copy Halacy's actual complaint.

1 On August 30, 2016, Hurwitz filed a grievance on behalf of Laudon. On October
2 11, 2016, the Union advanced that grievance to Step two pursuant to Article 25 of the
3 Agreement. On September 8, 2016, Laudon filed a grievance on behalf of Hurwitz. On
4 October 20, 2016, the Union advanced that grievance to Step two. On October 10, 2016,
5 Laudon filed a class action grievance on behalf of all bargaining unit members, including
6 Hurwitz. On October 15, 2016, Laudon filed another grievance on behalf of Hurwitz.

7 On November 28, 2016, the Union and the Town met to discuss the September 8,
8 October 10, and the October 15, 2016 grievances. Present at this meeting were Laudon,
9 Hurwitz, Atstupenas, and Gilmore. Atstupenas created an audio record of the meeting,
10 while Hurwitz created written notes summarizing his perspective of the meeting.¹¹ In his
11 meeting notes, Hurwitz described Atstupenas as being angry, hostile, and interruptive
12 concerning "comp time." On January 6, 2017, the Town and the Union met to discuss
13 several pending grievances, including the August 30 and September 8, 2016 grievances.
14 Present at that meeting were both Union and Town counsel, Laudon, Haynes, Hurwitz,
15 Atstupenas, Keyes, and Gilmore.

16 3. The Disciplinary Hearing

17 By letter dated April 18, 2017, the Town notified Hurwitz that the Board of
18 Selectmen had scheduled a disciplinary hearing on April 25, 2017 to determine whether
19 Hurwitz had violated Department Rules and Regulations pursuant to White's Report and
20 Atstupenas' Recommendations. By e-mails on April 20 and 21, 2017, the Union

¹¹ Although the Union offered as evidence Hurwitz's meeting notes, the Town did not offer into evidence Atstupenas' audio recording of the November 28, 2016 meeting.

1 requested information from the Town related to Hurwitz's April 25, 2017 disciplinary
2 hearing. The Town provided the Union with the requested information at the disciplinary
3 hearing on April 25, 2017. On April 25 and May 2, 2017, the Board of Selectmen
4 conducted two days of hearing at which Hurwitz appeared.

5 **The Internal Affairs Investigation and White's Report**

6 At some point between December 5 and 29, 2016, Atstupenas retained White's¹²
7 services as a private investigator to investigate Halacy's December 5, 2016 complaint
8 against Hurwitz.¹³ By letter dated December 29, 2016, Atstupenas notified Hurwitz about
9 White's investigation regarding allegations that Hurwitz had "acted in an unprofessional
10 and inappropriate manner" through his interactions with Halacy on June 16, 2016.

11 Between December 29 and February 13, 2017, White investigated Halacy's
12 complaint by reviewing relevant documentation, visiting the Department, viewing the
13 "area of concern" where Hurwitz had interacted with Halacy in June of 2016, verifying
14 other pertinent information, and contacting specific persons and interviewing them. White
15 first interviewed Halacy. Then in January of 2017, he interviewed Hurwitz with Union

¹² White testified that he worked for the Massachusetts State Police for 27 years, beginning as a patrol officer, then accepting promotions as sergeant, lieutenant, and detective lieutenant. He also testified that during the last five years of his employment with the State Police, he "participated or conducted 200 internal affairs investigations." Since White's retirement from the Massachusetts State Police, he has conducted "several hundred" investigations of which approximately 15-20 were IA investigations of police departments. The Union did not rebut White's testimony on these facts.

¹³ Atstupenas testified on direct examination that he hired White as an "independent person to protect Officer Hurwitz" and to be "an objective investigator." On cross-examination, Atstupenas testified that he wanted to keep himself "out of the investigation" and "to give [Hurwitz] a fair investigation" because Hurwitz had contested the Town's decision to bypass him for promotion to sergeant in the Spring of 2016.

1 counsel present. During his interview, Hurwitz told White that in November of 2016, three
2 sergeants who had participated in Halacy's application review process for patrol officer
3 told Hurwitz that Halacy did not do well during that process and was not a fit candidate
4 for that position.¹⁴ After Hurwitz's interview, White informed Atstupenas that he wanted

¹⁴ On rebuttal, Hurwitz testified that he never told White that he had three separate conversations with the three sergeants about Halacy's suitability as a candidate for patrol officer. Instead, Hurwitz testified that while he could not recall the exact dates, he explicitly remembered two group conversations where he discussed Halacy's candidacy with Laudon, Sergeant Brodeur (Broder), and Sergeant Luis (Luis). Hurwitz also testified on rebuttal that Laudon was present for one of those conversations and that "generally" both conversations were "pretty consistent that officer Halacy would not be a suitable candidate for the Department...that he did not do well in the process, and that he may not be a good fit." Hurwitz testified further that "between the two conversations, that was the consensus" among himself, Laudon, Brodeur, and Luis.

Laudon testified on rebuttal that while he did not have "a direct, single, one-on-one conversation with anyone," he did witness conversations between Hurwitz and Luis regarding the suitability of Halacy as a candidate for employment at the Department. Laudon also testified that he was "not sure if there were other people around" during those conversations because they occurred during "shift-change." Like Hurwitz, Laudon testified that he did not "recall the exact dates and times" of when the conversations occurred, but he recalled there being "a lot of...locker-room scutter type talk" about Halacy not being "a good fit."

White testified that Hurwitz never identified Laudon by name as being present during his group conversations about Halacy. However, White conceded on rebuttal that Hurwitz did identify the presence of other "coworkers" and that Laudon is a "coworker." Nonetheless, White gave un rebutted testimony that Hurwitz did have conversations with the three sergeants about Halacy's candidacy. White reiterated his findings in the Report that Hurwitz had lied during his IA interview because all three sergeants denied conveying anything to Hurwitz that was negative about Halacy.

The record shows that while Hurwitz specifically identified Laudon, Brodeur, and Luis, he failed to specify their exact statements during the group conversations in November of 2016. Rather, Hurwitz testified generally that at some point in November of 2016 the group had reached consensus about Halacy's candidacy. Similarly, Laudon failed to attribute specific statements to Brodeur, Luis, or Hurwitz during their group conversations; and, instead, pointed to general "locker-room scutter type talk." Based on the general recollections of Hurwitz and Laudon, and White's specific testimony about what the three

1 to conduct additional interviews with the three sergeants. White conducted those
2 interviews separately. In these interviews, each sergeant denied telling Hurwitz anything
3 negative about Halacy's review process.¹⁵ At the end of his investigation, White authored
4 a report on February 13, 2017, and provided a copy to Atstupenas. White's report included
5 the following findings:

- 6 • Hurwitz was on duty when he interacted with Halacy at 5:57 P.M. on
7 June 16, 2016;
- 8 • the interaction occurred in the front parking lot of the Blackstone
9 Municipal building where the Town's Police Department
10 (Department) is located;
- 11 • Halacy had legally parked his car in the front parking lot of the
12 Blackstone Municipal building and had entered the Department to
13 conduct official business;
- 14 • although Hurwitz intended to enforce the Town's existing parking
15 restriction regulation, he did not issue a parking ticket against Halacy;
- 16 • when Hurwitz encounters a vehicle parked in a restricted area, he
17 usually contacts the Department dispatcher to first determine
18 whether a person is in the Department lobby;
- 19 • in this case Hurwitz first utilized the Department's confidential
20 Criminal Justice Information System (CJIS) database to inquire
21 about Halacy's Massachusetts registration;
- 22 • when Halacy exited the Blackstone Municipal building, Hurwitz saw
23 Halacy and, at the time same, received a "robo query response"
24 from his CJIS inquiry;
- 25 • Hurwitz received the "robo query response" within seconds of his
26 CJIS inquiry;
- 27 • after Halacy exited the Blackstone Municipal building, Hurwitz had a
28 conversation with Halacy;
- 29 • during their conversation, Hurwitz told Halacy that Hurwitz had
30 returned to work that day after being on administrative leave for 10

sergeants told him during their IA interviews, and because Brodeur and Luis did not testify, I credit White's testimony that during his interviews with the three sergeants, all denied conveying anything negative to Hurwitz about Halacy's review process in November of 2016.

¹⁵ On rebuttal, Hurwitz testified that the sergeants' statements made to White during their interviews were "lie[s]."

1 days due to an earlier IA investigation involving Hurwitz's former
2 employment at Framingham State University (FSU);

- 3 • during their conversation, Hurwitz also asked Halacy if he had
4 informed the Department about Hurwitz's former employment at
5 FSU—a subject that was a part of an on-going legal dispute involving
6 Hurwitz and his earlier IA investigation;
- 7 • during their conversation, Hurwitz also expressed good will toward
8 Halacy's application for employment at the Department;
- 9 • the Department did not hire Halacy for employment;
- 10 • on December 5, 2016, Halacy filed a formal complaint with the
11 Department regarding his interaction with Hurwitz on June 16, 2016;
- 12 • during his interview with White and "under questioning by his own
13 Attorney," Hurwitz stated that three sergeants who had served on the
14 Department's "hiring interview panel" informed him that Halacy was
15 not a suitable candidate for employment at the Department, and that
16 they had advised Chief Atstupenas against hiring Halacy;
- 17 • all three sergeants denied having any conversation with Hurwitz
18 concerning Halacy's interview process and his suitability as an
19 employment candidate.

20
21 White's report also included three "Recommendations" or conclusions based on
22 three issues: (1) whether Hurwitz used the Department's CJIS in violation of the
23 Department policy and CJIS policy; (2) whether Hurwitz engaged in "conduct
24 unbecoming" during his interaction with Halacy; and, (3) whether Hurwitz was "untruthful"
25 during his IA investigation on January 18, 2017. On the first issue, White concluded that
26 Hurwitz did not violate Department policy and CJIS policy when he used the Department's
27 CJIS system because his use of that database occurred during the lawful performance of
28 his official duties. On the second issue, White concluded that Hurwitz had engaged in
29 "conduct unbecoming" during his interaction with Halacy on June 16, 2016 because
30 having a conversation with Halacy about an on-going labor dispute in which Halacy was

1 a potential witness was "unprofessional."¹⁶ White also concluded that it was
2 unprofessional of Hurwitz to disclose his administrative leave to Halacy on June 16, 2016,
3 because at that time Halacy was a "complete stranger." Last, White concluded that
4 Hurwitz was untruthful during his testimony on January 18, 2017 because his
5 investigation revealed that all three sergeants involved in Halacy's hiring interview panel
6 had stated that Halacy "performed well or fine during the interview process," and all
7 denied having any conversations with Hurwitz concerning Halacy's suitability for
8 employment at the Department.

9 **The Chief's Recommendation**

10 Based on Atstupenas' review of White's Report, the Chief issued his own
11 "Recommendations"¹⁷ concerning Hurwitz's conduct. He agreed with White's
12 conclusions that Hurwitz had engaged in "conduct unbecoming" during his interaction with
13 Halacy on June 16, 2016, and that Hurwitz was "untruthful" during his interview with White
14 on January 18, 2017. However, the Chief disagreed with White's conclusion that
15 Hurwitz's use of the Department's CJIS on June 16, 2016, did not violate the policies of
16 the Department and the CJIS.¹⁸ Instead, the Chief found that Hurwitz's use of the

¹⁶ During his investigation, White learned that prior to Halacy's interaction with Hurwitz on June 16, 2016, Halacy had a conversation with two Department officers about Hurwitz, which prompted the Town to investigate Hurwitz and place him on administrative leave in the spring of 2016 pending the outcome of a Department investigation into Hurwitz's employment history at FSU.

¹⁷ Although Atstupenas made formal Recommendations after White's Report, the record is unclear when Atstupenas finalized those Recommendations.

¹⁸ Atstupenas testified that he disagreed with White's finding on this issue because he felt that White "didn't understand the whole thing with the CJIS."

1 Department's CJIS on that date was improper because Hurwitz did not access the
2 database to inquire about Halacy's Massachusetts registration, but used it to "confront"
3 Halacy "for personal matters." Atstupenas also found that when Hurwitz conversed with
4 Halacy on June 16, 2016, Hurwitz never asked Halacy about a parking violation, Hurwitz
5 never explained an "official purpose" for approaching Halacy, and Hurwitz took away
6 Halacy's rights because Halacy "felt he could not leave." Based these findings,
7 Atstupenas recommended that the Town's Board of Selectmen "make a motion and vote"
8 to terminate Officer Hurwitz's employment with the Town.

9 **The Board of Selectmen's Hearings**

10 **1. The First Hearing**

11 By letter dated April 18, 2017, Town Administrator Keyes notified Hurwitz that the
12 Board of Selectmen had scheduled a disciplinary hearing on April 25, 2017, and stated in
13 pertinent part:

14 The purpose [of the hearing is to consider] discipline against you, up to and
15 including suspension or discharge, for possible violations of...Department
16 Rules and Regulations,¹⁹ including but not limited to:

- 17
- 18 • Rule 4.02 – Conduct Unbecoming an Officer
- 19 • Rule 4.12 – Interfering with Course of Justice
- 20 • Rule 4.15 – Abuse of Position
- 21 • Rule 7.5 – Dissemination of Official Information
- 22 • Rule 10.10 – Cooperation with Investigations
- 23 • Rule 12.18 – Departmental Records
- 24

25 Effective April 18, 2017, the Town also placed Hurwitz on administrative leave with
26 pay, pending the outcome of his disciplinary hearing. On April 25, 2017, the Board of

¹⁹ Neither party offered into evidence a copy of the Department's Rules and Regulations.

1 Selectmen conducted the disciplinary hearing where Hurwitz, White, Atstupenas, Town
2 counsel, and Union counsel were present. At the end of that hearing, the Board of
3 Selectmen adjourned and continued the matter until May 2, 2017.

4 **2. The Second Hearing**

5 On May 2, 2017, the following members of the Board of Selectmen convened to
6 determine what discipline, if any, to issue against Hurwitz: Chairman and Town
7 Administrator Keyes, Vice Chairman Margo Bik (Bik), and Members Michael Catalano
8 (Catalano) and Gerald Rivet (Rivet). Also at that hearing were Town counsel, Atstupenas,
9 and Hurwitz who appeared on his own.²⁰

10 At some point during the hearing, Atstupenas recommended termination based on
11 Hurwitz's misuse of the CJIS database, his interaction with Halacy on June 16, 2016, and
12 his untruthful statements concerning the three sergeants. Later, Catalano made a motion
13 to dismiss all charges against Hurwitz and restore him to full duty, which Rivet seconded
14 "for discussion purposes only." Eventually, Catalano made a final motion to dismiss all
15 charges against Hurwitz and restore him to full duty, which Keyes seconded. On that
16 motion, the members voted 3-1 in favor of it. Those members also voted to keep Hurwitz's
17 administrative leave in his personnel file. After learning of the final motion, Atstupenas
18 stated at the hearing that he intended to notify the District Attorney's (DA) office about
19 Hurwitz's conduct related to Halacy's complaint.

20 Ultimately, Keyes sent Hurwitz a letter dated September 6, 2017, stating in full: "At
21 a meeting of the Board of Selectmen on May 2, 2017 at 6:30 PM, the following motion

²⁰ Union counsel was not present at the May 2, 2017 hearing.

1 was made: 'A motion was made by Mr. Catalano seconded by Mr. Keyes, to dismiss all
2 the charges against Officer Hurwitz and restore him to full duty. The vote was 3-1 in favor
3 of Officer Hurwitz.'"

4 **The Chief's Disclosure to the District Attorney's Office**

5 Prior to May 16, 2017, Atstupenas had never provided the DA's office with an
6 investigation report that contained a finding of untruthfulness²¹ concerning any member
7 of the bargaining unit. At some point between May 2 and May 16, 2017, Atstupenas
8 contacted Assistant District Attorney (ADA) Jeffrey Travers (Travers) by telephone to
9 discuss his concerns about Hurwitz. By follow-up e-mail on May 16, 2017, the Chief
10 provided Travers with White's Report and Atstupenas' Recommendations.²² That e-mail
11 stated in full:

²¹ Atstupenas testified that "several years ago" he investigated a Department Officer named "Holland," but could not remember if he found Holland to be untruthful. Atstupenas also testified that "criminal charges were brought against [Holland,]" and that Atstupenas did not forward his findings to the DA's office because the Town had placed Holland on administrative leave, relieved him of duty (i.e., confiscated "his gun and everything"), and later terminated him.

Lieutenant Gregory Gilmore (Gilmore) testified that he participated in IA investigations where he sometimes issued reports to the Chief. Gilmore also testified that in the 15-to-25 investigations in which he participated that resulted in reports, he never disclosed any report to the DA's office. Next, he testified that when he did issue reports, sometimes the Chief would ask for his recommendation, and other times the Chief would state that discipline was warranted and direct Gilmore to incorporate that discipline into the report. Last, Gilmore gave unrebutted testimony that the Department "rarely" hires outside investigators to conduct IA investigations.

²² Atstupenas testified that he provided Travers with information about Hurwitz pursuant to the Bulletin and the Brady case, which the Bulletin referenced. Atstupenas also testified that because this was the first time that he provided information to the DA's office, he did not "know what they do when it goes into the DA's hands." He testified further that he waited until May of 2017 to provide Travers with White's Report because he first

1 Good Morning Sir:

2
3 I have attached all the documentation for the investigation on my officer also
4 with the investigators [sic] report and recommendations and mine.

5 As stated in my first e-mail,²³ there was a motion on the floor by one
6 selectperson to terminate and it was shot down and then a motion to drop
7 everything and it passed 3 to 1.

8
9 I feel it is my obligation to notify your office because of the investigator's
10 findings and my own.

11
12 If you need anything else please let me know.

13
14 Ross

15
16 By e-mail dated May 25, 2017, Travers notified Worcester County DA Joseph Early
17 (Early) and seven other ADAs, including Krista Wallace (Wallace) about Hurwitz.

18 Specifically, Travers' e-mail stated in full:

19 ADAs handling matters involving the Blackstone Police and officer Maxwell
20 Hurwitz please be aware of the following discoverable issue:

21
22 The Blackstone Police have notified this office of an internal investigation
23 related to a concern for the candor of the above-officer. This email should
24 serve as a record of this issue in case [sic] discovery. Additional[ly],
25 inquiry/discovery in this matter should be directed to the Blackstone Police
26 Department.

27
28 Thank you
29

wanted the Board of Selectmen to issue its determination concerning Hurwitz. If the Board had terminated Hurwitz, Atstupenas testified that he would not have provided Travers with White's Report because Hurwitz's unemployment at the Department would have rendered moot the issues about his untruthfulness and conduct unbecoming an officer. Based on Atstupenas' specific reasoning for contacting Travers in May of 2017, and because the Union failed to rebut that reasoning, I credit Atstupenas' testimony that he contacted the DA's office based primarily on the Bulletin, the Brady case, and the Board of Selectmen's decision at Hurwitz's disciplinary hearing.

²³ Neither party offered a copy of this e-mail into evidence.

1 By follow-up e-mail on June 1, 2017, Travers informed Atstupenas about the
2 discovery process related to Hurwitz, stating, in pertinent part:

3 Based upon the issue raised with officer Hurwitz I have forwarded the
4 following message (below) to our ADA staff in Uxbridge and Milford Courts.
5 In similar instances, where an officer's candor has been questioned, we
6 make mandatory discovery to all defendants in related cases. Further
7 discovery of the issue would typically proceed by defense motion seeking
8 orders directed to the police department/town.
9

10 **The Union's Inquiry to ADA Travers**
11

12 At some point in August of 2017, Hurwitz appeared in Worcester District Court in
13 Uxbridge, Mass. pursuant to a subpoena to testify in a criminal trial. Prior to testifying,
14 Hurwitz stood outside of the courtroom with ADA Matthew Malone (Malone) and Defense
15 Attorney Greg Kachagian (Kachagian), and the three discussed a possible settlement of
16 the case.²⁴ During their discussion, Kachagian handed a single-page document²⁵ to
17 Malone which questioned why Hurwitz was called to testify in that case. Malone asked
18 Hurwitz if he knew about the document, and Hurwitz said he "knew absolutely nothing"
19 about it. Hurwitz later asked Kachagian about the origins of the document, and Kachagian
20 said that ADA Wallace²⁶ had placed it in Hurwitz's file. About four or five months later,
21 Hurwitz met with Wallace in preparation for another case. During their meeting, Hurwitz
22 asked Wallace about the document. She answered that her boss had instructed her to

²⁴ Neither Malone nor Kachagian testified in this case.

²⁵ Neither party offered into evidence a copy of this document.

²⁶ Wallace did not testify.

1 put the document in his file, and into any case file that contained his name. Wallace also
2 told Hurwitz that she was uncomfortable about the issue concerning his candor.

3 Immediately after his conversations with Kachagian and Malone, Hurwitz
4 contacted the Union. By e-mail on August 18, 2017, the Union contacted Travers and
5 requested certain public records with respect to Hurwitz and the Department. By reply e-
6 mail on August 22, 2017, Travers acknowledged receipt of the Union's request. By follow-
7 up e-mail to Travers on September 6, 2017, the Union inquired into whether it needed to
8 file a separate request for information related to Atstupenas' May 16, 2017 provision of
9 information to Travers which included White's Report. By reply e-mail, Travers notified
10 the Union that Atstupenas' provision of information was delivered via telephone. At some
11 point between September 6 and 14, 2017, Travers spoke with the Union regarding
12 possible rescission/cessation of discovery notices related to Hurwitz. By e-mail on
13 September 14, 2017, the Union provided Travers with the Board of Selectmen's May 2,
14 2017 dismissal of all charges against Hurwitz which restored him to full duty. By reply e-
15 mail to the Union on that same date, Travers confirmed that he had "updated staff here
16 that the discovery notice is not required," effectively ending the Rule 17²⁷ process against
17 Hurwitz.

18 Since September of 2017, Hurwitz has testified in criminal matters without anyone
19 challenging his ability to testify in those cases. No person has filed a public records
20 request and no defense counsel has filed a Rule 17 motion to obtain information

²⁷ Rule 17 is a trial court procedural rule that renders discoverable information that would otherwise be privileged as Department personnel records. Defense counsel may file a Rule 17 motion for the purpose of impeaching an officer's credibility.

1 concerning Hurwitz's credibility in relation to White's Report or Atstupenas'
2 Recommendations.

3 DECISION

4 **Section 10(a)(3)**

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

15 The Town does not dispute that Hurwitz's participation in the grievance meeting
16 with Atstupenas on January 6, 2017, or that his participation in the Board of Selectmen's
17 disciplinary hearing on April 25 and May 2, 2017 constitute concerted, protected activity.
18 However, the Town disputes the timeliness of Hurwitz's participation in filing grievances
19 on August 30, September 8, October 10 and 15, 2016 because that activity occurred more
20 than six months before the Union filed its Charge on August 25, 2017, and its Amended
21 Charge on September 26, 2017. Similarly, the Town argues that Hurwitz's participation

1 at the November 28, 2016 meeting between the Union and the Chief was also untimely
2 because it occurred outside of the statutory limitations period.

3 **1. Timeliness**

4 DLR Rule 15.04 states in full: "[E]xcept for good cause shown, no charge shall be
5 entertained by the [DLR] based upon any prohibited practice occurring more than six
6 months prior to the filing of a charge with the [DLR]." 456 CMR 15.04. It is well established
7 that a charge of prohibited practice must be filed with the DLR within six months of the
8 alleged violation or within six months of the date the violation became known or should
9 have become known to the charging party. Felton v. Labor Relations Commission, 33
10 Mass. App. Ct. 926 (1992); Town of Lenox, 29 MLC 52 (2002) (citing Town of Dennis, 26
11 MLC 203 (2000)). In applying Rule 15.04, the CERB does not consider whether the
12 protected activity occurred within six months of the Charge. Instead, it considers whether
13 the Charging Party filed the Charge within six months of the *alleged violation* (or within
14 six months of the date the violation became known or should have become known to the
15 charging party). 456 CMR 15.04 (emphasis added).

16 Here, the Town does not challenge the timeliness of the Union's Charge as it
17 relates to Atstupenas' decision to notify the DA's office about Hurwitz's truthfulness and
18 conduct unbecoming an officer in May of 2017. The Union filed its Charge in September
19 of 2017, which is less than six months from when the Town engaged in the alleged
20 unlawful activity. Based on this evidence, I find that the Town's argument concerning the
21 timeliness of Hurwitz's protected activity lacks merit. Additionally, because there is no
22 dispute that Section 2 of the Law protects the filing and processing of grievances or the

1 participation in DLR proceedings and disciplinary hearings, I find that Hurwitz was
2 engaged in concerted protected activity when he: (1) filed grievances on August 30,
3 September 8, October 10 and 15, 2016; (2) met with Atstupenas on November 28, 2016
4 and January 6, 2017 to discuss the grievances; (3) participated in the DLR's proceeding
5 on November 14 and 16, 2016; and, (4) participated in the Board of Selectmen's
6 disciplinary hearing on April 25 and May 2, 2017.

7 Because I have found that Hurwitz was engaged in concerted, protected activity,
8 and because the Town does not dispute knowing about this activity, the Union has
9 successfully satisfied its burden of proving the first and second elements of its prima facie
10 case.

11 2. Adverse Action

12 The third element of the Union's prima facie case requires a showing of adverse
13 action. The CERB has consistently defined adverse action as an adverse personnel
14 action. City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (Jan. 9, 2009) (citing Town of
15 Dracut, 25 MLC 131, 133, MUP-1397 (Feb. 17, 1999)). Many management decisions,
16 though possibly inconvenient or even undesirable, do not constitute adverse employment
17 actions unless the charging party is materially disadvantaged in some way. City of
18 Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009) (citing MacCormack v. Boston
19 Edison Co., 423 Mass. 652, 662 (1996)).

20 The Union argues that the Town's disclosure of information about Hurwitz to
21 Travers on or about May 16, 2017 constitutes adverse action because that disclosure
22 interfered with Hurwitz's ability to testify as a witness in criminal proceedings, which is an

1 essential part of his duties as a police officer. Conversely, the Town argues that there is
2 no adverse action because Hurwitz did not suffer any discipline, reduction in authority,
3 change in working conditions, or lost wages. The Town also argues that there is no
4 adverse action because Travers ultimately rescinded the discovery notice regarding
5 Hurwitz that he had sent to Early, Wallace, and the other ADAs. Last, the Town argues
6 that there is no adverse action because the Union cannot show that any defense attorney
7 obtained any information about Hurwitz showing that he was untruthful or that he had
8 engaged in conduct unbecoming of an officer.

9 Here, I find that Atstupenas' decision in May of 2019 to notify the DA's office about
10 Hurwitz's untruthfulness and conduct unbecoming an officer was an adverse employment
11 action because it materially affected Hurwitz's ability to testify as a witness in criminal
12 proceedings, which is an essential part of his duties as a police officer. See, generally,
13 MacCormack v. Boston Edison Co., 423 Mass. 652, 663 (1996) (material affect arises
14 when an employee has been disadvantaged in respect to salary, grade, *or other objective*
15 *terms and conditions of employment*); see, generally, City of Boston, 35 MLC at 291
16 (citing Sallis v. Univ. of Minnesota, 408 F.3d 470, 476 (8th Cir. 2005) (changes in
17 employment that significantly affect an employee's future career prospects constitute
18 material employment disadvantage) (emphasis added)).

19 3. Unlawful Motivation

20 The fourth and final element of the Union's prima facie case requires it to show
21 unlawful motivation by the Town to penalize or discourage Hurwitz's concerted, protected
22 activity. To support a claim of unlawful motivation, the charging party may proffer direct

1 evidence of discrimination, circumstantial evidence of discrimination, or both, depending
2 on the nature of the evidence. Town of Brookfield, 28 MLC at 327-28 (citing Wynn &
3 Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 667
4 n. 23 (2000)).

5 Absent direct evidence of unlawful motivation, the charging party may establish
6 unlawful motivation through circumstantial evidence and reasonable inferences drawn
7 from that evidence. City of Holyoke, 38 MLC at 156; Town of Carver, 35 MLC 29, 48 MUP-
8 03-3894 (June 30, 2008) (citing Town of Brookfield, 28 MLC at 327-28); Suffolk County
9 Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001). Several factors may
10 suggest unlawful motivation, such as: the timing of the alleged discriminatory act in
11 relation to the protected activity; the triviality of reasons given by the employer; shifting or
12 inconsistent reasons given by the employer; disparate treatment; an employer's deviation
13 from past practices; or expressions of animus or hostility towards a union or the protected
14 activity. Town of Carver, 35 MLC at 48 (citing Melrose School Committee, 33 MLC 61,
15 69, MUP-02-3549 (Sept. 27, 2006)). Circumstantial evidence of unlawful motive may also
16 be shown by demonstrating an "employer's general bias or hostility toward the union or
17 toward employees engaged in concerted activity." Board of Higher Education, 43 MLC
18 148, 154, SUP-14-3771 (Nov. 30, 2016) (citing Town of Halifax, 1 MLC 1486, 1490, MUP-
19 2059, (June 30, 1975)).

20 **i. Timing**

21 The Union contends that the timing of the Atstupenas' notice to Travers on May
22 16, 2017 shows unlawful motivation because Atstupenas contacted the DA's office within

1 two weeks of the Board of Selectmen rejecting his recommendation to terminate Hurwitz.
2 The Union also contends that the timing of Atstupenas' decision to assign White as the
3 investigator on or about December 29, 2019 demonstrates unlawful motivation because
4 the Town was engaged in a "plot to remove Hurwitz" based on Atstupenas' prior
5 relationship with Halacy.

6 First, nothing in the record demonstrates "a plot [by the Town] to remove" Hurwitz.
7 Collusion is defined as "an agreement between two or more persons to defraud a person
8 of his rights by the forms of law....It implies the existence of fraud of some kind, the
9 employment of fraudulent means or of lawful means for the accomplishment of an
10 unlawful purpose." See Dickerman v. Northern Trust Co., 176 U.S. 181, 190 (1900);
11 Town of Hanover, 457 Mass. 248, 263 (2010). Allegations, standing alone, are
12 insufficient to show fraud or collusion. See Selectmen of Town of Watertown, 279 Mass.
13 22, 27 (1932) (The mere allegation of a relationship between parties, without more, is
14 insufficient to raise a presumption of impropriety). Here, I find no evidence of collusion
15 among the Town, Atstupenas, and Halacy because there is no evidence of an agreement
16 among them to defraud Hurwitz of his rights by the forms of law. Contrast, Town of
17 Hanover, 457 Mass. at 263. Instead, the evidence shows that the Town had no control
18 over whether and when Halacy chose to file his December 5, 2016 complaint.
19 Nonetheless, when Halacy did file the complaint, the Town took immediate action in terms
20 of hiring White to investigate the matter independently.

21 The timing of Atstupenas' May 16, 2017 notice to Travers could suggest unlawful
22 motivation because Atstupenas threatened to notify the DA's office about Hurwitz at the

1 Board of Selectmen's hearing on May 2, 2017, and he acted on that threat by contacting
2 Travers and providing him with information about Hurwitz's untruthfulness and conduct
3 unbecoming an officer on May 16, 2017. Nonetheless, the CERB has long-held that
4 timing alone is insufficient to establish unlawful employer motivation. City of Malden, 5
5 MLC 1752, 1764, MUP-3017 (March 20, 1979). Therefore, the Union must prove other
6 factors that suggest the Town's motivation to notify Travers in May of 2017 was unlawful,
7 including expressions of anti-union animus or insubstantial reasons for the adverse
8 action.

9 **ii. Expressions of Anti-Union Animus**

10 The Union maintains that the Town's decision to notify the DA's office about
11 Hurwitz was unlawfully motivated by anti-union animus based on Atstupenas' hostile
12 conduct during the November 28, 2016 grievance meeting, and based on the Town's
13 delay in providing the Union with information it needed to represent Hurwitz at his
14 disciplinary hearing on April 25 and May 2, 2017. Specifically, the Union asserts that the
15 basis of Atstupenas' hostility at the November 28, 2016 meeting stemmed from a "history
16 and pattern of contention between Hurwitz and Atstupenas relating to Hurwitz's role in
17 the Union," which "reach[ed] a boiling point when Hurwitz testified against the Town
18 before the DLR."

19 Contrary to the Union's assertion, Atstupenas did not demonstrate anti-union
20 animus against Hurwitz or anyone else at the November 28, 2016 grievance meeting.
21 While Hurwitz's meeting notes describe Atstupenas as being "angry, hostile, and
22 interruptive" over the issue of "comp time," the Union is unable to show that Atstupenas'

demeanor at the meeting stemmed from bias directed specifically toward Hurwitz's protected activity or toward the Union, in general. The Union also failed to offer specific statements made by Atstupenas' during the parties' November 28, 2016 meeting. Instead, the record shows that: (1) Atstupenas successfully rebutted Hurwitz's testimony by denying that he was angry, hostile, or interruptive; (2) Laudon did not offer any testimony to corroborate Hurwitz's impressions of the November 28, 2016 meeting; and (3) Gilmore, who was present during that meeting, did not testify. Consequently, I do not find that Atstupenas' conduct at the November 28, 2016 meeting demonstrates anti-union animus.

iii. Insubstantial and Shifting Reasons for the Adverse Action

The Union argues that the Town's reasons for taking adverse action against Hurwitz were insubstantial and shifting. First, it asserts that Atstupenas' reasoning for overruling White's finding on the CJIS issue was insubstantial because various law enforcement agencies use CJIS—including the state police—and White was a state trooper. It also asserts that Atstupenas' decision to issue findings that were different from White's Report was inconsistent with the fact that he hired White to be an objective and independent investigator. Specifically, the Union maintains that Atstupenas' Recommendation to discipline Hurwitz for misusing the CJIS was inconsistent with White's initial "exonerat[ion]" of Hurwitz on that same issue. Second, the Union contends that Atstupenas' reasons for waiting months before notifying the DA's office about Hurwitz's untruthfulness and conduct unbecoming an officer were insubstantial because Atstupenas had almost 40-years of law enforcement experience, yet claimed that he only became aware of his obligation to disclose the information about Hurwitz to the DA's office

1 based on the April 4, 2017 Bulletin. Further, it claims that Atstupenas' reasons for delaying
2 notice to the DA's office were shifting because instead of notifying the DA's office
3 immediately about Hurwitz in April of 2017, he waited over a month until after the Board
4 of Selectmen's decision to dismiss all charges against Hurwitz on May 2, 2017 before
5 contacting Travers.

6 The record is void of evidence supporting the Union's first assertion that
7 Atstupenas' reasons for overruling White's Report were insubstantial or shifting. The
8 Union failed to show whether White had personal knowledge about the CJIS system while
9 he was employed by the Commonwealth as a state trooper. The Union also failed to rebut
10 Atstupenas' well-established knowledge of the CJIS system or his professional opinion
11 that White did not fully understand how CJIS worked. Rather, the record shows that
12 Atstupenas recommended discipline against Hurwitz for misusing the CJIS system and
13 for "confront[ing]" Halacy on June 16, 2016 based on: (1) Hurwitz's failure to explain an
14 "official purpose" for approaching Halacy; (2) Hurwitz's decision to confront Halacy "for
15 personal matters" related to the Town's inquiry into Hurwitz's former employment at FSU;
16 and, (3) Hurwitz's conduct which caused Halacy to believe that he "he could not leave,"
17 thereby denying Halacy's rights. Based on this evidence, I find that Atstupenas' reasons
18 for recommending discipline against Hurwitz were substantial and consistent with the
19 Chief's 40-plus year tenure at the Department.

20 Concerning the Union's second assertion, the record again reveals no evidence
21 that Atstupenas' reasons for notifying the DA's office were insubstantial or shifting.
22 Atstupenas was aware in February of 2017 based on White's Report that Hurwitz had

1 engaged in conduct unbecoming an officer during his June 2016 interaction with Halacy,
2 and that Hurwitz was untruthful during this January 2017 IA interview with White.
3 Atstupenas did not immediately notify the DA's office about Hurwitz's alleged misconduct
4 because Atstupenas subsequently issued his own Recommendations which modified
5 White's Report by recommending discipline against Hurwitz for misusing the CJIS
6 system, in addition to being untruthful and engaging in conduct unbecoming.

7 On April 4, 2017, Atstupenas received the Bulletin, and on April 18, 2017, he
8 became aware that the Town had scheduled a disciplinary hearing for Hurwitz before the
9 Board of Selectmen. Atstupenas delayed notifying the DA's office about Hurwitz's alleged
10 misconduct because he first wanted to determine whether the Board of Selectmen would
11 accept his recommendation to terminate Hurwitz, which was guided in part by Atstupenas'
12 prior experience with the Town's termination of Holland. When the Board of Selectmen
13 voted unanimously to dismiss all charges against Hurwitz and restored him to full duty on
14 May 2, 2017, Atstupenas acted immediately by contacting Travers by telephone, then by
15 follow-up e-mail on May 16, 2017, which contained a copy of White's Report.

16 Based on this evidence, I find that Atstupenas' reasons for waiting to contact the
17 DA's office were not insubstantial or shifting but were based on his cumulative
18 consideration of the Report, the Recommendations, the Bulletin, the Board of
19 Selectmen's vote, and his prior experience with Holland. Thus, Union has not shown that
20 Atstupenas' conduct was motivated by an unlawful desire to penalize or discourage

1 Hurwitz's protected activity. Consequently, because the Union is unable to establish a
2 prima facie case of discrimination, I dismiss the Complaint.²⁸

3 **CONCLUSION**

4 Based on the record, I conclude that the Town did not discriminate against Hurwitz
5 for engaging in concerted activity protected by Section 2 of the Law; and, therefore, did
6 not violate Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law.

²⁸ Even if the Union could establish a prima facie case of discrimination, the Town is able to satisfy its burden of producing legitimate, non-discriminatory reasons for taking action against Hurwitz. City of Easthampton, 35 MLC 257, 265, MUP-04-4244 (April 23, 2009) (citing Boston Water & Sewer Commission, 29 MLC 176, 181, MUP-1677 (April 2, 2003)). Specifically, Atstupenas' decision to notify Travers' about Hurwitz in May of 2017 was based on White's Report, the Recommendations, and the Bulletin which specifically directed the Department "to provide the prosecution with any allegations against the officer which bear upon the officer's truthfulness...*regardless of whether the claims are unsubstantiated, not credible[,] or the officer is exonerated.*" (Emphasis added.)

Further, the Union cannot show that but for Hurwitz's Union activity, the Town would not have notified the DA's office about Hurwitz's untruthfulness and conduct unbecoming an officer. Trustees of Forbes Library, 384 Mass. 559, 565-66 (1981); Suffolk County Sheriff's Department, 27 MLC at 160; Quincy School Committee, 27 MLC 83, 92, MUP-1986 (Dec. 29, 2000). It was Halacy's complaint that initiated the IA investigation in December of 2016, and Atstupenas acted appropriately by hiring White as the independent investigator. Next, it was White who initially found that Hurwitz was untruthful when he lied during the IA investigation in January of 2017, and that he had engaged in conduct unbecoming an officer when he confronted Halacy in June of 2016. While Atstupenas issued his own subsequent Recommendations, he adopted White's finding that Hurwitz had been untruthful during the IA investigation. Thus, based on the Bulletin which specifically addresses an officer's "truthfulness," and shortly after the Board of Selectmen's decision in Hurwitz's disciplinary hearing, Atstupenas provided the DA's office with White's Report which found Hurwitz to be untruthful, inter alia. Based on the totality of this evidence, I do not find that Atstupenas would not have contacted the DA's office but for Hurwitz's Union activity.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

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