THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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RE: MUP-22-9272, Town of Medfield

Dear Attorneys Berkowitz and Messina:

On May 4, 2022, the Medfield Police League (Union) filed a charge with the Department of Labor Relations (DLR), alleging that the Medfield Police Department (Police Department) had violated Section 10(a)(3) and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by assigning an officer to a walking beat and, separately, by eliminating the officer's specialty position of court prosecutor from the shift bid in retaliation for her protected activity. The charge also alleged that the Chief of Police independently violated Section 10(a)(1) by telling the officer that she did not want to hear more from her. Pursuant to Section 11 of the Law and Section 15.05 of the DLR's Rules, I conducted an investigation on October 6, 2022.[1]

[1] During the investigative conference, which I conducted remotely by Webex, the Union moved to amend its charge to add that the Police Department also violated 10(a)(3) and, derivatively, 10(a)(1) of the Law by moving the officer to a less desirable shift and by refusing to renew her license to carry (LTC) a firearm until after she retired, and independently violated Section 10(a)(1) by ordering the officer to work patrol on her scheduled in-service training date. I granted the motion and held the record open until October 26, 2022, to allow the Police Department to submit information related to the new allegations, and to allow the Union to respond to any such submission. Lastly, although the Union alluded to a constructive discharge in some written materials, when the Union clarified its allegations during the investigation, it did not allege that the Police Department constructively discharged the officer, and I therefore do not address that issue.

Based on the information presented during the investigation, I have decided to dismiss the charge in its entirety for the reasons explained below.

Background[2]

The Union is the exclusive bargaining representative for City police officers. Officer Christine DiNatale (DiNatale), a senior officer in the Police Department, had been working a specialty assignment as the court prosecutor. This was an administrative position with a Monday through Friday, 7:00 a.m. to 3:00 p.m. shift. The Police Department paid a stipend for this position and for another specialty position, the school resources officer. At some point prior to the events at issue in this charge, due to a shortage of staff, DiNatale was only assigned as court prosecutor from 7:00 to 11:00 a.m. and then worked patrols for the remaining four hours of her shift.[3]

Purported Concerted Protected Activity

For several months at the start of 2022, the Police Department required officers to work shifts in addition to their regular schedule due to staffing shortages.[4] On March 18, 2022, DiNatale was required to add a 3:00-11:00 p.m. shift on top of her regularly scheduled 7:00 a.m.-3:00 p.m. shift. She and Officer Michael Stanley (Stanley) reported to the scene of a party involving at least 85 underage individuals. They did not conclude their responsibilities at the scene and ensure that all the attendees were picked up until after 11:00 p.m. Although Stanley would normally write and submit the report regarding the underage party, he had to work the next day starting at 7:00 a.m. Consequently, DiNatale offered to write and submit the report on the following Monday.

On Monday, March 21, 2022, DiNatale experienced computer problems and due to the large number of individuals at the party, she had not yet completed her report when, at 2:00 p.m., Police Chief Michelle Guerette (the Chief) asked about the Friday party. DiNatale understood that the Chief wanted her to charge the attendees with possession of alcohol, but DiNatale expressed her concern about the lack of probable cause for such charges. The Chief said she wanted to think about this overnight. DiNatale said words to the effect that it would probably take that long for her to finish the report. The Chief asked why the report was not already completed. DiNatale began to explain that she was entering hour 17 after dealing with the party on Friday, but the Chief cut her off, and told

[2] For the purpose of determining whether there is probable cause to believe that the Police Department violated the Law as alleged, I am presenting the facts provided by the Union in support of its charge, along with facts presented by the Police Department that the Union did not dispute.

[3] The Police Department asserted that even when employees had to be removed from a specialty assignment to work patrol due to a staffing shortage, the employees continued to receive their stipend. The Union did not dispute this assertion.

[4] Neither party submitted a collective bargaining agreement (CBA) or indicated that any CBA article applied to this or any other matter addressed during the investigation.

DiNatale to stay and finish the report that day. The Chief referenced that this was the second time that DiNatale had not timely completed a report.

DiNatale was frustrated by the conversation[5] and as they walked away, she said quietly to some coworkers "I'm done." The Chief heard the comment and said "I don't want to hear any more of your…" while making a hand gesture resembling a mouth opening and closing rapidly. DiNatale asked the Chief if she would like her two-week notice. The Chief didn't respond verbally but gestured in a way which DiNatale understood to mean that the Chief would be willing to accept her resignation.

Walking Beat at the State Hospital

On Tuesday, March 22, 2022, the Police Department was short-staffed so DiNatale was assigned to work patrol for her whole shift. The Chief texted the Sergeant to have DiNatale walk the Medfield State Hospital (Hospital) grounds for the second half of her shift, from 11 a.m. to 3:00 p.m.[6]

In-Service Training

DiNatale and others were scheduled for In-Service Training for April 1, 2022. This training is awarded by seniority. The Police Department was short-staffed so the Chief told the Sergeant to have DiNatale work patrol that day. DiNatale had seniority over others who were not asked to work patrol instead of attending the training. Ultimately, the Police Department did not require DiNatale to work patrol that day, and she attended the In-Service Training as scheduled.

April 2022 Bids

On April 8, 2022, DiNatale put in for retirement. She expected to train her replacement as court prosecutor, but she was not asked to do so. The detective who had assisted with the court prosecutor duties previously was to assume the position part time.

[5] DiNatale explained during the investigative conference that she was not able to explain to the Chief in more detail why she had not yet been able to complete the report. She never got the chance to mention to the Chief that if either she or Stanley had stayed after the party to work on the report, they would be working a triple shift.

[6] The Union explained that there are some walking beats, but no one has ever been assigned to a walking beat at the Hospital before. The Chief indicated that the day before, someone reported their dog stolen and the Hospital had asked for a police presence. The Union maintains that the dog was missing from a location away from the Hospital and the dog was not stolen but returned home on its own. DiNatale believed the Chief assigned her to walk the Hospital grounds because the Chief was angry that she did not complete the report more quickly and because she had only charged the homeowner and not the attendees at the underage party.

The Union asked the Police Department to conduct a shift bid for a temporary shift change for a three-month period, beginning on April 24, 2022, because certain officers were on administrative leave. On April 11, 2022, the Chief sent out the shift bid for 7 shifts. Neither the court prosecutor nor the school resource officer positions were on the bid sheet.[7] Bid 4 was for a 7:00 a.m.-3:00 p.m. shift as "detective (M-F) (Covering Court)". Bid 5 was 7:00-11:00 a.m./11:00 a.m.-3:00 p.m. "patrol/detective 4/2 (Covering Court)" The bid sheet noted that "[i]f your bid is not in by April 18th at 8:00am, then I reserve the right to assign you a shift." Each employee was told they must select three bids, which would be awarded by seniority.

On April 13, 2022, DiNatale wrote in "Prosecutor" for her first bid and selected bids 4 and 5 for her other two choices. On April 14, the Chief texted DiNatale, who was out of state, that her bid included a shift that is not listed. The Chief wrote that "I will need you to select 3 bids." On April 15, DiNatale resubmitted her bids, listing bids 4, 5 and 6. Even though she had seniority, DiNatale did not receive any of her requested bids and was scheduled for the less desirable shift, working 4 days on, 3 days off from 3:00-11:00 p m. She was informed that she was not qualified for the bids that she submitted.[8]

DiNatale only worked two days of the new schedule, and then began to use her accumulated vacation days in advance of her retirement.

LTC

Because her LTC was due to expire in May, DiNatale submitted her paperwork to renew her LTC on April 27, 2022. She understood that as long as the application was submitted, her LTC would not expire.

DiNatale retired on May 21 2022. When she subsequently attempted to purchase a firearm, she was informed that her LTC had expired. DiNatale followed up with the Sergeant. Based on that conversation, DiNatale understood that the Chief had told the

[7] The Police Department maintains that because two officers were on administrative leave, two additional officers were needed to work patrol. The Police Department opted not to have bids for the school resource officer or court prosecutor to have sufficient personnel to cover the patrols.

[8] The Union asserts that on April 14, 2022, the Chief referred to DiNatale's bids by saying "F--- her she put in for jobs she is not qualified for let everyone else pick and give her whatever is left." DiNatale stated that she heard this from an unnamed coworker but is not aware of how the unnamed coworker learned of the comment. The Chief denies making the specific comment attributed to her, but she did explain that because DiNatale did not submit a bid for any bids that she was qualified for, the Police Department gave the bids out as usual for all who submitted proper bids and DiNatale was assigned what was left. The Chief explained that DiNatale was not a detective and, as such, was not qualified for the first two bids that she listed. The Chief did not explain why DiNatale was unqualified for her third bid.

Sergeant to hold off on DiNatale's LTC until she retired so she could be charged a fee.[9] DiNatale's application to renew her LTC was not logged on the Police Department's logs until May 22, 2022. The Chief approved the application on June 25, 2022, and issued DiNatale's LTC as a retired officer, with a $25 fee.

Party Arguments

The Union maintains that DiNatale engaged in protected activity when she explained to the Chief that her and her coworkers' excessive forced overtime prevented her from getting her report done. The Police Department took retaliatory actions against DiNatale based on this protected activity by: 1) assigning her to an undesirable walking beat at the Hospital which had not been assigned to any other officer; 2) removing her specialty assignment as court prosecutor during the April 2022 bid process; 3) giving her a shift that she did not bid for, despite her seniority; and 4) refusing to renew her LTC until after DiNatale retired, which would cost her additional funds. The Union further asserts that the Police Department independently violated Section 10(a)(1) when the Chief told DiNatale, on March 22,2022, that she did not want to hear her, while making a talking gesture; and when the Police Department informed DiNatale that she would be working patrol instead of attending in-service training on April 1, 2022.

The Police Department denies violating the Law as alleged and argues that the Union did not state a prima facie case because DiNatale did not engage in concerted protected activity. The facts as presented at the investigation do not show that DiNatale brought up any staffing concerns or other similar concerns on behalf of the bargaining unit. Moreover, the Union did not establish that DiNatale suffered any adverse actions. The Chief assigned DiNatale to the walking beat at the Hospital one time because the Hospital asked for increased police presence. There was a staffing problem on the day of the in-service training, but DiNatale was permitted to attend the training. The Union requested that the employees submit new bids in April, and the Police Department agreed. The Chief has the right to determine what positions are to be filled. Due to the ongoing staffing issues, she determined not to have the specialty bids, but the employees who had worked those positions kept their stipends even when not working those positions. DiNatale wrote in a bid for a position that was not up for bid. In order to ensure that DiNatale could get the bid that she wanted, the Chief advised her to resubmit her bid. However, when DiNatale resubmitted, she bid for positions that she was not qualified for. Therefore, the Police Department honored the bids that they had and assigned DiNatale to the remaining bid. The Police Department denies that the Chief made the comment attributed to her regarding the bid process. The Union did not establish who allegedly heard the quote. Lastly, DiNatale was licensed to carry a weapon as a police officer. Since she was retiring, she would not be renewed as a police officer. She needed to go through

[9] Officers are not charged a fee. Retired officers are charged a $25 fee. Other residents are charged a $100 fee. The Chief explained that DiNatale had obtained her LTC as an officer. Because she was not going to be an officer any longer, she needed to apply for a LTC as a private citizen, just like other officers who retired or resigned.

the process to have the Medfield issue her a LTC as a citizen, just like other officers who resigned or retired. DiNatale was granted her LTC.

Analysis

Section 10(a)(3) Allegations

A public employer that retaliates or discriminates against an employee for engaging in activity protected by Section 2 of the Law violates Section 10(a)(3) of the Law. Southern Regional Vocational School District v. Labor Relations Commission, 38 Mass. 414 (1982); School Committee of Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327 (1996). To establish a prima facie case of a Section 10(a)(3) violation, a charging party must produce information that supports the following four elements: 1) the employee engaged in concerted activity protected by Section 2 of the Law; 2) the employer knew of the activity; 3) the employer took adverse action against the employee; and 4) the employer's conduct was motivated by a desire to penalize or discourage the protected activity. Commonwealth of Massachusetts, 25 MLC 44, 46, SUP-4128 (August 24, 1998). Once the charging party establishes a prima facie case, if the employer provides lawful reasons for the alleged discriminatory conduct, the charging party must then prove that "but for" the protected activity, the employer would not have taken the adverse action. Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 565-566 (1981).

The charge alleges that the Police Department retaliated against DiNatale for her protected concerted activity by: 1) assigning her the walking beat at the Hospital on March 22, 2022; 2) removing the court prosecutor position on the April bid sheet; 3) assigning DiNatale to the less desirable 3:00-11:00 p.m. shift in April; and 4) failing to renew her LTC while she was still an officer. The Union asserts that DiNatale engaged in concerted protected activity when she explained to the Chief on March 21, 2022, why she did not complete her report. The Commonwealth Employment Relations Board (CERB) has determined that an employee's activity is protected if it focuses on generally applicable terms and conditions of employment that impact the collective bargaining unit as a whole. City of Boston, 8 MLC 1872, 1875, MUP-3994 (February 25, 1982). To be concerted, the evidence must demonstrate that the employee is acting with other employees, or on the authority of other employees, rather than acting out of self-interest. Town of Southborough, 21 MLC 1242, 1249, MUP-8521 (August 29, 1994). Compare Commonwealth of Massachusetts, 14 MLC 1743, 1747, SUP-3081 (May 19, 1988)(probationary employee's complaints with other employees about unhealthy working conditions constituted concerted activity) with Town of Athol, 25 MLC 208, 211, MUP-1448 (June 6, 1999)(employee's safety and work break complaints did not constitute concerted activity, because the employee was acting alone and without the authority of other employees).

Although the Union asserts that DiNatale was complaining about her and Stanley's excessive forced overtime when she explained to the Chief why she had not yet completed her report, the Union did not present facts to support this assertion. When the Chief asked DiNatale, at 2:00 p.m. on Monday March 21, 2022, why the report was not

completed, DiNatale stated that she was entering hour 17 on Friday by the time she concluded her duties pertaining to the underage party. DiNatale did not say anything further. She did not reference Stanley or any other bargaining unit member. The Union did not present any evidence that Stanley or anyone else designated DiNatale to represent their concerns to the Chief. She did not mention excessive forced overtime nor did she assert any contractual right. Therefore, the Union did not present any evidence that DiNatale raised any concerns about working conditions or attempted to enforce any CBA provision. DiNatale herself attributes the actions taken against her, which the Union deemed retaliatory, to the Chief's disappointment that DiNatale did not charge the underage attendees at the party and did not complete the report sooner, rather than any protected concerted activity. I find that the evidence presented at the investigation is insufficient to establish that DiNatale engaged in concerted protected activity.

Because the Union has failed to meet its burden of establishing the first prong of a prima facie case, I do not find probable cause to believe that the Police Department retaliated against DiNatale in the manner alleged, and I dismiss the four allegations alleging that the Police Department violated Sections 10(a)(1) and (3).

Independent Section 10(a)(1) Violation

A public employer violates Section 10(a)(1) of the Law when it engages in conduct that tends to interfere with, restrain or coerce employees in the exercise of their rights under Section 2 of the Law. Quincy School Committee, 27 MLC 83, 91, MUP-1986 (February 29, 2000); Town of Athol, 25 MLC 208, 212, MUP-1448 (June 11, 1999). Pursuant to Section 2 of the Law, an employee has the right to "form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion." The focus of a Section 10(a)(1) analysis is the effect of the employer's conduct on reasonable employees' exercise of their Section 2 rights. Town of Winchester, 19 MLC 1591, 1596, MUP-7514 (December 22, 1992). The CERB does not analyze the motivation behind the conduct, Town of Chelmsford, 8 MLC 1913, 1916, MUP-4620 (March 12, 1982), aff'd sub nom. Town of Chelmsford v. Labor Relations Commission, 15 Mass. App. Ct. 1107 (1983), or whether the coercion succeeded or failed. Groton-Dunstable Regional School Committee, 15 MLC 1551, 1556, MUP-6748 (March 20, 1989).

The Union alleges that the Chief violated Section 10(a)(1) when she told DiNatale that she did not want to hear more from her. According to the Union and DiNatale, after the Chief asked DiNatale why the report was not finished, DiNatale started to explain that she was entering hour 17 after dealing with the party, but the Chief cut her off, and told her to stay and finish the report that day. DiNatale said to some coworkers "I'm done." The Chief, overhearing that comment, said "I don't want to hear any more of your…" while making a hand gesture resembling a mouth opening and closing rapidly. The Union has not established that the Chief's comments, or hand gesture, pertained to any Section 2 rights. The Union did not present any information to support a finding that DiNatale was

complained about staffing issues, overtime or any other terms or conditions of employment. Accordingly, I do not find probable cause to believe that the Chief's comments, under the circumstances presented here, would tend to interfere with, restrain or coerce DiNatale or any other employee in the exercise of their rights under Section 2 of the Law.

The Union also alleges that the Police Department violated Section 10(a)(1) of the Law when it informed DiNatale that she was needed to work patrol on April 1, instead of attending in-service training. Even though DiNatale was ultimately permitted to attend the training and was not required to work patrol that day, the Union suggests that the original decision to have DiNatale work would chill protected activity. However, because DiNatale's comments about not completing the report did not constitute protected concerted activity, the Union has not established that the Police Department's intent to have DiNatale work patrol and miss the in-service training, would chill a reasonable employee's Section 2 rights. Therefore, I do not find probable cause to believe that the Police Department independently violated Section 10(a)(1) of the Law as alleged, and I dismiss the charge in its entirety.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

Gail Sorokoff

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GAIL SOROKOFF, INVESTIGATOR

APPEAL RIGHTS

The charging party may, within ten (10) days of receipt of this order seek a review of the dismissal by filing a request with the Commonwealth Employment Relations Board pursuant to Department Rule 456 CMR 15.05(9). The request shall contain a complete statement setting forth the facts and reasons upon which such request is based. The charging party shall include a certificate of service indicating that it has served a copy of its request for review on the opposing party or its counsel. Within seven (7) days of receipt of the charging party's request for review, the respondent may file a response to the charging party's request.