

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of

MASSACHUSETTS DEPARTMENT OF
TRANSPORTATION

and

UNITED STEELWORKERS, LOCAL 5696

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

Date Issued: July 31, 2017

Board Members Participating:

Marjorie F. Wittner, Chair
Katherine G. Lev, CERB Member
Joan Ackerstein, CERB Member

Appearances:

James Norton, Esq.:

Representing Massachusetts
Department of Transportation

Alfred Gordon O'Connell, Esq.:

Representing United Steelworkers,
Local 5696

CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Summary

1 The Massachusetts Department of Transportation (MassDOT or Employer)
2 appeals from a Department of Labor Relations (DLR) Hearing Officer's decision holding
3 that MassDOT violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of M.G.L. c.
4 150E (the Law) by retaliating against two MassDOT employees, Peter Fimognari
5 (Fimognari) and Douglas Haskins (Haskins), because they engaged in concerted

1 activity protected under Section 2 of the Law. At the hearing, MassDOT defended its
2 decision not to promote Fimognari and Haskins on the grounds that they did not have
3 the highest interview scores in their respective districts. It reiterates this defense on
4 appeal, and claims that the Hearing Officer erred in two ways; first when she concluded
5 that all three of the members of Haskins' interview panel were aware of his protected,
6 concerted activity; and second, when she concluded that MassDOT's decision not to
7 promote either employee was unlawfully motivated.¹ The Charging Party, United
8 Steelworkers, Local 5696, (Union), which represents Haskins and Fimognari for
9 purposes of collective bargaining, filed a response to the appeal urging affirmance of
10 the decision, but seeking clarification of one aspect of the remedy. We reject the
11 MassDOT's arguments, affirm the Hearing Officer's decision, and clarify the remedy for
12 the reasons stated below.

13 Facts

14 The parties entered into stipulations of fact and the Hearing Officer made further
15 findings of fact based on the hearing record. MassDOT does not challenge any of the
16 Hearing Officer's detailed and extensive findings. We therefore adopt those findings
17 and briefly summarize only those facts necessary to an understanding of our Opinion.

¹ The Hearing Officer also concluded that MassDOT violated Section 10(a)(5) of the Law by transferring bargaining unit work outside of the unit without satisfying its bargaining obligation. She further dismissed a Section 10(a)(3) allegation concerning bargaining unit member Greg Campbell and a Section 10(a)(4) allegation concerning Haskins. Neither party appealed from those determinations and, thus, only the Section 10(a)(3) allegations described above are at issue in this appeal.

1 See Massachusetts Board of Regents, 13 MLC 1267, SUP-2809 (November 17, 1986).
2 Further reference may be made to the facts set out in the Hearing Officer's decision,
3 reported at 43 MLC 67 (September 8, 2016).

4 The Union is the exclusive bargaining representative for certain MassDOT
5 employees in the title of Motor Equipment Mechanic IV (MEM IV).² At all times relevant
6 to this proceeding, Haskins and Fimognari were employed by MassDOT as MEM IVs.
7 In August 2013, both employees applied for the newly-created, non-bargaining unit title
8 of Program Coordinator III (PC III) in their respective MassDOT districts.³ At the end of
9 2013, beginning of 2014, two separate panels comprised of three MassDOT
10 representatives each interviewed Haskins and Fimognari for the position.⁴ Both panels
11 posed twelve oral questions that were the same in each district. The panels also posed
12 two questions that were unique to the district. Each interviewer scored the candidates
13 separately. Out of the seven candidates who applied in District 2, Fimognari received
14 the fourth-highest score and John Bieg (Bieg) received the highest score. Out of the

² Pursuant to legislation enacted in 2009, "An Act Modernizing the Transportation Systems of the Commonwealth, the Massachusetts Turnpike Authority was consolidated with the Massachusetts Highway Department. The Union is part of the Coalition of MassDOT Unions, which is defined in the Master Labor Integration Agreement (MLIA)." MassDOT entered into the MLIA on December 28, 2010. Among other things, the MLIA addresses collective bargaining with the unions that represent MassDOT employees.

³ Fimognari applied for the District 2 position. Haskins applied for the District 1 position.

⁴ The panels consisted generally of one representative from MassDOT's Human Resources Department (HR) and two from the respective district.

1 five candidates who applied in District 1, Haskins received the second highest score
2 and Stephen Kotski (Kotski) received the highest score.

3 On April 1, 2014, Fimognari received a form letter signed by "Robin Burke,
4 Human Resources" (Burke) indicating that Bieg had been selected for the PC III
5 position.⁵ The form letter indicated via "X" marks that Bieg had:

6 [B]een selected (because he has been deemed to be more qualified than
7 you by virtue of) for one or more of the flowing [sic] reasons:

8 (X) 1. "Better Able (Ability) to perform the job due to:

(X) More experience in the same or related work.

Although the form included the option to select "Interview *An explanation must be provided if this section is checked,*" (Italics and punctuation in original) this option was not selected nor any explanation provided.⁶ At some unspecified date after receiving the letter, Fimognari retired.

⁵ The record does not indicate Burke's title or responsibilities. The CERB has added details that were not included in the Hearing Officer's decision regarding the non-selection letters sent to Fimognari and Haskins for the sake of completeness. The non-selection letters were entered into the hearing record as Joint Exhibits 37 and 38.

⁶ The form letter indicated that one or more reasons could be selected. The possible choices were:

1. Better Able (Ability) to perform the job due to: more experience in the same or related work or demonstrated competence in the same or related work; job performance (including evaluations and disciplinary record)
2. Interview *An explanation must be provided if this selection is checked*
3. Education and training (directly related to the duties of the vacant position);
4. More Seniority (Applicant from within the work unit selected);
5. Other

1 On April 16, 2014, Haskins received a form letter notifying him that Kotski had
2 been selected for the PC III position. Other than identifying Kotski as the selected
3 candidate, Haskins' non-selection letter was in all respects identical to Fimognari's .

4 Haskin's and Fimognari's Union-related activities

5 Haskins

6 Haskins was demoted from his MEM IV position in 2011. The Union grieved the
7 demotion, and in 2012, an arbitrator ordered MassDOT to reinstate Haskins to his
8 former position. The Union also filed a motion to confirm the arbitration award in
9 Superior Court and a related prohibited practice charge with the DLR. The parties
10 eventually settled these issues and Haskins returned to work as an MEM IV. At some
11 point thereafter, Haskins filed a grievance over District Engineer Stephen Webster
12 (Webster) sending him home during snow and ice overtime. MassDOT eventually paid
13 Haskins for the overtime that Webster worked. Webster was one of the three persons
14 who interviewed Haskins for the PC III position.

15 Fimognari

16 Until he retired, Fimognari served as the chairman of Unit B of the Union and a
17 Union trustee. He had engaged in various visible Union activities over several years,
18 including bargaining over the PC III position at issue here and being involved with
19 Haskins' demotion grievance.

20

Opinion⁷

The issue on appeal is whether the Hearing Officer correctly concluded that MassDOT did not select Fimognari and Haskins for the PC III position due to their concerted protected activities. At hearing, the Employer defended its actions on grounds that it had selected the candidates who received the highest interview scores. After determining that the Union had established a prima facie case of discrimination, the Hearing Officer examined whether the Employer had met its burden of providing legitimate reasons for its conduct. Finding that it had not, she concluded that MassDOT's refusal to promote Haskins and refusal to fairly consider Fimognari for promotion⁸ violated Section 10(a)(3), and, derivatively, Section 10(a)(1) of the Law.

On appeal, the Employer continues to claim that it did not select Fimognari and Haskins because of their interview scores and argues that the Hearing Officer erred when she concluded otherwise. We address these arguments below.

4 As the Hearing Officer correctly found, to establish a prima facie case for when a
5 public employer will be found to have retaliated or discriminated against an employee for
6 engaging in activity protected by Section 2 of the Law in violation of Section 10(a)(3) of the

⁷ The CERB's jurisdiction is not contested.

⁸ As indicated above, Fimognari scored fourth out of seven candidates. Because the Hearing Officer had no information about the candidates who scored third and second, she held that she could not determine who would have received the promotion had MassDOT not discriminated against Fimognari. Under these circumstances, the Hearing Officer decided that MassDOT's violation was not failing to promote Fimognari, but failing to fairly consider him for the PC III position.

1 Law, a charging party must show that: 1) an employee was engaged in activity protected
2 by Section 2 of the Law; 2) the employer knew of that conduct; 3) the employer took
3 adverse action against the employee; and 4) the employer took the adverse action to
4 discourage the protected activity. Trustees of Forbes Library, 384 Mass. 559 (1981);
5 Quincy School Committee, 27 MLC 83, 92, MUP-1986 (December 29, 2000); Town of
6 Clinton, 12 MLC 1361, 1364, MUP-5659 (November 9, 1985). The Hearing Officer found
7 that the Union had established the first and third elements of its prima facie case.
8 MassDOT does not appeal from this aspect of the decision.

9 MassDOT, does, however, dispute the Hearing Officer's conclusion that the
10 Union established that it was aware of Haskins' protected concerted activities.⁹ When
11 analyzing this element of the prima facie case, the Hearing Officer focused on whether
12 the three individuals who had interviewed Haskins, District Operations Engineer Brian
13 DiOrio (DiOrio), HR Generalist Christine Mountain (Mountain), and Webster were aware
14 of Haskins' concerted protected activity. She found that DiOrio and Webster had direct
15 knowledge but that Mountain did not. Nevertheless, relying on Fowler v. Labor Relations
16 Commission, 56 Mass. App. Ct. 96 (2002), the Hearing Officer inferred Mountain's
17 knowledge from that fact that two out of the three interviewers knew about Haskins'
18 activities, and shared their knowledge with Mountain.

⁹ The Hearing Officer concluded that the Union established that MassDOT knew of Fimognari's protected, concerted activities. MassDOT does not challenge this conclusion.

1 The Employer challenges the Hearing Officer's finding on appeal, claiming that
2 Fowler, which concerned a well-known union activist, is factually inapposite. It further
3 claims that there is no evidence that Mountain knew about Haskins' activities, or that
4 she had any involvement with them. It also argues that there is no evidence that
5 Mountain harbored any ill will towards Haskins' conduct or towards the Union generally.
6 The Employer does not, however, challenge the legal principle for which the Hearing
7 Officer cited Fowler, that a factfinder may infer knowledge of protected concerted
8 activity based on circumstantial evidence. 56 Mass. App. Ct at 100. Therefore, as the
9 Hearing Officer correctly found, the Union did not have to establish that the Mountain
10 had direct knowledge of Haskins' activities in order to meet its burden here. Further,
11 although Fowler *permits* a factfinder to infer employer knowledge based on evidence of
12 union animus or hostility, it does not require that there be such evidence in order to
13 draw the inference. Rather, it holds that knowledge may be inferred from a number of
14 different factors, including timing, pretext and the employer's general knowledge of the
15 employee's union activities. Id.

16 In this case, there is no dispute that MassDOT was generally aware that Haskins
17 had engaged in protected, concerted activity by filing grievances over his demotion and
18 overtime pay. Further, because these grievances caused MassDOT to take certain
19 personnel actions with Haskins, i.e., reinstating him to the position from which he had
20 been demoted and paying him the overtime that it had paid to Webster, it is reasonable
21 to presume that MassDOT's HR department was also aware of the grievances and their

1 aftermath. Under these circumstances, it is reasonable to infer that Mountain and
2 Burke, both of whom worked in the HR Department, were aware of Haskins' protected
3 concerted activity when, respectively, Mountain interviewed Haskins for the PC III
4 position and Burke signed his non-selection letter. Id. For these reasons, we affirm the
5 Hearing Officer's conclusion that the Union has shown by both direct and circumstantial
6 evidence that MassDOT was aware of Haskins' concerted, protected activities when it
7 did not select him for the PC III position.^{10 11}

8 Unlawful Motivation

9 The fourth element of a charging party's prima facie case can be proven by either
10 direct evidence or circumstantial evidence and reasonable inferences drawn therefrom.
11 Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001).
12 Absent direct evidence of unlawful motivation, several factors may suggest unlawful
13 motivation, including the timing of the alleged discriminatory act in relation to the

¹⁰ In so holding, we do not rely on the inference of knowledge that the Hearing Officer drew that Mountain knew about Haskins' conduct because DiOrio and Webster were aware of it and shared their knowledge with her.

¹¹ The Hearing Officer dismissed the Section 10(a)(4) allegation that MassDOT retaliated against Haskins for bringing a prohibited practice charge at the DLR. The Hearing Officer found no evidence that any of Haskins' interviewers knew about the charge. In a footnote in its supplementary statement, the Union argues that in the event the CERB determines that it established a prima facie case of unlawful motivation, there would be no reason to dismiss the Section 10(a)(4) allegation based on Mountain's lack of knowledge, because MassDOT's stated reason for non-selection was not based on the interview. The Union did not, however, file a cross-appeal from the dismissal of this aspect of the charge and concedes that a different ruling would not result in a different remedy. We therefore do not address the dismissal of the Section 10(a)(4) charge with respect to Haskins.

1 protected activity, the triviality of reasons given by the employer, or shifting and
2 inconsistent reasons given by the employer; disparate treatment, an employer's
3 deviation from past practices, or expressions of animus or hostility towards a union or
4 the protected activity. Town of Carver, 35 MLC 29, 48 MUP-03-3894 (June 30, 2008).

5 Here, the Hearing Officer found that the Union had established improper
6 motivation through circumstantial evidence based on the shifting and inconsistent
7 reasons MassDOT offered for not selecting either Haskins or Fimognari for the PC III
8 position. That is, at hearing, MassDOT's witnesses testified that the candidates with the
9 highest interview scores were selected but, as described above, the reasons checked off
10 on both non-selection form letters was: "Better Able (Ability) to perform the job due to:
11 More experience in the same or related work."

12 The Employer argues that the Hearing Officer improperly relied on the non-
13 selection letter as grounds for inferring unlawful motivation. It claims that no other factors
14 tending to show circumstantial evidence, such as timing or animus, were present in this
15 case. Rather, it claims that the "great weight" of the evidence at hearing was that the
16 selections were made solely on the basis of the applicants' interview scores. The
17 Employer further argues that nowhere during the course of the hiring process or at any
18 time since has anyone asserted that the employees' experience and not the scoring was
19 the basis for selecting the employees for the PC III position.

20 The Employer's arguments miss the point. At the prima facie stage of
21 proceedings, a charging party need only present evidence that is within its knowledge

1 and reach, sufficient to create a presumption that the employer's decision was improperly
2 motivated. Trustees of Forbes Library, 384 Mass. at 566. The CERB has long-held that
3 an employer's inconsistent or shifting reasons for taking an adverse action can give rise
4 to a reasonable inference of improper motivation. See, e.g., Town of Carver, 35 MLC at
5 48-49; Everett Housing Authority, 13 MLC 1001, 1005, MUP-5656 (June 4, 1986). In this
6 case, the Hearing Officer drew an inference of unlawful motivation from the fact that
7 MassDOT gave one reason to Haskins and Fimognari for not selecting them for the PC III
8 positions but gave a different reason at hearing. Where MassDOT does not dispute the
9 facts underlying this inference or offer any explanation for this disparity,¹² we affirm the
10 Hearing Officer's conclusion that the Union established the fourth element of its prima
11 facie case.

12 Legitimate and Substantial Reasons

13 Under the three-part shifting burden test set out in Trustees of Forbes Library and
14 the numerous CERB decisions that follow it, an employer has the opportunity to rebut the
15 presumption of discrimination created by the prima facie case by coming forward with
16 evidence that states a lawful reason for its decision. Trustees of Forbes Library, 384
17 Mass. at 566; Town of Brookfield, 28 MLC 320, 329, MUP-2538, *aff'd sub. nom.* Town of

¹² Indeed, MassDOT's failure at hearing and on appeal to explain the disparity could itself constitute circumstantial evidence of improper motivation. "When a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." Town of Mashpee, 36 MLC 163, 172 MUP-02-3653 (April 15, 2010) (citing Bellingham Teachers Association, 9 MLC 1536, 1548, MUPL-2336 (December 30, 1982); City of Malden, 5 MLC 1752, 1768, n. 18, MUP-3017 (March 20, 1979)).

1 Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005) (additional citations
2 omitted). The Employer's burden at this stage is more than simply stating
3 unsubstantiated reasons. School Committee of Boston v. Labor Relations Commission,
4 40 Mass. App. Ct. 327, 335 (1996). It must produce supporting facts indicating that the
5 proffered reason was actually a motive in the decision. Id.

6 The Hearing Officer rejected the Employer's argument that it met this burden
7 merely by presenting evidence showing that Haskins and Fimognari did not receive the
8 highest interview scores in their respective districts. The Hearing Officer found this
9 evidence insufficient for three reasons. First, MassDOT offered no witness testimony to
10 explain why they scored one candidate higher than the other. Indeed, the only
11 interviewer who testified was DiOrio. In the absence of such testimony or any argument in
12 the Employer's post-hearing brief that explained the scores or the interviewers' notes that
13 the parties provided (some of which the Hearing Officer found unreadable), the Hearing
14 Officer found that she was unable to determine whether one candidate's answers were
15 validly scored higher than another candidate's answers. Second, MassDOT offered no
16 testimony about why different reasons were given on the non-selection form. Finally,
17 MassDOT offered no testimony as to why it concluded that Bieg and Kotski had more
18 experience than Fimognari and Haskins, as stated on the non-selection form.

19 As to this final point, the Hearing Officer reviewed the candidates' respective
20 qualifications and found that the evidence before her did not support the reasons given on

1 the non-selection form.¹³ Because she found that the Employer had not met its burden to
2 establish that it had a legitimate reason for selecting Bieg and Kotski, she concluded that
3 it violated the Law when it failed to fairly consider Fimognari, and failed to promote
4 Haskins to the PC III position.

5 In an apparent effort to rectify its failure to support its stated reasons for non-
6 selection, the Employer devotes a good portion of its supplementary statement to a
7 detailed review of Haskins' and Kotski's interview answers and the interviewers' scores
8 and notes for each answer, including in some instances, the Employer's opinion as to
9 which candidate provided the better answer.¹⁴ However, this information and related
10 arguments are improperly presented for the first time on review. We therefore decline to
11 consider them. Joseph R. Anderson and others v. Commonwealth Employment
12 Relations Board, 73 Mass. App. Ct. 908, 909, n.7 (2009) (declining to consider claims
13 made by plaintiffs for first time on appeal)

¹³ Among other things, the Hearing Officer found that Fimognari had significantly more and more recent management and supervisory experience and worked for many years in the MEM IV position that performs some similar duties to the PC III. She similarly found that Haskins had extensive experience performing certain duties that are similar to the PC III position, had more relevant experience in motor equipment repair than Kotski and met the required supervisory minimum entrance requirement where Kotski did not.

¹⁴ See, e.g., MassDOT Supplementary Statement at pp. 13, 22, 24, 25, 26. MassDOT did not provide any of the same information with respect to Fimognari's and Bieg's interview answers and scores. Instead, it argues that the decision that it discriminated against Fimognari because of the non-selection form letter suffered from the "same infirmities" as that determination with respect to Haskins and should be reversed.

1 Even if we were to consider the new arguments, however, at the second stage of
2 the Forbes analysis, the Employer would still have the burden of producing evidence that
3 the proffered reason was actually a motive in the decision. Trustees of Forbes Library,
4 384 Mass. at 566. MassDOT's explanation of the interview process in its Supplementary
5 Statement does not meet this burden at this stage of the proceedings and rings hollow
6 when viewed in light of the fact that the Employer gave a different reason to the
7 employees for not selecting them, failed to offer any explanation for the disparity and then
8 provided no witness testimony to support either of its stated reasons.¹⁵

9 In sum, where we have concluded based on both direct and indirect evidence that
10 the interviewers who interviewed Haskins and Fimognari were aware of their Union-
11 related activities, we agree with the Hearing Officer that the Employer needed to do more
12 than simply rely on the selected candidate's higher interview scores to meet its burden of
13 production at the second stage of the Forbes analysis. It needed to provide facts either
14 substantiating the scores or the reasons stated in the non-selection letter, as well as
15 evidence that its proffered reason played a motive in its decision. Trustees of Forbes
16 Library, 384 Mass. at 566; School Committee of Boston v. Labor Relations Commission,
17 40 Mass. App. Ct. at 335. Because MassDOT failed to provide such evidence, we affirm
18 the Hearing Officer's conclusion that the Employer did not establish or satisfy its burden

¹⁵ In this regard, although the Employer contests the Hearing Officer's conclusion that Kotski did not meet the minimum supervisory experience for the position and that Haskins' experience in motor vehicle repair was relevant for the position, it does not contest the Hearing Officer's more general finding that Haskins had "extensive" experience as a Foreman performing certain duties that were similar to some of the duties of the PC III position.

1 to produce credible evidence that it had a legitimate reason for its decisions. We therefore
2 also affirm the Hearing Officer's conclusion that MassDOT violated §10(a)(3) and,
3 derivatively, §10(a)(1) of the Law when it failed to fairly consider Fimognari for the PC III
4 position and selected Kotski instead of Haskins for the position in retaliation for his
5 protected, concerted activity.

6 Remedy

7 We address the Union's concerns regarding a footnote in the Remedy section of
8 the Hearing Officer's decision concerning Fimognari. Because Fimognari was ranked
9 fourth out of seven interviewees, the Hearing Officer did not order MassDOT to promote
10 him to the PC III position. Instead, she ordered MassDOT to rescind Bieg's promotion to
11 PC III in District II and conduct a new selection and interview process taking into account
12 only lawful considerations. The footnote at issue stated:

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

18
19 The Union expresses concern that the footnote could be read to require Fimognari to
20 come out of retirement before reapplying for the PC III position. The Union asks that the
21 CERB not adopt this "apparent suggestion" but instead adopt the Order as written.

22 When a Hearing Officer or the CERB concludes that a party has violated the Law, it
23 orders that party to take certain actions designed to restore the situation as nearly as
24 possible to that which would have existed but for the unfair labor practice. Commonwealth

1 of Mass, 41 MLC 186, 187, SUP-12-1829 (January 16, 2015). Because the footnote at
2 issue concerns what the Hearing Officer ordered *MassDOT* to do to remedy the violations
3 found, we do not construe it as requiring action on *Fimognari's* part. Rather, the footnote
4 merely clarifies MassDOT's obligations under the Order in two potential, alternative
5 scenarios – if Fimognari decides not to apply for the job, in which case MassDOT would
6 not have to comply with certain aspects of the Order, or if he were to apply and were
7 selected, in which case the Order would apply. We otherwise agree with the Union that
8 there is no need to modify the Order.¹⁶

9 Conclusion

10 For the foregoing reasons, we affirm the Hearing Officer's conclusion that
11 MassDOT violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by
12 discriminating against Haskins and Fimognari for their protected, concerted activity and
13 issue the following Order.

14 Order

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

1. Cease and desist from:

¹⁶ As the Union suggests, Fimognari's retirement status and retirement benefit income could be a factor in backpay computations in the event he successfully re-interviews for the PC III position. Any disputes over the amount of backpay owed may be addressed in a subsequent compliance proceeding. See generally, 456 CMR 16.08.

- a. Transferring bargaining unit work to non-bargaining unit employees without first bargaining to resolution or impasse with the United Steelworkers, Local 5696 over the decision to transfer the work and the impact of that decision on bargaining unit members' terms and conditions of employment;
 - b. Discriminating against Peter Fimognari and Douglas Haskins for engaging in concerted, protected activities;
 - c. In any like manner, interfering, restraining and coercing any employees in the exercise of their rights guaranteed under the Law.
2. Take the following action that will effectuate the purposes of the Law:
- a. Upon request, bargain in good faith with the Union to resolution or impasse about the decision and impact of the decision to transfer the following duties to non-unit employees:
 - i. District 1, Lee Garage: taking incoming calls to prioritize the repair of equipment and scheduling repair work; making decisions about outside repairs; and making recommendations regarding the purchase of new equipment;
 - ii. District 2, Chicopee Garage: tracking and reporting vehicle mileage; tracking the assignment of staff to certain locations; consulting with the fleet supervisor regarding the purchase of new equipment; and identifying and coordinating training needs;
 - iii. District 3, Auburn Garage: auction and purchasing decisions; coordinating training; paperwork for accident reports; resolving transponder issues; and overtime reports;
 - iv. District 6, South Boston and Charlestown Garages: assessing vehicles for purchase and auction; prioritizing repairs; and conducting evaluations of mechanics.
 - b. Restore to the bargaining unit the duties referenced in paragraph 2(a) of this order. The obligation to restore the duties to the bargaining unit shall continue until the earliest of the following conditions is met:
 - i. Mutual agreement is reached with the Union relating to the subjects of bargaining set forth in paragraph 2(a) above;

- ii. Good faith bargaining results in a bona fide impasse;
 - iii. The Union fails to request bargaining within 15 days of this order; or
 - iv. The Union subsequently fails to bargain in good faith.
- c. Immediately rescind the promotion of Stephen Kotski to the position of PC III in District 1;
- d. Offer Douglas Haskins the position of PC III in District 1, which position he shall be deemed in terms of seniority, benefits, and all rights and privileges to have held since the day the PC III position was filled in District 1 in April 2014;
- e. Make Douglas Haskins whole for all losses he suffered, if any, as a result of the discriminatory denial of his promotion. He shall be paid a sum equal to the difference between what he would have earned as a PC III and his salary as an MEM IV from the date that the PC III position was filled in April 2014 to the date of compliance with this order, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly;
- f. Rescind the promotion of John Bieg to the PC III position in District 2;
- g. Repeat the interview and selection process for the PC III position in District 2, taking into account only lawful considerations. In order to ensure a fair selection process, MassDOT's interview panel must not include the interviewers who selected Bieg for the position in 2013, and the selection should be made based on the circumstances that existed at the time of the original application deadline;
- h. If MassDOT selects Peter Fimognari for the PC III position after completing the process described in paragraph 2(g), he shall be deemed in terms of seniority, benefits, and all rights and privileges to have held the position since the day the PC III position was filled in District 2 in April 2014;
- i. If MassDOT selects Peter Fimognari for the PC III position after completing the process described in paragraph 2(g), and he accepts the position, make Peter Fimognari whole for all losses he suffered, if any, as a result of the discriminatory denial of his promotion. He shall be paid a

sum equal to the difference between what he would have earned as a PC III and his salary as an MEM IV from the date that the PC III position was filled in April 2014 to the date of compliance with this order, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly;

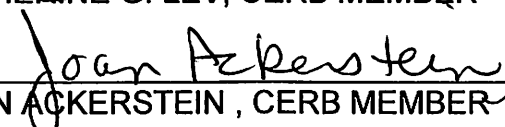
- j. If MassDOT selects
- k. Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if MassDOT customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter signed copies of the attached Notice to Employees;
- l. Notify the DLR in writing of the steps taken to comply with this decision within thirty (30) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD


MARJORIE F. WITTNER, CHAIR


KATHERINE G. LEV, CERB MEMBER


JOAN ACKERSTEIN, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

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

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

MassDOT assures its employees that:

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

- Make Fimognari whole for all losses he suffered, if any, as a result of the discriminatory denial of his promotion if he is selected for the position. He shall be paid a sum equal to the difference between what he would have earned as a PC III and his salary as an MEM IV from the date that the PC III position was filled in April 2014 to the date of compliance with the order, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly;
- Notify the DLR within thirty (30) days after the date of service of this decision and order of the steps taken to comply with its terms.

For MassDOT

Date

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

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