

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

In the Matter of

COMMONWEALTH OF MASSACHUSETTS,
SECRETARY OF ADMINISTRATION AND
FINANCE

and

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
COUNCIL 93, AFL-CIO

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Case No. SUP-10-5606

Date issued: July 31, 2015

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, CERB Member
Harris Freeman, CERB Member

Appearances:

Phillip Brown, Esq. - Representing AFSCME, Council 93
Patrick Butler, Esq. - Representing Commonwealth of
Massachusetts

DECISION ON APPEAL OF HEARING OFFICER DECISION

SUMMARY

1 The Commonwealth of Massachusetts (Commonwealth or Employer) appeals
2 from a Hearing Officer decision issued on June 3, 2014. The Hearing Officer dismissed
3 allegations that the Commonwealth violated Sections 10(a)(3) and 10(a)(4) of M.G.L. c.
4 150E (the Law) by laying off Peter Horsman (Horsman), a Department of

1 Developmental Services Motor Truck Driver, in April 2010 in retaliation for his engaging
2 in protected, concerted activity and for participating in proceedings at the Department of
3 Labor Relations (DLR).¹ The Hearing Officer also concluded, however, that the
4 Commonwealth violated Section 10(a)(4) of the Law by issuing reprimands to Horsman
5 in February and September of 2009 in retaliation for his participating in DLR
6 proceedings, She further found that the Commonwealth violated Section 10(a)(3) by
7 issuing a reprimand in April 2010 in retaliation for Horsman engaging in protected
8 concerted activities. The three reprimands that form the bases of the violations were
9 not alleged as separate violations in the charge of prohibited practice that AFSCME,
10 Council 93 (Union) filed on August 24, 2010 or in the two-count complaint that a DLR
11 investigator issued on February 12, 2012. The charge and complaint both alleged that
12 the sole adverse action that formed the basis for the Section 10(a)(3) and 10(a)(4)
13 violations was Horsman's layoff in August 2010.²

14 The Commonwealth raises numerous arguments on appeal, including, as a
15 threshold matter, that the Hearing Officer improperly found violations based on three
16 reprimands that it claims were not pled and were either untimely or ultimately, not fully
17 litigated. The Union disagrees contending, among other things that all three reprimands
18 were fully litigated and the Commonwealth waived its right to argue that the 2009
19 reprimands were untimely. For the reasons set forth below, we agree with the

¹ AFSCME, Council 93 did not appeal from the dismissal of these allegations.

² The charge also alleged that Horsman was laid off because he filed a reclassification appeal under M.G.L. c. 30, §45 in September 2009 and that the Commonwealth delayed deciding that appeal in order to make it easier to lay Horsman off. The Investigator dismissed both those allegations and the Union did not file an appeal from the partial dismissal.

1 Commonwealth and reverse the Hearing Officer's decision on procedural grounds.
2 Accordingly, we do not reach the remainder of the Commonwealth's arguments.

3 Facts

4 The Employer disputes many of the Hearing Officer's findings concerning the
5 elements of the Union's prima facie case of retaliation, e.g., when and whether
6 Horsman was engaged in protected, concerted activity, the Commonwealth's
7 knowledge of this activity, the Commonwealth's motivation for issuing the reprimands,
8 etc. Because we are deciding this case on procedural grounds, we do not reach these
9 issues and summarize below only the undisputed portion of the record pertinent to our
10 opinion. Further reference may be made to the facts set out in the Hearing Officer's
11 decision, reported at 40 MLC 366 (2014) and attached to the slip opinion of this
12 decision.

13 Background

14 The Union is the exclusive bargaining representative for certain employees in
15 statewide bargaining unit 2, including the title Motor Truck Driver (MTD). Horsman is a
16 member of the Union's bargaining unit. Between 2009 and August 2010, Horsman was
17 a MTD at the Waverly Redemption Center operated by Metro Residential Services
18 (MRS), a division of the Commonwealth's Department of Developmental Services
19 (DDS), which operates at the Walter E. Fernald Development Center (Fernald).

20 On December 10, 2008, Horsman filed a charge of prohibited practice at the DLR
21 against the Commonwealth, which was docketed as Case No. SUP-08-5451. Horsman
22 participated in the in-person investigation of SUP-08-5451 on February 9, 2009 and the
23 hearing in that case on August 26 and September 16, 2009.

1 February 25, 2009 Reprimand

2
3 Janet Pula (Pula) is the director of Metro Employment Services (MES), which
4 provides vocational training through MRS in Waltham, Massachusetts. On February 25,
5 2009, Pula sent Horsman a letter stating that it had “come to her attention” that
6 Horsman had been signing in and out of his worksite outside of his specified work
7 schedule. Pula indicated that Horsman’s work schedule was 8:00-4:30 and that he was
8 expected to sign in and out at specified times. The letter concluded by stating, “Failure
9 to comply with this may result in further disciplinary action.” This letter was not
10 mentioned in the Union’s charge filed on August 24, 2010 or in the two-count complaint
11 that issued in this matter on February 12, 2012.

12 September 22, 2009 Verbal Reprimand

13 At all relevant times, Deborah White (White) was Horsman’s supervisor at the
14 Redemption Center. On September 22, 2009, Pula had a meeting with White and other
15 employees to discuss Horsman’s duties in which Pula instructed White to reduce
16 Horsman’s access to Fernald residential assistance during his travel routes and to limit
17 his interactions with Fernald residents. Pula also instructed White to restrict Horsman’s
18 Saturday lunch breaks, requiring him to: (1) stay in the kitchen and not leave unless he
19 was instructed to leave; (2) terminate his break period early if staff needed his help; and
20 (3) resume his break only after helping the staff. On September 22, 2009, after her
21 meeting with Pula, White publicly confronted Horsman and verbally reprimanded him for
22 using Fernald residential assistants during his redemption routes and for taking his
23 Saturday lunch breaks outside of the kitchen area. Horsman complained about this
24 incident by letter to Labor Relations Specialist Linda Wallace (Wallace) three days later,

1 claiming, among other things, that White's tone and attitude was "disrespectful and
2 uncalled for, especially in front of other staff and individuals" Horsman also stated that
3 he believed that he had been reprimanded based on the charge he filed at the DLR and
4 a reclassification form he had submitted. Wallace responded in writing on January 19,
5 2010, finding insufficient evidence to substantiate that White had approached Horsman
6 in a disrespectful manner and further disagreeing that Horsman had received a verbal
7 reprimand.

8 April 16, 2010 Reprimand

9
10 On or about April 16, 2010 during work hours, Horsman approached White to
11 discuss some work-related concerns. At some point during their conversation, which
12 was held in a public area, White made several negative references to Horsman's
13 position as an MTD and as a Union Executive Board member. White also made
14 statements that she could change Horsman's schedule anytime, and that he could "run
15 to the union" and complain if he did not like it. That day, Horsman wrote a letter to Pula
16 complaining about White's statements. He copied Wallace on the letter.

17 Wallace responded to the letter on August 6, 2010 notifying Horsman that she
18 had found insufficient evidence to substantiate that White made the statements
19 attributed to her in his April 16, 2010 letter.

20 Elimination of Horsman's Position

21 On August 9, 2010, the DDS Chief Financial Officer informed Horsman that the
22 Employer had eliminated his position and terminated his employment by reduction in
23 force, effective August 21, 2010. White's position was also eliminated at that time.

1 stated, however, that the “parties litigated the issue of Horsman’s reprimands at the
2 hearing and argued it in their [post-hearing] briefs.” Accordingly, citing Town of Norwell,
3 18 MLC 1263, 1274, MUP-6962 (January 22, 1992), she concluded that these
4 reprimands, although not specifically pled in the Complaint, could form the basis of
5 separate unfair labor practices based on her finding that the “conduct relate[d] to the
6 general subject matter of the complaint, and the issue ha[d] been fully litigated.”

7 On appeal, the Commonwealth seeks reversal of the Hearing Officer’s ultimate
8 findings that its conduct with respect to the reprimands violated both 10(a)(3) and
9 10(a)(4) of the Law. The Commonwealth raises arguments that challenge the Hearing
10 Officer’s factual and legal findings and, in that context, contend that there are
11 procedural irregularities – timeliness and issues not pled or fully litigated - which are
12 grounds for reversal.

13 Section 10(a)(4) - Timeliness

14 We begin with the employer’s procedural argument on timeliness. The CERB
15 has recognized timeliness as an affirmative defense and has permitted a party to
16 adjudicate an otherwise untimely charge when the opposing party has expressly agreed
17 to waive timeliness. See AFSCME Council 93 and Bruce Gauvain, 35 MLC 300, 304 n.
18 35, MUPL-03-4449 (June 10, 2009). Otherwise, a party must provide good cause to
19 allow the DLR to entertain any prohibited practice claim occurring more than six months
20 prior to the filing of the charge. 456 CMR 15.03.⁴

⁴ Section 15.03 of the DLR’s rules provides that: “[e]xcept for good cause shown, no charge will be entertained by the [DLR] based upon any prohibited practice occurring more than six months prior to the filing of a charge with the [DLR].”

1 We agree with the Commonwealth and find that the reprimands of Horsman in
2 February and September of 2009 cannot form the basis for the 10(a)(4) violation
3 because they are time-barred. These reprimands, which occurred respectively,
4 eighteen months and eleven months *prior* to his filing charges with the DLR were
5 introduced into evidence by the Union as part of Horsman's allegation that his layoff in
6 August 2010 was unlawful. Because the Hearing Officer dismissed the allegation that
7 the layoff itself violated § 10(a)(4), the two reprimands, standing alone, are without
8 question untimely under the six-month period of limitations set forth in DLR Rule 15.03,
9 456 CMR 15.03. See Felton v. Labor Relations Commission, 33 Mass. App. Ct. 926
10 (1992) (distinguishing Boston Superior Officers Federation v. Labor Relations
11 Commission, 410 Mass 890, 893 (1991) (no basis for finding a violation if no
12 independent wrong occurred within six months of filing charge, but timely charge should
13 not be dismissed merely because a prior prohibited practice occurred more than six
14 months before timely charge was filed)).

15 The Hearing Officer based her ruling on the 10(a)(4) allegation on Town of
16 Norwell, 18 MLC at 1264, which stands for the principle that the CERB may consider
17 and decide allegations not pled in the complaint if the conduct relates to the general
18 subject matter of the complaint and the issue has been fully litigated and the issues
19 were fully litigated. In Norwell, however, the unpled allegation that formed the basis of
20 the allegation, a unilateral change in the employer's promotion practices, occurred on
21 the same day as the timely allegation contained in the complaint, which was based on a
22 change in a different promotion practice. Thus, in Norwell, unlike here, where the
23 unpled allegations occurred months before the layoff alleged in the change, there was

1 no need for the CERB to consider timeliness when addressing whether a finding of
2 liability may be based upon allegations not pled in the complaint. 18 MLC at 1264-
3 1265. The same is true of other cases where the CERB relied on this principle to find a
4 violation of the Law based upon unpled allegations. See, e.g., Town of Randolph, 8
5 MLC 2044, MUP-4589 (April 23, 1982) (finding independent Section 10(a)(1) violation
6 based on meeting that occurred 11 days before charge was filed); Local 285 SEIU and
7 Irene L. Hueter, 3 MLC 1646, SUPL-2006 (December 7, 1976) (unpled conduct found to
8 constitute a violation of union's duty of fair representation occurred three months before
9 charge was filed).

10 In this case, however, the unpled 2009 reprimands occurred, respectively,
11 eighteen months and eleven months before the charge was filed. Thus, this situation is
12 analogous to that in City of Easthampton, 35 MLC 257, n. 3, MUP-04-4244 (April 23,
13 2009), where, distinguishing Town of Norwell, the CERB refused the charging party's
14 request that it find a violation based on incidents that had occurred more than six
15 months before the charge was filed and thus were untimely. We apply the same
16 reasoning here. As a policy matter, to find a violation based on these untimely and
17 unpled violations would be inconsistent with the purpose of Section 15.03's period of
18 limitations, which extinguishes liability for unfair labor practices committed more than six
19 months before the filing of a charge in order to avoid stale claims.⁵ Miller v. Labor
20 Relations Commission, 33 Mass. App. Ct. 404, 408 (1992).

⁵ Notably, the Union has not invoked the discovery rule and does not claim or offer evidence that it did not discover these purported adverse actions until the hearing.

1 Given the facts and legal standard presented above, we are compelled to reject
2 the Union’s argument on appeal that the Employer’s failure to object to the admission of
3 these reprimands into evidence constituted an explicit waiver of an affirmative
4 timeliness defense. Critical to our finding on waiver is the fact that the hearing record
5 does not establish that these reprimands were ever introduced as the basis for separate
6 Section 10(a)(4) allegations. The reprimands were not referenced anywhere in the
7 original charge or in the complaint, either as factual background to the retaliation
8 charges or as separate adverse actions taken by the Employer in retaliation for
9 Horsman’s protected activity. Nor was there a motion to amend the complaint to include
10 them. These reprimands were not identified or referenced in the parties’ joint pre-
11 hearing memo and neither party treated them as *independent* grounds for the Section
12 10(a)(4) allegation in either their opening or closing arguments or post-hearing briefs.⁶
13 Indeed, until the Hearing Officer’s opinion issued, there was no express indication from
14 the Hearing Officer that the February and September 2009 reprimands would provide
15 independent grounds for the 10(a)(4) count in the Complaint. In sum, because the
16 Commonwealth did not have notice that the two reprimands were going to be treated as

⁶ It is evident from reviewing both post-hearing briefs that neither party anticipated that the reprimands could form the basis for separate Section 10(a)(4) violations. The Employer’s brief restates the issues as pled in the complaint and argues that it did not lay Horseman off for his participation in protected, concerted activity. The Employer’s brief occasionally references the reprimands, but the Employer never argues that they are independent violations, and consistently focuses on the layoff at issue in the complaint. See Employer post-hearing brief, at 11-16. Further, when discussing whether the Union had met its ultimate burden under the Trustees of Forbes Library test, the Employer asserted that “the Union has not shown that the Commonwealth would not have laid off Horsman but for his participation in protected activity.” Employer brief at 17. The Union similarly addressed the reprimands only in the context of arguing that they were evidence of unlawful animus under the fourth prong of its prima facie case, but expressly stated that this prong revolved around the Commonwealth’s “motive for the layoff of Horsman.” See Union post-hearing brief at p. 13.

1 separate violations until the decision issued, we disagree that the Commonwealth
2 explicitly or implicitly waived this defense by failing to raise it during the hearing. See
3 McCormick v. Labor Relations Commission, 412 Mass. 164, 171 n. 12 (1992) (“although
4 the association has the burden of pleading and proving an affirmative statute of
5 limitations defense before the [DLR], here the association could not be expected to
6 plead and prove a defense to a claim of which it did not have notice.”)

7 We conclude there was no waiver of the timeliness defense by the
8 Commonwealth and, for the reasons set forth above, and pursuant to Section 15.03 of
9 the DLR’s rules, we reverse on procedural grounds that portion of the Hearing Officer’s
10 decision finding that the Commonwealth violated Section 10(a)(4) of the Law.

11 Section 10(a)(3) Violation – Issues Not Pled or Fully Litigated

12 We next address the Commonwealth’s argument that the §10(a)(3) violation,
13 which the Hearing Officer found based on White’s April 16, 2010 statement to Horsman,
14 should be dismissed because it was not fully litigated. Because this statement was
15 made to Horsman within the six-month period preceding the filing of the charge, it does
16 not suffer from the same timeliness problems as the reprimands discussed in the
17 preceding section. Therefore, in addressing the Employer’s appeal of this aspect of the
18 decision, we must determine whether the Hearing Officer properly found the matter had
19 been fully litigated.

20 At minimum, “full” litigation requires that the Respondent be given some notice
21 that the subject is in issue and thus be given an opportunity to present evidence
22 concerning the facts material to the subject. Whitman-Hanson Regional School
23 Committee, 10 MLC 1606, 1607-1608, MUP-5249 (May 17, 1984). The test is one of

1 fairness under the circumstances of each case – whether the employer knew what
2 conduct was in issue and had a fair opportunity to present its defense. Town of
3 Randolph, 8 MLC at 2051 (citing Soule Glass and Glazing Co. v. NLRB, 652 F. 2d 1055
4 (1st Cir. 1981)).

5 The Employer argues that it had no notice that the Hearing Officer was going to
6 consider White's April 16 statements to Horsman as separate grounds for finding a
7 Section 10(a)(3) violation. It points out that the verbal reprimand was not referenced in
8 the Complaint and that, even after Horsman's April 16 letter to Pula complaining about
9 these statements was allowed into the record over its objection, there was no indication
10 from the Hearing Officer that this incident would form the basis of a separate 10(a)(3)
11 finding. The Commonwealth further asserts that it merely referenced the April 16, 2010
12 letter in its post-hearing brief and, thus, there is not enough in the record to support the
13 Hearing Officer's finding that the issue was fully litigated. The Union disagrees, arguing
14 that, even though the Commonwealth objected to introduction of the April 16, 2010 letter
15 in which Horsman complains about the statements that White made to him, the Hearing
16 Officer informed the parties that the reprimand would be accepted in the record. The
17 Union argues that this was sufficient to put the Commonwealth on notice that the
18 incident described could form the basis of liability.

19 We agree with the Commonwealth and conclude that the Hearing Officer's
20 acceptance of the April 16 letter into the record did not sufficiently emphasize to the
21 Employer that it could serve as the basis of a *separate* violation under Section 10(a)(3)
22 of the Law. In Whitman-Hanson Regional School Committee, the CERB reversed a
23 hearing officer's decision that an unpled violation had been fully litigated, explaining,

1 among other things, that testimony that merely mentions the incident that allegedly
2 triggered a violation of the Law is insufficient to put a party on notice that the issue is to
3 be litigated. 10 MLC at 1608. Here, even though the April 2010 reprimand was
4 mentioned in the testimony, it was not “emphasized to such a point that it would have
5 placed the Employer on notice that it was an issue to be litigated” as an independent
6 violation. Id. (citing City of Worcester, 5 MLC 1397, 1399, MUP-2691 (November 3,
7 1978)). More specifically, our review of the record shows that after the Commonwealth
8 objected to the introduction of Horsman’s letter as beyond the scope of the complaint,
9 the Union did not respond by arguing that these were separate allegations, but rather
10 that the document should be admitted because it goes to “both of the allegations that
11 underlie this complaint.” The Hearing Officer then accepted the document without
12 further explanation or comment. We agree with the Commonwealth that this exchange
13 was insufficient to place the parties on notice that April 16th incident could form the basis
14 of a separate Section 10(a)(3) violation. See id. See also Town of Wayland, 7 MLC
15 2082, 2084, MUP-3453 (April 29, 1981) (reversing hearing officer determination that
16 issue of reprimand was fully litigated where, although letter of reprimand was introduced
17 at hearing and there was some testimony regarding it, CERB found that nothing
18 occurred during the hearing to “dispel” the impression that the reprimand was at issue).

19 Our conclusion is buttressed by reviewing both parties’ post-hearing briefs.
20 Although the Union’s brief mentions the April 16 letter in several places, it does so only
21 in the context of arguing that this incident and Wallace’s response thereto helped to
22 support the elements of its prima facie case, i.e., that Horsman engaged in protected
23 activities by complaining about White’s statements to him, and that White’s and

1 Wallace's response to Horsman therefore constituted evidence of the Commonwealth's
2 unlawful motivation. Nowhere, however, does the Union argue that the April 16 incident
3 constituted an *independent* violation of Section 10(a)(3). Instead, it makes plain on
4 page 13 of its post-hearing brief that the adverse action at issue is the August 9, 2010
5 layoff. And, significantly, except in its exhibit list, the Employer's post-hearing brief
6 makes no express mention of the April 16 letter.⁷

7 Under these circumstances, we are unable to conclude that the factual grounds
8 for the 10(a)(3) violation found by the Hearing Officer were fully litigated. See Town of
9 Dracut and Dracut Fire Fighters, Local 2586, IAFF, 24 MLC 37, 39 MUP-9458, MUP-
10 9464 (November 20, 1997)(comparing Commonwealth of Massachusetts, 18 MLC
11 1161, SUP-3356, 3459 (October 16, 1991) (allegations not in complaint considered after
12 charging party raised allegations in opening statement and respondent responded
13 raising defenses) with Whitman-Hanson Regional School Committee, 10 MLC at 1608
14 (allegations not in complaint not considered where neither party raised issue in opening
15 statements or argued merits of issue in its brief at hearing). We specifically note that
16 the factual bases for the violation were not alleged in the complaint and that, the parties'
17 post-hearing briefs do not clearly establish that the parties were on notice that this was
18 a separate violation. Further, the Hearing Officer's statements and evidentiary rulings in

⁷ The Commonwealth claims on page 9 of its post-hearing brief that the Union alleged that Horsman was subjected to adverse action when, among other things, "Deborah White, the Rehabilitation Counselor made statements to him about being in the Union." Even assuming that this sentence refers to White's April 16, 2010 statements and not the statements she made on September 22, 2009, this is the sole reference to the April 16th incident in the Commonwealth's post-hearing brief. The brief is otherwise silent as to the April 16th incident. The Commonwealth does not offer an argument as to why it believes that this particular incident was not an adverse action or otherwise mount a defense regarding this incident.

1 response to the objection of admission of Horsman's April 16, 2010 letter to Wallace left
2 questions concerning the scope of the hearing. Therefore, we are unable to conclude
3 that the issue was fully litigated and reverse on procedural grounds that portion of the
4 Hearing Officer's decision concluding that the April 16, 2010 reprimand violated Section
5 10(a)(3) of the Law. See Town of Dracut, 24 MLC at 38-39; Whitman-Hanson, 10 MLC
6 at 1608.

7 Conclusion

8 For the reasons set forth above, we reverse the Hearing Officer's decision and
9 dismiss Count I and Count II of the Complaint.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

ELIZABETH NEUMEIER, CERB MEMBER

HARRIS FREEMAN, 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.

.[HEARING OFFICER DECISION]
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of *
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COMMONWEALTH OF MASSACHUSETTS, * Case No.: SUP-10-5606
SECRETARY OF ADMINISTRATION AND *
FINANCE *
*
and *
*
AMERICAN FEDERATION OF STATE, *
COUNTY AND MUNICIPAL EMPLOYEES *
COUNCIL 93, AFL-CIO *
*

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Phil Brown, Esq. - Representing AFSCME
Patrick Butler, Esq. - Representing Commonwealth of
Massachusetts

HEARING OFFICER'S DECISION

SUMMARY

1 The issue is whether the Commonwealth of Massachusetts (Commonwealth of
2 Employer), Secretary of Administration and Finance, Department of Developmental
3 Services (DDS or Department), discriminated against Peter Horsman (Horsman) for
4 engaging in concerted, protected activity in violation of Sections 10(a)(3), 10(a)(4) and
5 derivatively Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law)

1 when it reprimanded him in 2009 and 2010⁸ and terminated his employment as a DDS
2 motor truck driver (MTD) on August 21, 2010. Based on the record, and for the reasons
3 explained below, I find that the Commonwealth violated the Law when it reprimanded
4 Horsman in 2009 and 2010 in retaliation against his protected activity, but did not violate
5 the Law when it terminated him from his MTD position in August of 2010.

6 STATEMENT OF THE CASE

7 On August 24, 2010, the American Federation of State, County and Municipal
8 Employees, Council 93, AFL-CIO (AFSCME or Union) filed a Charge of Prohibited
9 Practice (Charge) with the Department of Labor Relations (DLR) alleging that the
10 Commonwealth had engaged in prohibited practices within the meaning of the Law. On
11 February 12, 2012, a DLR Investigator issued a Complaint of Prohibited Practice
12 (Complaint), alleging that the Commonwealth had violated Section 10(a)(3), 10(a)(4)
13 and, derivatively, 10(a)(1) of the Law by retaliating against Horsman for engaging in
14 protected activity when it terminated his employment on August 10, 2010, and by
15 retaliating against him for filing a prohibited practice charge against the Employer in a
16 charge docketed by the DLR as case number SUP-08-5451. On March 9, 2012, the
17 Commonwealth filed its Answer.

18 I conducted a hearing on September 16, 2013, at which both parties had the
19 opportunity to be heard, to examine and cross-examine witnesses and introduce

⁸ Although not alleged in the Complaint, the parties litigated the issue of Horsman's reprimands at the hearing and argued it in their briefs. Conduct not specifically pleaded in a complaint may form the basis for an unfair labor practice finding if the conduct relates to the general subject matter of the complaint, and the issue has been fully litigated. See Town of Norwell, 18 MLC 1263, 1264, MUP-6962 (Jan. 22, 1992).

1 evidence.⁹ On October 29, 2013, both parties filed their post-hearing briefs. On the
2 entire record, I make the following findings and render the following decision.

3 ADMISSIONS OF FACT

4 The Commonwealth admitted to the following facts:

- 5 1. The Commonwealth is a public employer within the meaning of Section 1
6 of the Law.
- 7
8 2. The Union is an employee organization within the meaning of Section 1 of
9 the Law.
- 10
11 3. The Union is the exclusive bargaining representative for certain
12 employees in the statewide bargaining unit 2, including the title Motor
13 Truck Driver (MTD).
- 14
15 4. Peter Horsman (Horsman) is a public employee within the meaning of
16 Section 1 of the Law and a member of the bargaining unit described in
17 paragraph 3.
- 18
19 5. At all times relevant to the instant Charge, Horsman worked as a MTD for
20 Metro Residential Services (MRS) a division of the Commonwealth's
21 Department of Developmental Services (DDS), which operates at the
22 Walter E. Fernald Development Center (Fernald).
- 23
24 6. In November 2009, Horsman was elected to the Union's Executive Board.
25 In this capacity, he publicly criticized the Commonwealth's plan to close
26 the Fernald and organized bargaining unit members in opposition to the
27 plan to close the Fernald.
- 28
29 7. On August 9, 2010, Horsman received notice that he would be laid off
30 from his position as MTD for the WRC at Fernald. Horsman was laid off
31 effective August 21, 2010.

⁹ At the hearing, the Employer made a Motion to Dismiss the Complaint (Motion), which I took under advisement. As discussed below, I deny the Motion, in part, as it pertains to Horsman's reprimands, and grant the Motion, in part, as it pertains to Horsman's 2010 termination.

- 1 8. On December 10, 2008, Horsman filed a prohibited practice charge
- 2 against the Commonwealth, which the [DLR] docketed as SUP-08-5451.¹⁰
- 3
- 4 9. Horsman participated in the in-person investigation of SUP-08-5451, a
- 5 [DLR] proceeding, on February 9, 2009.
- 6
- 7 10. The [DLR] issued a complaint of prohibited practice in SUP-08-5451 on
- 8 May 15, 2009.
- 9

STIPULATIONS OF FACT

- 11 1. In 2003, it was publicly announced that the Fernald Center would be closing.
- 12
- 13 2. From 2009 to August 2010, Horsman was a MTD for the Waverly Redemption
- 14 Center, operated by MRS on the site of the Fernald. The redemption center
- 15 is a program that provides work to DDS residents and clients involving the
- 16 collection of bottles and cans and return of them to distributors.
- 17
- 18 3. While employed as a Motor Truck Driver at the WRC, Mr. Horsman's duties
- 19 included but were not limited to, picking up redeemable recyclables from
- 20 various locations around the community and bringing said recyclables to the
- 21 WRC on Fernald's campus.
- 22
- 23 4. On October 6, 2009, Linda Wallace [(Wallace)] Labor Relations Specialist and
- 24 Janet Pula [(Pula)] Metro Employment Services (MES), met with members of
- 25 the Redemption Center staff to discuss the future of the Greenhouse¹¹ and
- 26 Redemption Center. Ms. Wallace announced at that meeting that the
- 27 Greenhouse and WRC would be consolidated within one site.
- 28
- 29 5. The DLR issued a partial complaint, partial dismissal of prohibited practice in
- 30 SUP-08-5451 on May 15, 2009.
- 31
- 32 6. The Commonwealth had knowledge of Horsman's concerted, protected
- 33 activity on December 10, 2008, when he filed the SUP-08-5451 prohibited
- 34 practice charge against the Employer and, on February 9, 2009, when he
- 35 participated in the in-person investigation for SUP-08-5451.
- 36

¹⁰ Horsman initially filed a charge of prohibited practice against the Commonwealth on July 14, 2008 in case number SUP-08-5409, but the DLR had dismissed that charge on November 10, 2008. Horsman appealed the dismissal on November 27, 2008, but after the Commonwealth Employment Relations Board (Board) upheld the appeal, he filed the charge for SUP-08-5451.

¹¹ The Greenhouse is a part of the Fernald that cultivates and produces certain plants.

1 7. After being informed of the lay-off, Horsman exercised his bumping rights to
2 secure his current position as a MTD at Wrentham Development Center.

3
4

FINDINGS OF FACT

5 **Background**

6 DDS is an agency that serves persons with intellectual disabilities. DDS provides
7 services that are facility-based and community-based. Facility-based services include
8 work performed at the Fernald in Waltham, Massachusetts. Community-based services
9 include work performed in the metropolitan Boston area by state-operated service
10 providers and private providers. State-operated services include the Redemption
11 Center and Metro Employment Services (MES), which provides vocational training to
12 citizens through the Metro Region Community Systems Division (MRS) in Waltham,
13 Massachusetts. MES Director is Janet Pula (Pula) and MRS Director of Program
14 Development is Brad Keddal (Keddal).

15 In 2003, the Commonwealth announced that it was closing the Fernald due to a
16 decreasing census (i.e., residential population) and a corresponding reduction in service
17 and staffing levels. However, for the next decade—including on several specific
18 occasions in June of 2010, August of 2010, September of 2010, October of 2010 and
19 January of 2011—the Commonwealth announced that Fernald’s closing would be
20 delayed to a future date.¹² In 2013, the Commonwealth kept Fernald open and
21 operational without selecting a tentative closure date.

22 The Waverly Redemption Center was located on the Fernald campus and was
23 established by the Commonwealth sometime in the 1980s to provide Fernald residents

¹² By e-mail on June 23, 2010 Keddal stated that the Commonwealth was going to close Fernald on September 1, 2010; however, as of 2013, the Fernald remains open.

1 with the opportunity to learn job skills and earn wages by redeeming bottles and cans to
2 area distributors for profit. Between 2003 and early 2010, the Employer decided to
3 keep the Waverly Redemption Center open and operational despite its earlier
4 announcements that Fernald would close and the Redemption Center would be
5 relocated to another worksite. In December of 2011, the Waverly Redemption Center
6 moved from the Fernald—where the Employer did not have to pay the costs of rent or
7 utilities—and relocated to Waltham, where it now pays the costs of rent and utilities.

8 **Horsman's Employment at the Waverly Redemption Center**

9 The Commonwealth hired Horsman in 1983 as a MTD for the Fernald. On
10 September 22, 2008, the Employer notified Horsman that it was eliminating his MTD
11 position at Fernald and permitting him to exercise his contractual bumping rights and
12 secure another position. On September 25, 2008, Horsman selected as his first option,
13 reassignment to the MTD position at the Waverly Redemption Center and, as a
14 secondary option, anywhere in the Metro Region.

15 At some point after Horsman's September 25, 2008 selection, Keddal accepted
16 Horsman's reassignment and assigned him to the MTD position at the Waverly
17 Redemption Center. In his role as MRS Director, Keddal did not supervise Horsman
18 and never directly discussed with Horsman the duties of the MTD position.

19 Horsman's MTD duties included driving a truck to various locations on Tuesdays
20 through Fridays to pick up and/or deliver redeemable containers. As part of his duties,
21 Horsman would also travel with Fernald residents who would assist him with the
22 recyclable items at the pick-up and drop-off locations. On Saturdays, Horsman did not
23 drive the truck but instead, performed work onsite at the Waverly Redemption Center

1 facility. During that time, the Redemption Center was located on the Fernald campus
2 and included five DDS employees: three Vocational Instructor Cs, one Rehabilitation
3 Counselor position, occupied by Deborah White (White) and one MTD position,
4 occupied by Horsman. At all relevant times, White was Horsman's supervisor.

5 Between 2009 and 2010, Horsman performed numerous pick-up and drop-off
6 runs at the Waverly Redemption Center, including five regular pick-ups and two or three
7 high-volume drop-offs per week. In or about June of 2010, Keddal and Pula decided to
8 eliminate Horsman's travel routes to schools, which reduced all of his scheduled pick-
9 ups and drop-offs to two days per week, or less.

10 **Horsman's December 3, 2008 Written Complaint to White**

11 On December 3, 2008, White met with Horsman to discuss his duties as MTD.
12 By letter on December 3, 2008, Horsman informed White that pursuant to their meeting
13 earlier that day, he disputed the characterization of his duties and responsibilities per
14 his Employee Performance Review System (EPRS) Form 30. Copying Wallace and
15 McKinnon on that letter, Horsman stated:

16 On December 3, 2008, you requested to meet with me regarding my
17 EPRS, although I have no problem [m]eeting I do take issue with Duty #5
18 as it states I am to "*Work on Saturday to assist with business to*".¹³

- 19
20 1. Assists with cleaning out customer area as needed.
21 2. Runs register and waits on customers.
22 3. Sorts materials and prepares for shipping.
23 4. Truck runs as scheduled (This duty I have no problem with)

24
25 As I'm sure you are aware my Form 30 list[s] my duty as working on the
26 truck and the responsibilities of the dock, it [does] not list anything
27 pertaining to the list as you have on Duty#5.
28

¹³ Emphasis in original.

1 If this is an issue I'm more than happy to meet with you to discuss this, I
2 assume this is a **Stage A**¹⁴ introduction [and] this should give us enough
3 time to deal with this problem during this assessment period.

4
5 Horsman attached to his December 3, 2008 letter an EPRS form for 2008-2009,
6 showing five duties for the MTD position on Tuesday through Saturday:

7 Duty #1

8 Transports materials for Metro Employment Services and FLOW
9 employment programs to provide work for clients.

10

11 Criteria

- 12 1. Prepares materials for shipping.
13 2. Loads and unloads trucks by hand or with material equipment.
14 3. Responsible for securing materials on truck and closing door.
15 4. Follows trucking schedule, reports any problems with schedule to
16 supervisor.
17 5. Maintains trucking logs and associated paperwork.
18 6. Schedules runs as needed.

19

20 Duty #2

21 Responsible for monitoring condition of vehicles to insure safety.

22

23 Criteria

- 24 1. Services vehicles with oil and gas.
25 2. Identifies possible mechanical problems and reports them to
26 designated staff.
27 3. Cleans interior and exterior of vehicles on a regular basis. Washes
28 truck weekly when possible.

29

30 Duty #3

31 Maintains a professional relationship with individuals at the program sites,
32 colleagues, customers and company personnel.

33

34 Criteria

- 35 1. At all times behaves like a professional, respectful and courteous
36 manner as a representative of the Metro Region.
37 2. When problems arise seeks to solve potential conflicts and problems
38 through notifying appropriate supervisors and following through on
39 agreed upon actions.
40 3. Interacts with customers, company employees and their managers by
41 listening to their questions, requests and/or concerns. Demonstrates

¹⁴ Emphasis in original.

- 1 flexibility in responding to their needs presents problems in a positive
- 2 manner and responds professionally and in a timely manner.
- 3 4. Communicates any relevant information to co-workers about
- 4 individuals working at the Redemption Center.
- 5 5. When working with individuals at the Redemption Center or on the
- 6 truck, follows all programs and practices as defined by the Redemption
- 7 Center.

8
 9 **Duty #4**
 10 Keeps shipping area clean to maintain a safe and clean environment.

- 11
 12 **Criteria**
- 13 1. Keeps dock clean, sweeps dock regularly.
 - 14 2. Polices dock and loading area, picks up debris.
 - 15 3. Keeps shipping area and shipping containers clean.
 - 16 4. Washes out large plastic bins used to ship glass when possible.

17
 18 **Duty #5¹⁵**
 19 Works Saturday to assist with business.

- 20
 21 **Criteria**
- 22 1. Assists with cleaning out customer area as needed.
 - 23 2. Runs register and waits on customers.
 - 24 3. Sorts materials and prepares for shipping
 - 25 [4.] Truck runs as scheduled.

26
 27 **The February 25, 2009 Reprimand**

28
 29 On February 9, 2009, both Horsman and the Commonwealth¹⁶ participated in an
 30 in-person investigation at the DLR on February 9, 2009. By letter on February 25, 2009,
 31 Pula reprimanded Horsman for allegedly failing to adhere to his work schedule. That
 32 letter stated, in full:

¹⁵ Emphasis in original.

¹⁶ The record is not clear about whether Pula, Keddal and/or Wallace participated in the February 9, 2009 DLR investigation. Because the Commonwealth stipulated that it “had knowledge of Horsman’s protected, concerted activity...on February 9, 2009, when he participated in the in-person investigation for SUP-08-5451” I find that Pula, Keddal and Wallace knew about the investigation even if they did not attend it.

1 It has come to my attention that you have been signing in and out of your
2 worksite outside of your specified work schedule. Your work schedule is
3 8:00-4:30 with an hour break for lunch. You are expected to sign in and
4 out at the specified times. The sign in/sign out sheet is a legal document
5 and must be maintained as such. Failure to comply with this may result in
6 further disciplinary action.

7
8 Pula's February 25, 2009 letter changed Horsman's hours because, since he
9 began working at the Waverly Redemption Center, his regular work schedule had
10 always been 7:30 a.m. to 4:00 p.m.¹⁷ Horsman immediately replied to Pula by letter,
11 addressing his concerns and stating, in full:¹⁸

12 I'm in receipt of your letter dated February 25, [20]09. However, I must
13 say that I am a little surprised because I have always abided by the rules
14 and regulations of my job, and if there was anything I was unsure of I have
15 ask[ed] my supervisor Debbie White.

16
17 For the record, I have always come in early to my shift and for no other
18 reason th[a]n I like being on time[.] If I have left before the end of my shift
19 for any reason it wa[s] under expressed permission of my supervisor.

20
21 I did not realize this was such [a severe] problem that you "state it may
22 result in further disciplinary action." I can't help but feel that there is
23 something more to this when I am being singled out in a department
24 where others are treated different. I also would still like to meet with you
25 and my supervisor and a union rep. [t]o discuss this matter and to clarify
26 my job duties[.] [P]lease get back to me to schedule a date and time.

27

¹⁷ The Employer did not rebut Horsman's testimony that the letter effectively changed Horsman's schedule, which was originally from 7:30 a.m. to 4:00 p.m. Nor did the Employer rebut Horsman's testimony that he immediately contacted Pula in writing to clarify his scheduled working hours and requested to meet over the issue. Horsman also testified that Pula later admitted that: (1) he was in compliance with the sign in/out sheet; (2) he never improperly signed in/out of his specified work schedule; and (3) Pula sent the February 25, 2009 reprimand letter in error. Based on the totality of these circumstances, I credit Horsman's testimony that Pula's letter changed Horsman's schedule.

¹⁸ Neither party offered a submission date for the letter, but both parties agreed that Horsman sent the letter to Pula who received it shortly after the February 25, 2009 letter. Horsman also copied Wallace and Union President Raymond McKinnon (McKinnon) on that letter.

1 Per Horsman's request, Pula met with Horsman and restored and reaffirmed his
2 regularly scheduled working hours of 7:30 a.m. to 4:00 p.m.

3 **Horsman's SUP-08-5451 Hearing and White's September 22, 2009 Reprimand**
4

5 On May 15, 2009, a DLR investigator issued a Complaint of Prohibited Practice
6 against the Commonwealth in SUP-08-5451. On August 26, 2009 and September 16,
7 2009, a DLR hearing officer conducted two days of hearing in that case, in which
8 Horsman and the Commonwealth both participated.¹⁹ Six days later, on September 22,
9 2009, Pula met with White and other employees to discuss Horsman's work duties. At
10 that meeting, Pula instructed White to reduce Horsman's access to Fernald residential
11 assistance during his travel routes and to limit his interactions with Fernald residents.
12 Pula also instructed White to restrict Horsman's Saturday lunch breaks, requiring him to:
13 (1) stay in the kitchen and not leave unless he was instructed to leave; (2) terminate his
14 break period early if staff needed his help; and (3) resume his break only after helping
15 the staff. On September 22, 2009, after her meeting with Pula, White publicly
16 confronted Horsman and verbally reprimanded him for using Fernald residential
17 assistants during his redemption routes and for taking his Saturday lunch breaks
18 outside of the kitchen area.²⁰ Horsman complained to Wallace three days later by letter
19 on September 25, 2009, stating in full:

¹⁹ Neither Pula nor Keddal testified at the SUP-08-5451 hearing and neither the DLR investigator nor the DLR hearing officer identified them in the complaint or the decision. However, the DLR investigator specifically named Wallace in counts I, II and III of the complaint and she later testified as a witness for the Commonwealth in SUP-08-5451.

²⁰ Neither White nor Wallace testified. Pula testified to having no recollection of White's public confrontation with Horsman nor meeting with White earlier that day on September 22, 2009. Horsman testified to having direct knowledge of White's confrontation and memorialized the incident by letter dated September 25, 2009, which he addressed to

1 On September 22, 2009, at approximately 2:30 pm, I was approached by
2 my supervisor Debbie White who stated[,] "I was in a[n] all day meeting
3 and you were one of the topics. Don't shoot the messenger! But, Janet
4 Pula told me that you are no longer to take any of the individuals with you
5 on the truck, and to keep your interactions with them to a minimum.
6

7 On Saturday's [sic] you are to take your break in the kitchen and you are
8 not to leave unless you are told, and when needed even if you are on
9 break you are to come off your break help the staff and then go back and
10 finish the duration of your break.["] These were just a few issues that were
11 shouted at me.
12

13 I find that the tone and attitude towards me by Debbie was disrespectful
14 and uncalled for, especially in front of other staff and individuals. She has
15 never approached me in this manner before in fact she has always been
16 respectful.
17

18 I have never complained of the support I receive from the individuals
19 helping, as a matter of fact I welcome it. I really don't think it would be
20 possible to do what is expected in this job without the support of
21 individuals.
22

23 My concern has always been because I am teaching the individuals a skill
24 that I should be paid at the same rate of pay as my co-workers that are
25 doing the same work.
26

27 I strongly believe that this reprimand was based on my recent case filed
28 and heard at the [DLR], as well as the reclassification form I [submitted] to
29 Don Stevens on September 18, 2009.
30

31 I sincerely believe this because I've been doing this job this way since I
32 started over a year ago. Yet I must say I find this very troubling because I
33 was given this procedure under the instruction and directors of both
34 Debbie and Janet, now they want to reprimand me as if it were something
35 I've been doing of my own free will. As you are [aware], this has
36 happened once before when it was alleged that I was falsifying the sign in
37 sheet and I received a letter for that as well.
38

Wallace and copied to Union President McKinnon. Wallace acknowledged in her January 19, 2010 reply letter to Horsman that she had received his September 25, 2009 complaint. Based on the totality of evidence submitted, including Horsman's succinct recollection of events, I credit his testimony and find that White publicly confronted Horsman and verbally reprimanded him on or about September 22, 2009.

1 I would appreciate it if they want something changed that they will put it in
2 [writing] to me, and not embarrass me in front of co-workers and
3 individuals as she did on the shop floor.

4

5 I look forward to hearing from you at your earliest convenience.

6

7 **Horsman's October 2009 Meeting with Pula**

8 At a general staff meeting on October 6, 2009, Pula and Wallace announced that
9 the Employer was consolidating the Greenhouse with the Waverly Redemption Center
10 due to budget issues. They also announced that the Commonwealth decided to
11 relocate the Redemption Center away from the Fernald due to decreasing revenue from
12 the bottle returns and that they anticipated increased costs due to the move. Shortly
13 after that meeting, Pula confirmed to Horsman that she was reducing the number of
14 times that a Fernald resident could assist him on his travel routes. Pula also informed
15 Horsman that the Employer was going to re-evaluate the Fernald resident who usually
16 accompanied Horsman and determine whether any resident would accompany him in
17 the future. Pula told Horsman that if the Employer's financial outlook improved, she
18 would consider hiring a Fernald resident to assist Horsman on a full-time basis.

19 By e-mail on November 16, 2009, Pula provided Wallace with notes about the
20 general staff meeting and her follow-up meeting with Horsman on October 6, 2009.
21 Regarding the general staff meeting, Pula stated that she had discussed: (1) the
22 consolidation of the Greenhouse and the Redemption Center; (2) the Employer's
23 \$12,000 financial shortfall; and (3) the reduction of Fernald residents assisting truck
24 runs except on large-volume runs. Regarding the follow-up meeting with Horsman,
25 Pula stated that she had discussed: (1) the financial shortfall of the Redemption
26 program; (2) the Employer's preference to have a Fernald resident accompany

1 Horsman on a part time basis at 10 hours/week \$4,000/year, instead of on a regular, full
2 time basis; (3) the possibility of hiring a Fernald resident on a regular, full-time basis to
3 accompany Horsman on more truck runs if the Employer's financial outlook improved.

4 **Horsman's December 2009 Meeting with Wallace**

5 On December 10, 2009, Horsman met with Wallace, Pula and Union President
6 McKinnon. At that meeting, Wallace and Pula clarified that Horsman could have one
7 Fernald resident to assist him on his trips to Littleton and Harvard, only. They also
8 discussed White's September 22, 2009 verbal reprimand of Horsman.²¹

9 **Wallace's Response to Horsman's Complaint about White's September 22, 2009**

10 **Reprimand**

11 By letter on January 19, 2010, Wallace responded to Horsman's September 25,
12 2009 letter, stating, in full:

13 You alleged in your letter that on September 22, 2009, your supervisor,
14 Debbie White gave you a verbal reprimand. You characterized the
15 exchange between you and Ms. White as "Disrespectful and uncalled for,
16 especially in front of other staff and individuals." I have reviewed each
17 individual allegation and my findings are as follows:

18
19 I find insufficient evidence²² to substantiate that Ms. Debbie White
20 approached you on September 22, 2009 in a disrespectful and

²¹ Pula testified that she did not remember Horsman ever complaining about White in 2009. However, Horsman testified that he recalled meeting with Pula, McKinnon and Wallace on December 10, 2009 to discuss various issues including White's verbal reprimand. Further, the record shows that Horsman filed a written complaint with Wallace on September 25, 2009, and that Wallace memorialized the parties' December 10, 2009 meeting and her receipt of Horsman's complaint by letter dated January 19, 2010. Because the Respondent failed to rebut Horsman's testimony, I credit Horsman's testimony and find that Pula was aware of White's verbal reprimand and Horsman's subsequent complaint about the reprimand to Wallace in September of 2009.

²² The Employer did not identify the complete evidence on which Wallace relied, including the person(s) who she interviewed or the investigation methods used to make her final determination; however, in her January 19, 2010 letter, Wallace mentioned that

1 unprofessional manner. There is insufficient evidence to substantiate that
2 you were given a verbal reprimand. Please note that there is nothing in
3 your personnel record to reflect that you have received a reprimand or any
4 other form of discipline. There is insufficient evidence to support that you
5 were told to “keep your interactions with individuals to a minimum.” There
6 is insufficient evidence to substantiate that Ms. White shouted anything at
7 you. In short, I cannot substantiate any of the allegations raised in your
8 letter dated September 25, 2009 concerning Ms. White’s behavior towards
9 you, or the fact that these actions occurred before other staff and/or
10 individuals.

11
12 As you know, the Redemption Center suffered a financial shortfall of
13 twelve thousand dollars. On October 6, 2009, the issue was explained in
14 detail to you by Janet Pula both during a general staff meeting and
15 immediately following the meeting. You were told that your scheduled
16 truck runs would be evaluated and a resident would go out to assist you
17 on the trips that warrant it.

18
19 There is insufficient evidence to substantiate that Ms. White shouted
20 orders regarding break time procedures at you. According to Ms. White,
21 you brought up the issue and she simply reiterated the procedure. Three
22 staff are scheduled to work on Saturdays. In the event of a sick call or a
23 scheduled vacation, two staff will be scheduled to work. The expectation
24 is that when one staff goes on break, the other staff will remain in the work
25 area. You may leave the building for a break if there is a staff [person]
26 covering the register. If not, you may take your break in the back room.

27
28 **White’s April 16, 2010 Reprimand**

29
30 On or about April 16, 2010, Horsman approached White to discuss some work-
31 related concerns. White and Horsman conversed in a public area and at some point
32 during their conversation, White made several negative references to Horsman’s
33 position as an MTD and a Union executive member. She also stated that she could
34 change Horsman’s schedule anytime, and that he could “run to the union” and complain

she interviewed White and relied on White’s statements to dismiss Horsman’s complaint.

1 if he did not like it. By letter dated April 16, 2010, Horsman complained to Pula about
 2 White's statements.²³ Copying Wallace on that letter, Horsman stated, in full:

3 On many occasions my supervisor Debbie White has talk[ed] to me in a
 4 degrading manner in front of my co-workers[.] On 4/16/10 I tried to have a
 5 conversation with her about my concerns, and her lack of respect towards
 6 me, these are just a few of the types of comments I found to be
 7 disrespectful.

8
 9 1) You are just a truck driver. (Numerous times)

10
 11 2) Why don't you run to the union that's what you usually do?

12
 13 3) You[re] just a steward in the union, big deal!

14
 15 4) I can change your schedule anytime I want I'm the boss.

16
 17 These bullying tactics on the job are no-way to talk to me, or any staff
 18 person. I would appreciate it if a meeting could be scheduled at your
 19 earliest convenience.
 20

21 **Wallace's Response to Horsman's Complaint about White's April 16, 2010**

22 **Reprimand**

23 By letter on August 6, 2010, Wallace responded to Horsman's April 16, 2010
 24 complaint, stating, in full:

25 You alleged in your letter that on 4/16/10 you tried to have a conversation
 26 with your supervisor, Debbie White and she showed a lack of respect
 27 towards you. You attributed the following statements made by Ms. White
 28 that you found to be disrespectful:

- 29 • "You are just a truck driver
- 30 • Why don't you run to the union that's what you usually do?
- 31 • You[re] just a steward in the union, big deal!
- 32 • I can change your schedule anytime I want I'm the boss."

²³ Pula testified that she did not remember whether Horsman complained about White in 2010. Horsman testified that he contacted Pula in writing and specifically complained to her about White's anti-union remarks. The record shows that Horsman contacted Pula by letter on April 16, 2010 alleging that White made anti-Union remarks against him. The Respondent also failed to rebut Horsman's testimony. Thus, based on the totality of the evidence submitted, I credit Horsman's testimony and find that Pula was aware of Horsman's written complaint against White's verbal reprimand on April 16, 2010.

1 I have reviewed each individual allegation and my findings are as follows:

2

3 I find insufficient evidence to substantiate that Ms. Debbie White made the
4 statements you attributed to her. I note that since you bumped into the
5 position of motor truck driver with the Metro Region your schedule has not
6 changed. In short, I cannot substantiate any of the allegations raised in
7 your letter dated 4/16/2010 concerning Ms. White's behavior towards you,
8 or the fact that these actions occurred before other staff and/or individuals.

9

10 **Pula's Decision to Eliminate Horsman's MTD Position**

11 By e-mail on October 20, 2009, Pula invited area directors from the Metro Region
12 and other program directors to attend an MES Open House on October 29, 2009. That
13 e-mail stated, in pertinent part:

14 With Fernald closing the programs will be moving to a new space. This
15 will necessitate the consolidation and redesign of the programs though we
16 envision that the majority of the work and clientele will remain the same....

17

18 There is continuous paid real work, workers at the programs see
19 customers bringing in containers, customers buying plants and materials
20 being shipped out, via Coca Cola, Pepsi, etc.

21

22 The staff and workers work together to complete tasks, everyone loads
23 and unloads trucks... Even though workers can identify the staff, there
24 seems to be a sense that everyone is in it together.

25

26 Currently there are 26 people attending these programs. After assessing
27 everyone's skills and needs, the individual's teams have recommended
28 that 20 individuals continue with the program....Upon moving the
29 programs will be consolidated into one site that will be able to serve 30
30 individuals.

31

32 After the Open House failed to garner needed financial support, Pula began
33 visiting possible locations for the new Redemption Center in the spring of 2010. In or
34 about June of 2010 and, after reviewing other programs and business models, Pula and
35 Keddal decided to discontinue Horsman's school pick-up runs and effectively reduced
36 his other pick-up and drop off runs to two and one-half days per week on Tuesday,
37 Wednesday and Friday/half-days only. During this time, there remained numerous

1 weekly pick-ups—including five regular dump sites—and three high-volume drop offs
2 per week. The total number of runs that Horsman performed dropped to approximately
3 10 runs per week and that remained unchanged through December of 2011.

4 In June of 2010, Pula and Keddal agreed that some of the truck runs at the
5 Waverly Redemption Center were no longer profitable and that the Commonwealth
6 would have to begin paying rent and utilities for the Waverly Redemption Center when it
7 relocated to a new future facility. They also agreed that once the Waverly Redemption
8 Center completed its merger with the Greenhouse, White's position as the
9 Rehabilitation Counselor A/B would become redundant. Based on these financial
10 concerns, the Employer decided to eliminate both the Rehabilitation Counselor and
11 MTD positions, agreeing that Horsman's responsibilities as MTD would be reassigned
12 to the three Vocational Instructors.

13 On or about June 17, 2010, Pula and Keddal met with MRS Director of Human
14 Resources Donald Stevens (Stevens), who instructed them to present their reduction-in-
15 force (RIF) plan to MRS Regional Director Gail Gillespie (Gillespie). By e-mail on June
16 23, 2010, Keddal notified Gillespie of the MES Staff Consolidation Plan, which stated in
17 full:

18 Janet Pula, Roberta Lewonis and I met with Don Stevens on June 17 to
19 review or MES consolidation Plan and to ask for guidance. Don asked
20 that we send a formal plan to you for your approval and then to forward
21 him to review with Labor representatives.

22
23 Our Plan is as follows:

24
25 Metro Employment Services (MES) Consolidation Rationale

26
27 MES provides employment services for 25 individuals at two sites on
28 Campus; the Redemption Center and the Greenhouse. With the closing

1 of all Fernald Campus operations as of 9-1-10, MES will be required to
2 move.

3
4 MES, Regional and Area staff have reviewed future program planning for
5 the past two years, in anticipation of the Fernald closure. There is [an]
6 agreement that the supports provided are valued and responsive and that
7 the program represents a unique cottage industry service niche. The
8 alternative was the closure of the program and referring the individuals to
9 alternative services in the community.

10
11 The program design has been identified as a single site to accommodate
12 the bottle/can redemption business as well as a horticultural/ craft resale
13 business. From a leasing, business operation and program management
14 perspective, a single program space will provide a number of efficiencies.

15
16 This also presents an opportunity to review all staffing and business
17 protocols to streamline the operation. Are some work tasks more staff
18 intensive than others? Are there business practices more expensive than
19 others? Are there ways to increase the revenue?

20
21 Currently there are 10 staff, all State Employees. FLOW, Inc (Triangle
22 Industries) provides all of the business functions such as individual payroll,
23 Department of Labor compliance, vehicle leasing/ repair, supplies, vendor
24 communications, etc. From revenue brought in from sales, the operation
25 mostly 'breaks even'. There are no current rental/ leasing costs. FLOW,
26 INC has done a property search and identified needing approximately
27 \$100,000 for leasing costs.

28
29 MES and the Region worked with the Areas over the past year to identify
30 any new funded referrals to increase the program size and to offset some
31 or all of the leasing costs. Given the overall service funding shortfalls, it
32 has not been possible to identify more than two referrals.

33
34 As part of the Program design review, in looking at efficiencies created by
35 the consolidation, there are two State Employee positions that would not
36 be needed. The Program would require only 1 Program Coordinator to
37 manage the site and we would propose eliminating the Rehabilitation
38 Counselor A/B position. Also, through a careful review of the shipping
39 schedule, we will not need the Motor Truck Driver position. Trucking could
40 be consolidated to only two days a week versus spread out among four
41 days. This function will be provided by the Vocational Instructor C
42 positions. This is currently in their job description.

43
44 MES took the opportunity to visit the Southeast Region Redemption
45 Center (Town Line) in Dighton. This operation was moved from the Dever
46 Campus successfully into the community, several years ago. We were

1 able to review their business practices and learn from their operation. For
2 instance, as a point of comparison, they process almost twice as many
3 containers and have been able to consolidate their shipping to once a
4 week, performed by their Vocational Instructor C position.

5
6 Implementation of Plan

7
8 Flow, Inc/ Triangle Industries is searching for space and has targeted
9 September 1, 2010 as the move date. We would need the reduction in
10 state payroll then to be able to transfer resources to pay for leasing costs.

11
12 We would like to notify staff on July 26, 2010.²⁴

13
14 We will prepare backup detail around our staffing and business decisions
15 in preparation for a meeting with Union representatives. Please let us
16 know if you require any further information from us before moving to the
17 next step.

18
19 On June 29, 2010, Gillespie approved Keddal's MES Staff Consolidation Plan.

20 By letter dated August 9, 2010, DDS Chief Financial Officer Jeanette Maillet informed
21 Horsman that the Employer had eliminated his position and terminated his employment
22 by RIF, effective August 21, 2010. The Employer also eliminated White's position and
23 terminated her employment by RIF; however, Horsman was the only unit member
24 terminated by the Commonwealth at that time.

25 Between June of 2010 and December of 2011, the Employer considered several
26 possible locations for the new Redemption Center, including Canton, Dedham,
27 Cambridge, Watertown, etc. Pula estimated that it would take about eight to ten months
28 to perform a "build-out" (i.e., install bathrooms, kitchen, air conditioning, sprinklers,
29 garage door and to meet state codes, etc.) and fully relocate the Redemption Center
30 once the Employer decided on an agreeable location. Sixteen months after terminating

²⁴ Emphasis in original.

1 Horsman's employment in August of 2010, the Employer agreed to relocate the
2 Redemption Center to Waltham and completed its relocation in December of 2011.

3 In September of 2010, Horsman exercised his contractual bumping rights and
4 secured a MTD position at the Wrentham Development Center (WDC). Horsman
5 currently commutes 80 miles to and from work at the WDC, whereas his previous
6 commute to and from the Waverly Redemption Center was 20 miles.

7 OPINION

8 The Union alleges that the Commonwealth violated Sections 10(a)(3) and
9 10(a)(4) of the Law by reprimanding Horsman on February 25, 2009, September 22,
10 2009 and April 16, 2010, and by terminating his employment as an MTD at the Waverly
11 Redemption Center on August 21, 2010, in retaliation for Horsman's engaging in
12 concerted protected activity, including filing a Charge with the DLR.

13 To establish a prima facie case of a Section 10(a)(3) retaliation violation, a
14 charging party must show that: (1) the employee engaged in concerted activity
15 protected by Section 2 of the Law; (2) the employer knew of the concerted, protected
16 activity; (3) the employer took adverse action against the employee; and, (4) the
17 employer's action was motivated by a desire to penalize or discourage the protected
18 activity. City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (Jan. 9, 2009); Town of
19 Carver, 35 MLC 29, 47, MUP-03-3094 (June 30, 2008); Quincy School Committee, 27
20 MLC 83, 92, MUP-1986 (Dec. 29, 2000); Town of Clinton, 12 MLC 1361, 1365, MUP-
21 5659 (Nov. 9, 1985). The elements of a Section 10(a)(4) prima facie case are
22 essentially the same as Section 10(a)(3), except to satisfy the first prong, Horsman
23 must establish that he signed or filed an affidavit, petition or complaint or gave

1 information or testimony as part of a DLR proceeding. Commonwealth of
2 Massachusetts, 25 MLC 44, SUP-4128 (Aug. 24, 1998).

3 The Union argues that Horsman was engaged in protected activities when he: (1)
4 filed a charge with the DLR in SUP-08-5451 on December 10, 2008; (2) participated in
5 an in-person investigation at the DLR for SUP-08-5451 on February 9, 2009; (3)
6 complained to Pula about her written reprimand on February 25, 2009; (4) participated
7 in a hearing at the DLR related to SUP-08-5451 on August 26, 2009 and September 16,
8 2009; (5) complained to Wallace about White's first reprimand on September 22, 2009;
9 (6) met with White to address work-related concerns on April 16, 2010; and, (7)
10 complained to Pula about White's second reprimand on April 16, 2010. The Union also
11 argues that the Commonwealth was aware of Horsman's protected activities and took
12 adverse action against him to discourage those activities when it changed the terms of
13 his employment conditions on February 25 and September 22, 2009, and terminated his
14 employment on August 21, 2010 in violation of Sections 10(a)(3) and 10(a)(4) of the
15 Law.

16 The Commonwealth argues that Horsman was not engaged in protected activity
17 when he complained to Pula and Wallace in 2009 and 2010, and even if he was, there
18 is no evidence to substantiate his complaints. The Commonwealth also contends that
19 while Horsman's termination was an adverse action, it was not taken to discourage his
20 right to engage in protected, concerted activity. For the reasons that follow, I conclude
21 that the Commonwealth did not violate either Section 10(a)(3) or (a)(4) when it
22 terminated Horsman, but it violated Section 10(a)(3) by reprimanding Horsman on April

1 16, 2010, and violated Section 10(a)(4) by reprimanding Horsman on February 25 and
2 September 22, 2009.²⁵

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

4 **I. Horsman's Protected Activity**

5 There is no dispute that Horsman's participation on the Union's executive board,
6 beginning in November of 2009 constitutes protected activity. However, the
7 Commonwealth argues that Horsman was not engaged in protected activity when he
8 discussed work-related issues with White on April 16, 2010. The Commonwealth also
9 contends that Horsman's complaint to Pula about his meeting with White and her anti-
10 union remarks did not constitute protected activity, because Wallace eventually
11 determined that his complaint was unsubstantiated. The Board has long held that
12 complaining about working conditions constitutes protected activity under Section 2 of
13 the Law. See generally Bristol County Sheriff's Department, 26 MLC 105, 109, MUP-
14 2100 (Jan. 28, 2000). Here, I find that Horsman was engaged in protected activity
15 when—acting in his capacity as Union steward—he filed the April 16, 2010 complaint
16 with Pula against White. Compare, Athol-Royalston Regional School Committee, 28
17 MLC 204, 213-15, MUP-2279 (Jan. 14, 2002) (processing grievances in employee's
18 capacity as union president and complaining to the press and another agency about
19 how the employer processed those grievances constitutes protected activity).

20 **II. The Employer's Knowledge of Horsman's April 16, 2010 Complaint**

²⁵ I have outlined my analysis according to these conclusions.

1 Although the Commonwealth maintains that Horsman was not engaged in
2 protected activity when he complained to Pula on April 16, 2010 about White's
3 statements to him on that date, I find that his complaint constituted protected activity,
4 and both Pula and Wallace knew about Horsman's complaint. When Horsman met with
5 White on April 16, 2010, she reprimanded him for raising certain work-related concerns
6 and then made anti-union remarks about his Union leadership role. On the same day,
7 Horsman complained to Pula about White's statements, and copied Wallace on his
8 complaint who sent Horsman a follow-up response on August 6, 2010 dismissing his
9 complaint. Based on this evidence, I find that the Commonwealth was aware of
10 Horsman's protected activity. Accordingly, the Union satisfies the second element of its
11 prima facie case.

12 **III. The Employer's Adverse Action Against Horsman**

13 **A. The April 16, 2010 Reprimand**

14 Relying on City of Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009), the
15 Commonwealth argues that White never reprimanded Horsman on April 16, 2010
16 because he did not suffer any material disadvantage in salary, grade or other objective
17 term of employment as a result of their alleged confrontation on that date. Further, it
18 asserts that White never made anti-union remarks nor threatened to change Horsman's
19 work schedule in reprisal for his bring work-related concerns to her attention on April 16,
20 2010. The Commonwealth based that assertion on Wallace's August 6, 2010
21 determination that Horsman's allegations were unsubstantiated.

1 Contrary to the Commonwealth's reliance on City of Boston, I find that White
2 reprimanded Horsman on April 16, 2010 and this conduct constituted an adverse action
3 because she threatened to change his work schedule if he continued to complain, which
4 effectively chilled his ability to bring future concerns to her attention. See Southern
5 Worcester County Regional Vocational School District v. Labor Relations Commission,
6 377 Mass. 897, 903 (1979) (statements by a supervisory employee in the nature of
7 threats of reprisal for protected activities have been held to violate the Law); see also
8 Athol-Royalston School Committee, 28 MLC 204, 214-15, MUP-2279 (Jan. 14, 2002) (it
9 is well-established that employee reprimands constitute an adverse employment
10 action).

11 **B. The Termination**

12 The Commonwealth does not dispute that it took adverse action against
13 Horsman when it terminated his employment as an MTD at the Waverly Redemption
14 Center on August 21, 2010. Accordingly, I find that the Union satisfied the third element
15 of its prima facie case.

16 **IV. The Employer's Unlawful Motivation**

17 A charging party can prove unlawful employer motivation, with direct or indirect
18 evidence of discrimination. Lawrence School Committee, 33 MLC 90, 97, MUP-02-
19 3631 (Dec. 13, 2006). Direct evidence is evidence that, "if believed, results in an
20 inescapable, or at least a highly probable inference that a forbidden bias was present in
21 the workplace." Wynn & Wynn, P.C. v. Massachusetts Commission Against
22 Discrimination, 431 Mass. 655, 667 (2000), (quoting Johansen v. NCR Comten, Inc., 30

1 Mass. App. Ct., 294, 300 (1991)).²⁶ Unlawful motivation may also be established
2 through circumstantial evidence and reasonable inferences drawn from that evidence.
3 See Town of Carver, 35 MLC at 48 (citing, Town of Brookfield, 28 MLC at 327-28; see
4 also Southern Worcester County Regional Vocational School District, 386 Mass. at 418-
5 19 (citing Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474
6 (1951)). Several factors may suggest unlawful employer motivation, including timing of
7 the alleged discriminatory act, triviality of reasons given by the employer, an employer's
8 deviation from past practices, or expressions of hostility toward a union or the protected
9 activity. Town of Carver, 35 MLC at 48; Cape Cod Regional Technical High School
10 District Committee, 28 MLC 332, 335, MUP-2541 (May 15, 2002); Bristol County, 26
11 MLC 105, 109, MUP-2100 (Jan. 28, 2000); Town of Andover, 14 MLC 1571, 1582,
12 MUP-6443 (H.O. March 3, 1988), aff'd 17 MLC 1475, 1482, MUP-6443 (Feb. 6,
13 1991). Timing alone is insufficient to establish unlawful employer motivation. City of
14 Malden, 5 MLC 1752, 1764, MUP-3017 (March 20, 1979).

15 The Commonwealth argues that there is neither direct nor indirect evidence of
16 unlawful animus. It also argues that the evidence presented is too attenuated to show
17 any connection between Horsman's alleged protected activities and the reprimands or
18 his termination. I disagree, and find that the Union has satisfied its threshold burden to

²⁶ Although the Union argues that White's anti-union remarks made on April 16, 2010 point to direct evidence of improper motivation, because the Union meets the higher burden of proof outlined in Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981), I instead consider whether there is sufficient indirect evidence to establish circumstantial evidence of unlawful motivation. See Town of Brookfield, 28 MLC 320, 327-28, MUP-2538 (May 1, 2002).

1 demonstrate that unlawful animus motivated both the April 16, 2010 reprimand and the
2 termination.

3 **A. The April 16, 2010 Reprimand**

4 The Union argues that unlawful animus motivated the April 16, 2010 reprimand
5 based on the White's expressions of hostility against Horsman on that date.
6 Specifically, the Union maintains that White's verbal reprimand on April 16, 2010
7 showed express hostility based on her anti-union remarks about Horsman's Union
8 leadership role and her threats to change his work schedule. I agree. White belittled
9 his position as a Union Steward, reminding him that she was his boss and could change
10 his work schedule anytime that she wanted. She also challenged him to "run to the
11 union" stating that is what he usually does. This public expression of hostility against
12 Horsman's Union activity shows unlawful animus. See Bristol County, 26 MLC at 109;
13 Town of Andover, 14 MLC at 1582, aff'd 17 MLC at 1482.

14 **B. The Termination**

15 The record shows that the reasons Wallace gave in her August 6, 2010 dismissal
16 of Horsman's April 16, 2010 complaint over White's reprimand were inadequate
17 because, other than White's personal statements, Wallace failed to show that she relied
18 on other forms of evidence to prior to determining that Horsman's allegations were
19 "unsubstantiated" and dismissing his complaint. The Commonwealth failed to show that
20 Wallace investigated or interviewed anyone other than White in connection to those
21 allegations. Consequently, I find that the reasons provided by the Commonwealth in
22 support of Wallace's August 6, 2010 dismissal of Horsman's complaint were

1 insubstantial and revealed that Wallace harbored unlawful animus against Horsman.
2 See Commonwealth of Massachusetts, 14 MLC 1743, 1748, SUP-3081 (May 19, 1988);
3 Town of West Springfield, 8 MLC 1041, MUP-3914 (June 4, 1981). Based on the
4 totality of the evidence presented, I find that the Commonwealth's conduct in
5 terminating Horsman's employment was motivated by an unlawful desire to penalize or
6 discourage his protected activity. Accordingly, the Union has successfully established
7 its *prima facie* case of discrimination.

8 **Employer's Burden of Production**

9 **1. The April 16, 2010 Reprimand**

10 Once the charging party establishes a prima facie case of retaliation, the CERB
11 applies the three-step analysis pursuant to Trustees of Forbes Library v. Labor
12 Relations Commission, 384 Mass. at 566, which shifts the burden to the employer to
13 produce a legitimate, non-discriminatory motive for taking the adverse action. The
14 employer must state a lawful reason for its decision and produce supporting facts
15 indicating that the proffered reason was actually a motive in the decision. Trustees of
16 Forbes Library, 384 Mass. at 566; Quincy School Committee, 27 MLC at 92;
17 Commonwealth of Massachusetts, 25 MLC at 46.

18 When Wallace reviewed Horsman's April 16, 2010 complaint, she determined
19 that his claims were unsubstantiated; however, she never elucidated the actual
20 evidence on which she relied to make her determination and failed to explain whether
21 she interviewed other potential witnesses or conducted further investigation into the
22 April 16, 2010 event. Instead, the record shows that Wallace repeatedly stated in her
23 August 6, 2010 dismissal letter that there was "insufficient evidence to substantiate"

1 Horsman's claims based on her sole interview with White. I find that the
2 Commonwealth's reasons for White's April 16, 2010 reprimand was pretextual because
3 it failed to show that White was warranted in reprimanding Horsman on that date. See
4 Commonwealth of Massachusetts, 25 MLC at 46 (the employer's burden to produce
5 legitimate, non-discriminatory reasons for taking the adverse action is more than simply
6 stating an unsubstantiated allegation).

7 Based on the totality of the evidence presented, I find that while the
8 Commonwealth offered reasons for the April 16, 2010 reprimand against Horsman, it
9 failed to substantiate the reasons for that reprimand. See Trustees of Forbes Library,
10 384 Mass. at 566; Quincy School Committee, 27 MLC at 92; Commonwealth of
11 Massachusetts, 25 MLC at 46. Consequently, because the Commonwealth failed to
12 produce credible evidence of a legitimate, non-discriminatory reason for White's April
13 16, 2010 reprimand, I find that the reprimand violated Section 10(a)(3) of the Law

14 **B. The Termination**

15 The Union contends that the Employer's reasons for terminating Horsman (based
16 on budget issues) were pretextual because the Fernald's budget issues had been on-
17 going for over seven years, as of 2010, and yet the Commonwealth continued to keep
18 the facility open and operational as of 2013. Further, the Union asserts that the
19 Commonwealth had announced its intent to relocate the Waverly Redemption Center in
20 June of 2010, but continued to operate at the Fernald campus and conducted large
21 volume pick-up and drop-off runs for sixteen months after Horsman's termination in
22 August of 2010. However, the record shows that the Employer based Horsman's
23 termination on the June 2010 MES consolidation plan which sought to relocate the

1 Waverly Redemption Center, reduce the number of pick-ups and drop-offs and
2 eliminate both Horsman's MTD position and White's Rehabilitation Counselor A/B
3 position. Based on this evidence, I conclude that the Commonwealth presented
4 legitimate, non-pretextual reasons for terminating Horsman's employment as an MTD at
5 the Waverly Redemption Center. Town of Easthampton, 35 MLC at 265; (citing Boston
6 Water & Sewer Commission, 29 MLC 176, 181, MUP-1677 (Apr. 2, 2003)).

7 **Mixed Motives**

8 Once the employer produces evidence of a legitimate, non-discriminatory reason
9 for taking the adverse action, the case becomes one of "mixed motives" and the CERB
10 shifts the burden to the charging party to demonstrate that "but for" the protected
11 activity, the employer would not have taken the adverse action. Trustees of Forbes
12 Library, 384 at 565-566; Suffolk County Sheriff's Department, 27 MLC at 160; Quincy
13 School Committee, 27 MLC at 92. The Union contends that, but for the White's animus
14 against Horsman's protected activities, the Employer would not have reprimanded him
15 on April 16, 2010 nor terminated his employment in August of 2010. The Union also
16 contends that White's animus ultimately infected Wallace's decisions to dismiss his April
17 16, 2010 complaint and support his termination.

18 I agree that Wallace was infected by White's anti-union animus against Horsman
19 based on Wallace's failure to adequately investigate Horsman's complaint. See Town
20 of Andover, 17 MLC at 1482 (town manager's overriding feeling that employee would
21 not be a "team player" was based on the evaluation and recommendations of other
22 supervisors; thus, creating a nexus between the chief's animus and the manager's
23 decision not to promote); see also Town of Easthampton, 35 MLC at 264-25 (where the

1 decision-maker does not make an independent review of the facts and bases the
2 decision to act on the evaluations and recommendations of other supervisors, the
3 motives of the supervisors in a discrimination case will be imputed to the decision-
4 maker). While this thinking supports evidence of unlawful motivation, I do not find that
5 anti-union animus against Horsman was the proximate cause for his termination. See
6 generally Provincetown School Committee, 13 MLC 1396, 1398, MUP-5752 (Jan. 27,
7 1987).

8 Instead, the Commonwealth showed that based on its October 20, 2009 Open
9 House invitation, the Employer had planned to relocate the Waverly Redemption Center
10 away from the Fernald campus. It also showed that in its June of 2010 MES
11 consolidation plan, Pula and Keddal decided to eliminate both White's Rehabilitation
12 Counselor A/B position (based on redundancy due to the Greenhouse merger) and
13 Horsman's MTD position (based on reduced runs, decreased profits and the need to
14 pay rent and utility costs at the Redemption Center's new future location). Additionally,
15 the Commonwealth showed that it needed an additional \$10,000 to keep Horsman
16 employed as a full-time MTD at the Waverly Redemption Center, but after the Open
17 House in October of 2009 failed to yield more than two referrals out of an expected ten,
18 the ability to operate the Redemption Center at Fernald and maintain Horsman's and
19 White's positions became untenable. Although the Employer did not relocate the
20 Waverly Redemption Center until 16 months after Horsman's termination, there is no
21 evidence that this delay was a pretext for eliminating his MTD position. Instead, once
22 the Commonwealth selected a new location, it required needed an additional eight to
23 ten months to finalize the agreement and complete the relocation process.

1 Consequently, I find that the Union has failed to satisfy its shifting burden because it
2 cannot demonstrate that but for Horsman's activity, the Commonwealth would not have
3 terminated his employment in violation of Section 10(a)(3) of the Law.

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

5 **I. Protected Activity**

6 The elements of a Section 10(a)(4) prima facie case are essentially the same as
7 Section 10(a)(3), except to satisfy the first prong, Horsman must establish that he
8 signed or filed an affidavit, petition or complaint or gave information or testimony as part
9 of a DLR proceeding. Commonwealth of Massachusetts, 25 MLC at 46. It is
10 undisputed that Horsman filed a prohibited practice charge against the Commonwealth
11 on December 10, 2008, which the DLR docketed as SUP-08-5451. Also, neither party
12 disputes that Horsman was engaged in protected activity related to SUP-08-5451 when
13 he participated in the in-person investigation at the DLR on February 9, 2009 and the
14 hearing on August 26, 2009 and September 26, 2009. Accordingly, the Union has
15 satisfied this part of its prima facie case.

16 **II. The Employer's Knowledge of Horsman's Protected Activities in 2009**

17 The Commonwealth does not dispute that Horsman was engaged in protected
18 activity when he filed a charge with the DLR in SUP-08-5451 on December 10, 2008.
19 However, it denies that either Pula or Wallace knew about Horsman's protected
20 activities as they related to his SUP-08-5451 DLR proceedings.

21 The record shows that the Commonwealth knew about Horsman's charge and
22 his participation in the in-person investigation at the DLR for SUP-08-5451 on February
23 9, 2009. While Pula denied knowing about Horsman's involvement with SUP-08-

1 5451,²⁷ I have found that the Commonwealth's stipulation regarding its knowledge of
2 Horsman's charge and investigation includes both Wallace and Pula. Further, the
3 record shows that Wallace also knew about Horsman's participation in the DLR hearing
4 related to SUP-08-5451 on August 26 and September 16, 2009 because she
5 participated in that proceeding. Based on this evidence, I find that the Commonwealth
6 was aware of Horsman's charge, complaint and participation in the DLR hearing.
7 Accordingly, the Union satisfies the second element of its prima facie case.

8 **III. The Employer's Adverse Action Against Horsman²⁸**

9 The Commonwealth argues that Pula's February 25, 2009 reprimand was not an
10 adverse action because it merely corrected Horsman's work schedule. It also argues
11 that White never reprimanded Horsman on September 22, 2009 because Wallace later
12 determined that his allegations were unsubstantiated without any evidence of material
13 disadvantage in salary, grade or other objective term of his employment.

14 Contrary to the Commonwealth's arguments, I find that Pula's February 25, 2009
15 reprimand caused Horsman to suffer a material disadvantage because it changed
16 Horsman's work hours to 8:00 a.m. to 4:30 p.m., and prior to that date, he had regularly
17 worked from 7:30 a.m. – 4:00 p.m. Similarly, Horsman suffered a material disadvantage

²⁷ Because I found that Pula's reasons for reprimanding Horsman in February of 2009 were pretextual, and based on the timing of that reprimand, I infer that Pula knew about Horsman's protected activity at the February 9, 2009 DLR investigation. See generally Richard Fowler vs. Labor Relations Commission, 56 Mass. App. Ct 96, 100-02 (2002) (citing NLRB vs. Joseph Antell, Inc., 358 F. 2d 880, 883 (1966) (an inference of knowledge may be based on such circumstantial evidence as the timing of the alleged discriminatory actions, the animus against the Union, and the pretextual reasons given for the adverse personnel actions. Pretext may be considered as part of the totality of circumstances from which employer knowledge may be inferred).

²⁸ As previously noted, I assess the February 25 and September 22, 2009 reprimands under Section 10(a)(4).

1 when, on September 22, 2009, Pula restricted his Saturday lunch breaks to the kitchen
2 area and eliminated his access to Fernald residential assistance during his truck runs.
3 Prior to that date Horsman had no Saturday lunch restrictions and had access to
4 Fernald residential assistance during his truck runs. Finally, it is well-established that
5 employee reprimands constitute adverse action. See Athol-Royalston School
6 Committee, 28 MLC at 214.

7 **III. Unlawful Motivation**

8 The Commonwealth maintains that there is no evidence of unlawful animus
9 against Horsman by Pula, White or Wallace. It also maintains that Horsman's complaint
10 against White in September of 2009 was unfounded based on Wallace's conclusive
11 determination on January 19, 2010 that White had not engaged in any wrongdoing.

12 **A. The February 25 and September 22, 2009 Reprimands**

13 The Union argues that the Commonwealth was motivated by unlawful union
14 animus based on the timing of Horsman's reprimands, which were issued within two
15 weeks of his SUP-08-5451 in-person investigation on February 9, 2009 and six days of
16 the hearing on September 16, 2009. It also argues that the Commonwealth provided
17 inadequate reasons for Pula's February 2009 reprimand and White's September 22,
18 2009 reprimand. Specifically, it contends that Pula's February 25, 2009 reprimand was
19 unwarranted because immediately after she met with Horsman to address his
20 complaint, she restored his work hours to 7:30 a.m. – 4:00 p.m. without further action
21 against him. It also contends that the reasons given by Wallace on dismissing
22 Horsman's September 25, 2009 complaint show that the reprimand was unwarranted.

23 I agree with the Union and find circumstantial evidence of unlawful employer

1 motivation against Horsman based on timing. First, the timing of Pula's written
2 February 25, 2009 reprimand occurred approximately two weeks after his DLR hearing
3 in SUP-08-5451. Second, the timing of White's reprimand on September 22, 2009
4 occurred just six days after Horsman had completed his participation in the DLR hearing
5 in SUP-08-5451. Based on the timing of Horsman's protected activity, I find anti-union
6 animus motivated the reprimands on February 25 and September 22, 2009. See Labor
7 Relations Commission v. Blue Hills Spring Water Co., 11 Mass. App. Ct. 50 (1981);
8 Town of Somerset, 15 MLC 1523, 1529, MUP-6404 (March 9, 1989)).

9 I also find circumstantial evidence of unlawful employer motivation against
10 Horsman because the reasons given for the reprimands were inadequate. Pula's
11 February 25, 2009 written reprimand was unwarranted because there was no evidence
12 that Horsman improperly reported his work hours and, immediately after meeting with
13 Horsman, she restored his work hours to his original 7:30 a.m. – 4:00 p.m. schedule,
14 which he had worked since becoming an MTD at the Waverly Redemption Center in
15 2008. White's September 22, 2009 reprimand was also unwarranted because after
16 meeting with Horsman on December 10, 2009, Pula and Wallace later restored his
17 access to at least one Fernald residential assistant during his truck runs and clarified
18 that he could take his Saturday lunch breaks away from the kitchen area if a staff
19 person covered the register. This evidence reveals the existence of unlawful animus
20 against Horsman. See Commonwealth of Massachusetts, 14 MLC at 1748.

21 **IV. Employer's Burden of Production**

22 **A. The February 25 and September 22, 2009 Reprimands**

23 I find that the Commonwealth's reasons for reprimanding Horsman on February

1 25 and September 22, 2009, were pre-textual. First, Pula alleged that she reprimanded
2 Horsman on February 25, 2009 for reporting an improper work schedule. However,
3 Pula later admitted that she had reprimanded Horsman in error for signing in and out at
4 his properly scheduled time of 7:30 a.m. – 4:00 p.m. Thus, Pula's reason was
5 pretextual because it was admittedly wrong. Commonwealth of Massachusetts, 25
6 MLC at 46 (employer's burden to produce legitimate, non-discriminatory reasons for
7 taking the adverse action is more than simply stating an unsubstantiated allegation).

8 Second, White alleged that she did not reprimand Horsman but only
9 communicated certain instructions on behalf of Pula on September 22, 2009. However,
10 the record shows that on that date White specifically reprimanded Horsman for using
11 Fernald residential assistants for truck runs and taking Saturday lunch breaks outside of
12 the kitchen area. Only after Horsman complained to Wallace on September 25, 2009
13 and met with Wallace and Pula on December 10, 2009, was his access to Fernald
14 residential assistance restored and his Saturday lunch breaks corrected, permitting his
15 to take them outside of the kitchen area when another staff covered the register. When
16 Wallace reviewed Horsman's complaint on January 19, 2010, she determined that it
17 was unsubstantiated but she failed to offer additional evidence other than her interview
18 with White to support the dismissal of his complaint. There is no evidence that Wallace
19 interviewed other potential witnesses or conducted further investigation into the
20 September 22, 2009 incident. I also find these reasons to be pretextual because there
21 was no proof that Horsman had committed any wrongdoing. Commonwealth of
22 Massachusetts, 25 MLC at 46.

23 Thus, based on the totality of the evidence presented, I find that even though the

1 Commonwealth offered reasons for its February 25 and September 22, 2009
2 reprimands against Horsman, it failed to substantiate the reasons for those
3 reprimands. See Trustees of Forbes Library, 384 Mass. at 566; Quincy School
4 Committee, 27 MLC at 92; Commonwealth of Massachusetts, 25 MLC at 46.
5 Consequently, because the Commonwealth cannot present a legitimate, non-pretextual
6 reason for reprimanding Horsman in February and September of 2009, I conclude that
7 the Employer unlawfully discriminated against Horsman in violation of Section 10(a)(4)
8 of the Law by issuing those reprimands. Commonwealth of Massachusetts, 25 MLC at
9 46.

10 **B. Horsman's Termination**

11 Conversely, as discussed above, I conclude that the Commonwealth's reasons
12 for terminating Horsman's employment on August 21, 2010 were legitimate and not
13 pretextual based on the on-going budget issues impacting the Fernald and based on the
14 June 2010 MES consolidation plan. Town of Easthampton, 35 MLC at 265; (citing
15 Boston Water & Sewer Commission, 29 MLC at 181). For the reasons discussed
16 above, I also conclude that the Union has not established that the Commonwealth
17 would not have terminated Horsman but for his protected activity.

18 CONCLUSION

19 Based on the record and for the reasons explained above, I conclude that the
20 Commonwealth violated Section 10(a)(3) of the Law when it reprimanded Horsman on
21 April 16, 2010. I also conclude that the Commonwealth violated Section 10(a)(4) of the
22 Law when it reprimanded Horsman on February 25 and September 22, 2009. However,

1 the Commonwealth did not violate the Law when it eliminated his MTD position and
2 terminated his employment at the Waverly Redemption Center on August 21, 2010.

3 ORDER

4 WHEREFORE, based on the foregoing, it is hereby ordered that the Commonwealth
5 of Massachusetts shall:

6 1. Cease and desist from:

- 7
- 8 a. Discriminating against Peter Horsman for filing a prohibited practice
9 charge at the DLR and for participating in proceedings related to that
10 charge at the DLR;
 - 11
 - 12 b. Discriminating against Peter Horsman for engaging in concerted,
13 protected activity;
 - 14
 - 15 c. In any like manner, interfering with, restraining and coercing Peter
16 Horsman in any right guaranteed under the Law.
 - 17

18 2. Take the following affirmative action that will effectuate the purpose of the
19 Law:

- 20
- 21 a. Rescind the February 25, 2009, September 22, 2009 and April 16,
22 2010 reprimands;
 - 23
 - 24 b. Sign and post immediately in conspicuous places where employees
25 usually congregate or where notices to employees are usually posted,
26 including electronically, if the Commonwealth customarily
27 communicates to its employees via intranet or e-mail, and maintain for
28 a period of thirty (30) consecutive days thereafter signed copies of the
29 attached Notice to Employees; and
 - 30
 - 31 c. Within thirty (30) days, notify the DLR in writing of the steps taken to
32 comply with this decision and Order.

33 SO ORDERED.

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 13.02(1)(j), 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.

