THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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August 4, 2023

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Re: MUP-22-9650, Town of Acushnet and United Steelworkers

Dear Ms. Bertrand and Mr. Collins:

On March 21, 2023, a Department of Labor Relations (DLR) Investigator issued a seven-count Complaint of prohibited practice and partial dismissal. The Complaint alleged that, in the context of an organizing campaign conducted by the United Steelworkers Union (Union) to represent all supervisory and professional employees employed by the Town of Acushnet (Town or Employer), the Town engaged in the following unlawful conduct: 1) made statements in violation of Section 10(a)(1) of the M.G.L. c. 150E (the Law) (Counts I, II, and III); 2) failed to provide wage increases/bonuses to two employees who had engaged in protected, concerted activities in violation of Section 10(a)(3) of the Law (Counts IV and VI); and 3) failed to provide wage increases/bonuses to the same two employees who had decided to be represented by Union in violation of Section 10(a)(4) of the Law (Counts V and VII).

The Investigator dismissed allegations that the Town Administrator and a Town Selectman violated Section 10(a)(1) of the Law by unlawfully interrogating employees about their Union activity and threatening employees with termination if they signed union authorization cards. The Investigator also dismissed the allegation that the Town failed to provide wage increases/bonuses to all of the employees in the petitioned-for bargaining

unit in violation of 10(a)(3) and Section 10(a)(4) of the Law. The Union seeks review of the dismissed Section 10(a)(3) and 10(a)(4) allegations only.[1]

After reviewing the investigation record, including the Union's charge and amended charge, the Town's response, the parties' exhibits and the complaint and partial dismissal, the CERB remands the dismissed Section 10(a)(3) allegation to the Investigator to issue a complaint. It affirms the dismissal of the Section 10(a)(4) allegation on different grounds.

Background[2]

On August 4, 2022, the Union filed a written majority authorization (WMA) petition with the DLR seeking to represent a unit of "All full-time and regular part-time supervisory, administrative, and professional employees employed by the Town of Acushnet."[3] At the time the petition was filed, clerical, Town Hall and library employees were represented by AFSCME Council, 93, Local 851 (AFSCME). Local Union 1249 of the Laborers' International Union of North America (Laborers) represented the employees who worked in the Town's Department of Public Works. The petitioned-for supervisory/professional employees were not represented for purposes of collective bargaining. With respect to the organizing campaign, the Complaint alleges that the Town knew that [redacted] (M[redacted]), [redacted] (S[redacted]), and [redacted] (K[redacted]) were active Union supporters who had signed authorization cards.

The Complaint also alleges that each of the petitioned-for employees, including M[redacted] and S[redacted], had an individual employment contract (IEC) with the Town that set forth their terms and conditions of employment, including, as alleged in the Complaint, that the Town would provide them with all the benefits available to the unionized

[1] We therefore do not address the unappealed dismissed Section 10(a)(1) allegations.

[2] This background is based mainly on the Complaint's allegations. The CERB also takes administrative notice of the record in Case No. WMAM-22-9486.

[3] The full description of the bargaining unit on the face of the petition and as certified is:

> All full-time and regular part-time supervisory, administrative, professional, and non-professional employees employed by the Town of Acushnet including Treasurer/Collector, Assistant Treasurer, Town Accountant, Assistant Accountant/IT Coordinator, building Commissioner, Principal Assessor, Town Planner, Director of Department of Public Works (DPW), Assistant DPW Director, Golf Course Superintendent, Director of Golf Course, Golf Professional, Library Director, Patron Services Associate (Library), Health Agent, Council on Aging Director, Conservation Agent, and Animal Control Officer, but excluding all managerial, confidential, and casual employees, and all other employees of the Town of Acushnet.

employees who worked in the department where they worked, or in the department that they oversaw. According to the Complaint, prior to August 4, 2022, the Employer granted wage increases to the petitioned-for employees in accordance with this provision of their IEC. However, on November 1, members of the Laborers' bargaining unit received a 2% cost of living adjustment as part of their July 1, 2021-June 30, 2024 collective bargaining agreement (CBA) with the Employer. Around November 2, 2022, members of AFSCME's bargaining unit received a $1,000 signing bonus following the execution of their July 1, 2022 through June 30, 2025 collective bargaining agreement with the Employer. The Complaint alleges that the Employer did not provide those increases to any of the employees with IECs, including M[redacted] and S[redacted], after the petition was filed.

Between August 4, 2022 and January 9, 2023, a DLR Neutral inspected the evidence submitted in WMAM-22-9486 and reviewed the Town's challenges. On January 9, 2023, the Neutral issued a report concluding that the Union had established majority support for the eighteen-person unit. On January 9, 2023, the DLR certified the Union as the unit's exclusive representative.[4]

On October 31, 2022, the Union filed this charge. On November 9, 2022, the Union filed an amended charge that contained the Section 10(a)(3) and (4) allegations that are at issue in this review. The Investigator investigated the amended charge on February 2, 2023. On March 21, 2023, he issued the Complaint and Partial Dismissal.

Complaint, Dismissal and Request for Review

Counts IV and V of the Complaint allege that the Town did not provide M[redacted] and S[redacted] with the November wage increases/bonuses that unionized employees received and that such action was in retaliation for their signing a Union authorization card in violation of Sections 10(a)(3), 10(a)(4) and, derivatively, Section 10(a)(1) of the Law. Counts VI and VII allege that the Town refused to consider giving K[redacted] a raise in retaliation for her Union activities, in violation of Sections 10(a)(3) and (4).

During the Investigation, the Union also alleged that the Employer's failure to provide the contractual increases/bonuses to *any* of the employees in the petitioned-for units in retaliation for filing the WMA petition violated Sections 10(a)(3) and (4) of the Law. The Investigator rejected this argument because he found that the Union had provided no evidence that any employees other than those named in the Complaint had engaged in protected, concerted activity, or any evidence that the Employer knew of that activity.

[4] The Employer filed outcome-determinative challenges to the validity of the cards and the composition of the unit. The Neutral dismissed all but one of the challenges. She upheld that one challenge to the validity of the card on grounds that the individual who signed it was not employed by the Town at the time the petition was filed and their name did not appear on the employee list. Although this ruling reduced the number of valid cards by one, it did not ultimately affect the Union's majority status.

The Investigator thus concluded that the Union had failed to establish a prima facie case of retaliation under Section 10(a)(3) or 10(a)(4).[5]

On review, the Union contends that this reasoning was flawed because the written majority authorization procedure is intended to guarantee the anonymity of the card signers and thus, the DLR should not require a charging party union to demonstrate that they engaged in protected, concerted activities or that the employer knew of such activities in order to bring a claim alleging that the employer unlawfully deprived them of benefits. Rather, the Union asserts that it established a prima facie case by showing that a written majority authorization petition is protected activity and the Town was aware of the petition, that the failure to provide wage increases to all the petitioned-for employees was an adverse action and that the Town's divergence from its longstanding practice of providing such increases during the pendency of the Union's petition was circumstantial evidence of unlawful motivation sufficient to support a probable cause finding. The Employer did not file a response to the request for review.

There is support for the Union's argument that proof of individual union activity is not required to establish a prima facie case for a Section 10(a)(3) violation in situations where an employer takes adverse action that affects an entire petitioned-for bargaining unit while a representation case is pending. See Boston School Committee, MUP-9067 March 2, 1994), aff'd School Committee of Boston v. Labor Relations Commission (LRC), 40 Mass. App. Ct. 327 (1996).[6] In Boston School Committee, the Labor Relations Commission (LRC)[7] held that the employer violated Section 10(a)(3) of the Law when it laid off all of its temporary and provisional custodians just a few months after the union

[5] The Investigator also found that the Union had not presented copies of IECs for any employees other than S[redacted] and M[redacted] and thus, there was no evidence to establish that the unnamed petitioned for employees were entitled to wage increases that they did not receive. However, Paragraph 26 of the complaint alleges that "Each employee in the petitioned-for unit has an individual employment contract with the Employer. Each contract provides that the Employer shall provide the petitioned-for unit member with all the benefits available to unionized employees who work in the department where the petitioned-for employee works or which the petitioned-for unit member oversees." Furthermore, in its response to the charge, the Employer provided a link to the Town's website, which includes copies of the IEC's of many of the petitioned-for positions. Of those IECs, all but the Library Director's and the Golf Professional's indicated that the employee would receive benefits in accordance with either the AFSCME or Laborers CBA. Thus, information about IECs for employees other than S[redacted] and M[redacted] was available during the investigation.

[6] The full LRC decision is not published in the MLC Reporter. It is, however, available in on-line databases. The hearing officer's Recommended Findings of Fact are published at 20 MLC 1005 (May 21, 1993).

[7] The LRC is the predecessor agency to the DLR and the CERB.

that represented non-temporary/provisional school custodians filed a representation and a unit clarification petition with the LRC seeking to add those custodians to its existing bargaining unit. When analyzing the elements of the prima facie case, the LRC found that the temporary and provisional custodians had engaged in protected concerted activity by their "effort to be represented, which included, in March 1992, filing a representation and clarification petition and attempting to negotiate a consent election agreement." Boston School Committee, MUP-9067, slip. op. at 3, (March 2, 1994). The Appeals Court affirmed, describing this activity as the petitioned-for employees' "attempt to participate in an election regarding a bargaining unit." 40 Mass. App. Ct. at 330. The LRC decision, which contained no discussion of individualized organizing efforts or which of the petitioned-for employees were union supporters, ordered reinstatement and a make-whole remedy for all of laid off provisional/temporary custodians. MUP-9067 slip op. at 8-9.

Here, at this stage of the proceedings, and based on Boston School Committee, we find that the petitioned-for employees engaged in protected concerted activity by filing the WMA petition and that the Town knew about the petition. We further find, based on the allegations contained in Paragraph 26 of the complaint and in the Amended Charge, that there is sufficient evidence to establish probable cause to believe that the Employer failed to provide wage increases or bonuses to any of the employees in the petitioned-for unit based on their IECs even though they had received such contractually-tied benefits before the WMA petition was filed.[8] For this reason, we find probable cause to believe that the Employer violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by not providing eligible employees in the petitioned-for unit with the signing bonus that AFSCME employees received in November 2021. We therefore remand this aspect of the charge to the Investigator to amend the Complaint in a manner consistent with this ruling.

We reach a different conclusion with respect to the Section 10(a)(4) allegation. Section 10(a)(4) of the Law states that it is a prohibited practice for an employer to:

> Discharge or otherwise discriminate against an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because he has informed, joined, or chosen to be represented by an employee organization.

The same elements of proof apply in both a Section 10(a)(3 and 10(a)(4) allegation, except that to satisfy the first prong in a Section 10(a)(4) allegation, a charging party must establish that the employee signed or file an affidavit, petition or complaint, or gave information or testimony as part of a DLR proceeding. Commonwealth of Massachusetts,

[8] As the Union points out, in several decisions, the National Labor Relations Board has similarly not required a correlation between each individual employee's union activity and the adverse action in order to find a Section 10(a)(3) violation when mass discharges take place in the context of an organizing campaign. See, e.g., ACTIV Industries, 277 NLRB 356, 356 n. 3 (1985).

25 MLC 44, 46 n. 7, SUP-4128 (August 24, 1998) ("In a case alleging that the employer violated Section 10(a)(4) of the Law, the determination is whether the employer participated in a DLR proceeding"). Here, there is no evidence that any of the petitioned-for employees signed or filed an affidavit, petition, or complaint or gave any information or testimony in the WMAM proceeding.[9] We therefore conclude that the Union has not made out a prima facie Section 10(a)(4) violation and affirm the dismissal of this aspect of the charge. In so doing, we note that the plain language of Section 10(a)(4) of the Law specifically prohibits discrimination against "an employee" due to that particular employee's conduct, whereas Section 10(a)(3) of the Law more broadly and without reference to "an employee," prohibits an employer from "discriminat[ing] in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization." The differences in the statutory language, as well as the caselaw cited above, forms the basis of our decision to remand of the Section 10(a)(3) allegation but affirm the dismissal of the Section 10(a)(4) allegation.

Very truly yours,
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F Wittner

MARJORIE F. WITTNER, CHAIR

Kelly B. Strong

KELLY B. STRONG, CERB MEMBER

Victoria B. Caldwell

VICTORIA B. CALDWELL, CERB MEMBER

APPEAL RIGHTS[10]

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, § 11. Any party aggrieved by a final order of the Board

[9] This ruling is not intended to affect the Section 10(a)(4) allegations contained in Counts V and VII of the Complaint.

[10] This dismissal pertains to the Section 10(a)(4) allegation only. The CERB's decision to remand a dismissed allegation to an investigator to issue a complaint is not a final decision subject to judicial review within the meaning of Section 11 of the Law.

may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c.150E, §11. **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.