Journal of Collective Bargaining in the Academy

Volume 0 *National Center Proceedings 2017* Article 67

March 2017

Legal Issues in Higher Education - Handout: Board of Higher Education on Bridgewater State University and Jon L. Bryan

2016 WL 7094056 (MA LRC)

Labor Relations Commission

Commonwealth of Massachusetts
IN THE MATTER OF BOARD OF HIGHER EDUCATION/BRIDGEWATER STATE **UNIVERSITY**
AND
JON L. BRYAN

Case No.: SUP-14-3771
Date issued: November 30, 2016

CERB Members Participating:
***1** Marjorie F. Wittner
Chair
Katherine G. Lev
CERB Member

Appearances
Alfred Gray, Esq.
Representing the Board of Higher Education Bridgewater State **University**
Dr. Jon L. Bryan
Pro Se

CERB Decision on Review of Hearing Officer's Decision

SUMMARY

The issue in this case is whether the Board of Higher Education/Bridgewater State **University's** (Employer or **University**) acts or omissions in connection with Professor Jon Bryan's (Bryan) attempts to be reimbursed for $77.75 in hotel expenses incurred during an academic conference that he attended in the fall of 2013 and to get the teaching schedule of his choice in the fall of 2014 were part of an overall scheme to retaliate against him for engaging in concerted activities protected under Section 2 of M.G.L. c. 150E (the Law) in violation of Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law.

After the submission of certain stipulated facts, two days of hearing, and the submission of post-hearing briefs by both parties, the Hearing Officer concluded that Bryan had failed to establish that the delay in the reimbursement was unlawfully motivated. On that record, he further found that the assigned teaching schedule did not constitute an adverse action and that Bryan had failed to establish an unlawful motivation in making that assignment.

Bryan filed an appeal and a supplementary statement with the Commonwealth Employment Relations Board arguing numerous errors of fact and law.[1] After reviewing the record, including the hearing exhibits, the decision, and the parties' briefs, including Bryan's supplementary statement, we affirm the dismissal of the Complaint for the reasons stated below. The fact that the **University's** conduct could be fairly characterized as flawed in some way constitutes neither direct nor circumstantial evidence of unlawful motivation, where, as here, there is no other evidence showing that Bryan was treated differently than other similarly-situated employees or that the **University's** higher levels of administration and/or any of the personnel directly involved bore any hostility towards Bryan's protected, concerted activity or to Union activity in general. We affirm the dismissal of the Complaint on these grounds.

Facts[2]

Background

Bryan has been a tenured professor at the **University** since 1987. At the time of this proceeding, he was a professor at the Department of Management within the **University's** Ricciardi College of Business (RCOB). Bryan is a member of the Massachusetts State College Association (MSCA or Union), which represents the full-time faculty at the **University**. The parties stipulated that, prior to the issues that were the subject of hearing, Bryan engaged in protected, concerted activity within the meaning of Section 2 of the Law. This conduct included filing a grievance over a scheduling dispute. The grievance went to arbitration and a hearing was held August 25, 2013. Also, two years earlier, on August 27, 2012, Bryan filed a charge with the Department of Labor Relations (DLR) that, similar to the matter before us, alleged that the **University** retaliated against him for engaging in protected, concerted activity by, among other things, denying his request to travel to an academic conference, cancelling a winter intersession class, and requiring him to teach on campus three-days a week.[3] The DLR dismissed portions of the 2012 charge as untimely and dismissed other portions for lack of probable cause. The CERB affirmed the dismissal.[4] During the hearing, Bryan characterized his prior disputes with the **University** as "acrimonious" and the **University** did not challenge that assessment.

***2** As described in greater detail below, the alleged retaliation at issue here took the form of a delayed reimbursement for $77.75 of hotel expenses that he incurred while attending academic conference in Cork, Ireland. It also allegedly resulted in the denial of his preferred class schedule for the fall of 2014.

Count I: Travel Reimbursement

In September 2013, the Employer's Center for Advancement of Research and Scholarship (CARS) approved a $1500 travel grant for Bryan to attend and present at an academic conference in Cork, Ireland the following month. On September 18, 2013, Bryan sent an email to the Employer's Institutional Travel Coordinator, Gregory DeMelo (DeMelo), seeking authorization to rent a car while in Ireland.[5] DeMelo promptly replied to Bryan's email, indicating that he would forward the request to Vice-President Mike Gomes (Gomes), but that he needed additional details about the rent and insurance coverage. DeMelo also asked if he could help with Bryan's air arrangements. Bryan answered the questions about the rental car, but did not reply to the offer of air travel assistance.[6] DeMelo then forwarded Bryan's request to Gomes. After receiving no response from DeMelo or Gomes, Bryan sent follow-up emails to DeMelo on October 4 and October 10, and to Gomes on October 11, but heard nothing further until Gomes approved the expense on October 11.[7]

Bryan left for the trip on October 13, 2013 and returned on October 21, 2013. After he returned, Bryan contacted CARS personnel regarding reimbursement for the hotel costs and other travel costs he had incurred but for which he had not received advance approval.[8] This led various personnel in the CARS office to contact DeMelo to ascertain whether Bryan had received the requisite approval for these expenses. In particular, on November 1, 2013, Caroline Anderson (Anderson), an administrative assistant in the CARS office, wrote to DeMelo asking, among other things, if the travel office had authorized Bryan to book his hotel on his own. DeMelo replied that it had not. Anderson wrote back to DeMelo on November 1, stating that she would "let Pam and Martina [Arndt] handle it."[9] On November 14, 2013, Arndt sent an email to Bryan informing him, among other things, that CARS could not reimburse him for his hotel expenses since he paid for it himself and did not book through the travel office. Bryan wrote back to Arndt on November 18 explaining that, since 2010, DeMelo had approved Bryan's post-travel expenses based on Bryan's ability to obtain "dramatically low cost travel opportunities."[10] On December 10, 2013, Arndt wrote back indicating that they needed evidence of DeMelo's approval of the hotel rate before they would reimburse him.

One week later, on December 17, 2013, Bryan sent an email to DeMelo reminding him that he had previously been very helpful regarding "self-booking flexibility." Bryan then proceeded to inform DeMelo that he had "recently attended a conference in Cork, Ireland, and, as usual, was unclear until the last moment about my flight and hotel situation." The email further indicated that Bryan had received "deeply discounted" hotel rates and sought DeMelo's approval of the same so that "CARS could move his reimbursement forward." The next day, on December 18, 2013, Bryan wrote to Anderson, indicating that he had contacted DeMelo, but did not know when he would hear back from him. Bryan asked whether CARS could submit the non-hotel expenses for which he sought reimbursement[11] and address the hotel reimbursement later. Anderson agreed to do that if Bryan did not hear from DeMelo by noon on December 18, 2013. After Bryan did not hear back from DeMelo, he wrote an email to Anderson on January 8, 2014 that states in pertinent part:
***3** Hi Carolyn,

I want to thank you again for your kind assistance in obtaining the majority of my CARS expenses for my November 2013 conference. With $1422.25 now paid, I have a balance of $77.75 from the CARS $1500 allocation available to pay a small portion of my conference hotel bills that have already been paid with my personal funds.

I have not received any response from the . . . travel office pursuant to my mid-December request for approval of payment in the manner that has been their extensive practice. Per the earlier travel office guidelines...there was no issue in the payment of my low cost, self-booked hotel expenses for my CARS Bosnia trip in September 2013, nor with the Lithuania trip in April 2014. Since the $77.25 maximum available is just a small fraction of my actual expense of over $400 for my five nights of conference hotel bills, I would hope they would follow that earlier guidance and pay the $77.75. . . .

If possible, and given my inability to receive a response from [the travel office], please submit the $77.75 for my hotel bills. I am very sorry that I have not been able to obtain any response to your request from Boyden.

Thank you again for your help,

Jon

Anderson did not reply to this email. There were no further communications between Bryan, DeMelo or Anderson or anyone else in the travel office and/or CARS regarding Bryan's Ireland hotel expenses before he filed this charge in June 2014.

In September 10, 2014, DeMelo wrote to Bryan, asking him to "[p]lease accept my apology," since he had been "made aware" that Bryan had still not received the reimbursement.[12] DeMelo then wrote that he had no objection to the reimbursement request as presented. Bryan replied a few hours later, thanking him and asking him to forward his approval to the appropriate party. DeMelo replied the next morning, asking Bryan to remind him which department had funded the trip. Bryan wrote back that it was CARS. DeMelo then forwarded the email chain to Anderson on September 11, 2014 indicating that Bryan had asked him to pass along the email to her office.

Bryan had not received the $77.25 as of the date of the hearing.[13] He had not previously experienced similar delays in travel reimbursement.[14]

Prior to June 2014, DeMelo was unaware of Bryan's protected concerted activity.[15]

Class Schedules

The dispute over Bryan's Fall 2014 teaching schedule began in the fall of 2013. At this time, RCOB was led by Dean Elmore Alexander (Alexander), who had recently been hired. Alexander delegated scheduling responsibility to Associate Dean Jeanean Davis-Street (Davis-Street), who was also new to her position. Davis-Street had previously served as an Assistant Professor and Department Chair in RCOB's Accounting and Finance Department. As Department Chair, she had done scheduling but neither she nor Alexander had ever done scheduling for the Management Department.

***4** Alexander learned about Bryan's protected, concerted activities shortly after he became Dean, when Bryan had a conversation with Alexander referencing issues he had had with the prior Dean. During this conversation, Bryan expressed his hope that he could have a "fresh start."[16] The Hearing Officer credited Davis-Street's testimony that she first learned about Bryan's protected, concerted activities several months later, in the spring of 2014, when Bryan raised them during the scheduling dispute.[17]

On December 4, 2013, Bryan submitted his proposed fall 2014 teaching schedule to Department of Management Chair Pieter Sietins (Sietins). The schedule consisted of three different management courses (MGMT 130, 140 and 340) that were either fully web-based, or web hybrids.[18] Bryan also submitted an alternative schedule to Sietins that consisted of a different combination of the same three courses in web or web-hybrid form. Both schedules reflected Bryan's desire to teach on consecutive days and to limit his time on campus. On March 24, 2014, which was the date the schedule system "closed" for each department, Davis-Street examined and rejected each of the proposed schedule based on the following criteria: 1) they consisted entirely of web-based and web-hybrid courses 2) they did not make efficient use of classroom space; 3) did not meet the requirement that at least fifty percent of the course load involve face-to-face class time; and 4) did not satisfy

so-called Vernon rules that concerned adequate classroom space and prioritizing full classroom courses over on-line courses.[19]

This initial rejection led to a series of emails between Bryan, Sietins, Alexander and Davis-Street between March 24 and April 2 regarding Bryan's proposed schedule. Bryan and Sietins continued to suggest alternative schedules but both Davis-Street and Alexander rejected them because they did not comply with the criteria set forth above.[20] Then, on April 3, 2014, Bryan submitted a schedule that included teaching a section of the undergraduate MGMT 340 class on Tuesday evening, at 6 p.m. Davis-Street rejected this change in the belief that an evening undergraduate course could not be used to satisfy the day load requirement. In particular, in two separate emails that Davis-Street sent to Bryan on April 3, she indicated that one of the guidelines that must be followed in scheduling courses was that, "No more than half of the day credit load can be taught as web or web-hybrid (i.e. faculty must teach at least 2 courses on campus during the 9 am - 4 pm time slots)." As reflected in subsequent emails, Alexander agreed with this interpretation of the policy, but Bryan did not.[21]

Upon learning that his schedule with an evening course had been rejected, Bryan sent several emails to Davis-Street. He sent the first one on April 3 at 3:25 p.m. Referencing his recent arbitration hearing that concerned a different semester's scheduling dispute that arose under former Dean Marian (Extejt) Bryan stated:

> ***5** The Provost[22] was clear in his testimony at arbitration that any course taught after 4 pm would count toward the three day requirement if it is a day load course. My course was such and qualified according to the Provost. I will provide you with a copy of the transcript of his sworn testimony if necessary. If I am to be denied on that basis, please tell me today so that I can attempt to deal with that issue immediately.

Bryan sent two more emails on April 3 that discussed London's arbitration testimony.[23] An email he sent at 9:35 p.m. proposed two schedules that he claimed were compliant with the Provost's guidelines: one that contained an evening course and one that did not. In this email, Bryan also informed Davis-Street that her initial rejection of his first schedule containing hybrid courses was now the subject of "an extant grievance." He further stated:

> If I could humbly suggest, this process has been chaotic. I am the most senior member of the RCOB staff, and the Agreement affords me with scheduling status. I should not be groveling for courses at the very last minute while my junior colleagues have been seated in courses. This matter is also incorporated in the Article XII grievance for Fall 2014. A onetime chaotic event might be understood, but this has become a habit in my case for the RCOB Dean's office.

As detailed in the Hearing Officer's decision, the correspondence between Bryan, Sietins, Alexander and Davis-Street continued through April 8, 2013. On April 7, Bryan sent Alexander an email asking him to "utilize your authority as Dean to waive the online course limitation for one semester" and allow him to teach one of his classes online. Alexander refused to do so, stating that the rule regarding the proportion of on-line courses was "not his to waive."[24] On April 8, Bryan accepted a schedule that consisted of four on-line courses and two face-to- face day courses: MGMT 130-010, meeting on Monday and Wednesday from 1:50 - 3:05 p.m. and MGMT 340-001-meeting on Thursdays from 2-4:40 p.m.

On April 23, 2014, Davis-Street sent an email to Associate Provost Michael Young (Young) regarding Bryan's fall 2014 schedule explaining why the schedules Bryan originally submitted violated the Provost's guidelines that no more than 50% of a faculty member's course can be taught as a web/web-hybrid and failed to meet the registrar's need for efficient classroom usage. Young's reply stated that they needed to discuss the matter.

On May 25, 2014, London sent an email to Alexander, Davis-Street and Extejt containing the subject line "Additional Documents for Bryan evidence review."[25] The email stated:

> As you may know, faculty in other colleges at BSU sometimes do teach evening courses as part of day load. Please let me know, to the best of your knowledge, if any faculty member in RCOB has done so, now or in the past.[26]

***6** On May 26, 2014, Davis-Street sent an email stating that, during the time she served as Chairperson of the Accounting and Finance Department from 2010-2013 and during her time as Associate Dean, evening courses were not used as part of

their day load. She also indicated that while she was Associate Dean in the AVSC and MGMT departments, evening courses were not used as part of a faculty member's day load, but that she would go back to the previous year and to schedules from previous years, if needed.

As a result of this email and the meeting she held with Young, Davis-Street realized that she had been misapplying the day load rule with respect to undergraduate evening courses, not only for all of RCOB in the fall of 2014, but when she did scheduling for the Accounting and Finance Department.[27] As a result, on June 6, 2014, Davis-Street emailed Sietins, Alexander and Bryan regarding MGMT 340 for the fall 2014. She indicated that, after reviewing three years of offerings for this course, only two sections were generally offered. She further indicated however, that if Sietins were willing to schedule a third section of MGMT 340 on Tuesday evenings, it could be added to the schedule. She added, however, that "the evening section may have insufficient enrollment and may be cancelled." Davis-Street therefore recommended that they keep Bryan listed as the instructor for the Thursday 2:00 - 4:00 pm section of MGMT 340 but that they list a "TBA" MGMT 340 section that met on Tuesday from 6:00 p.m. - 8:40 p.m. until they were sure that enrollment numbers were sufficient for the evening section. If that occurred, Davis-Street recommended that they switch Bryan to the evening section and find a new instructor for the day section.

Later that day, Sietins emailed Davis-Street asking whether her email meant that the evening course would satisfy the day load requirement and expressing that he had originally supported the evening course as a solution. Davis-Street wrote back to Sietins on June 9, stating that, "There was never any dispute that evening courses would satisfy the 3-day requirement; evening courses have consistently been used to satisfy the 3-day-on campus rule since I came to BSU." Rather, she explained that, in addition to meeting the three-day requirement, the schedule had to meet the 50% lecture requirement, which her new proposed schedule accomplished.[28]

On June 12, 2014, Bryan emailed Davis-Street indicating that changing his Thursday MGMT 340 (2-4:40 pm) class with a "non-cancellable Tuesday MGMT 340 (6-8:40 pm) class would be an acceptable resolution."" He further stated, "If the employer is concerned about enrollment at this late date, it could instead and on a one-time basis, operate the class online, which would surely populate." Bryan concluded by stating, "With that resolution," he was "prepared to execute a formal Settlement Agreement for Grievance 29, currently at Step 2."

***7** Davis-Street replied that, like other courses, whether day, evening or online, the evening Section of MGMT 340 would be cancelled if there were insufficient enrollment. She rejected his request to make this an on-line course because that would mean he would only have a two-day schedule and 50% of his courses would be taught in a web, web-hybrid format. Bryan replied that he would accept the solution that Davis-Street offered, of a contingent Tuesday evening section of MGMT 340, but keeping the Thursday day section of that class if the evening section did not populate. He indicated, however, that Davis-Street's refusal to make an evening section non-cancellable meant that it did not resolve his grievance and that he would take "further legal action given the implications of fraud, perjury and the violation of the Massachusetts Uniform Arbitration act that are embedded in this entirely unnecessary scheduling fiasco." Because offering the evening class would not resolve the pending grievance, the Dean's office decided not to offer it. Accordingly, the fall 2014 schedule that Bryan ended up teaching consisted of day courses that met on Monday, Tuesday and Thursday.

As of the hearing, there were fifteen professors in the Management department. In the fall of 2014, eleven of those fifteen professors taught on non-consecutive days.[29] In addition, the other fourteen professors were in compliance with the **University's** scheduling guidelines or had recognized exceptions.[30]

Opinion[31]

The Hearing Officer correctly stated the standard for determining whether an employer has violated Section 10(a)(3) of the Law by retaliating or discriminating against an employee for engaging in concerted, protected activity. To establish a prima facie case, a charging party must show that: 1) the employee engaged in concerted activity protected by Section 2 of the Law; 2) the employer knew of the concerted, protected activity; 3) the employer took adverse action against the employees; and 4) the employer's conduct was motivated by a desire to penalize or discourage the protected activity. Town of Carver, 35 MLC 29, 47, MUP-03-3894 (June 30, 2008).

To support a claim of unlawful motivation, a charging party may proffer direct evidence of discrimination. Town of

Brookfield, 28 MLC 320, 327-328 (MUP-2538) (May 1, 2002), *aff'd sub nom*. Town of Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005). Unlawful motivation also may be established through circumstantial, or indirect, evidence and reasonable inferences drawn from that evidence. Town of Carver, 35 MLC at 48 (citing Town of Brookfield, 28 MLC at 327-328). Several factors may suggest unlawful motivation, including the timing of the alleged discriminatory act in relation to the protected activity, triviality of reasons given by the employer, disparate treatment, an employer's deviation from past practices, or expressions of animus or hostility towards a union or the protected activity. Town of Carver, 35 MLC at 48 (citing Melrose School Committee, 33 MLC 61, 69, MUP-02-3549 (September 27, 2006) (further citations omitted).

Travel Count

***8** The Hearing Officer dismissed this count based on Bryan's failure to establish the fourth element of the prima facie case, unlawful motivation.[32] After finding that Bryan had not established direct evidence of unlawful motivation, the Hearing Officer considered whether Bryan had provided sufficient circumstantial evidence to establish this element. As explained below, the Hearing Officer considered and rejected Bryan's arguments concerning hostile work environment, and the timing, deviations in procedure and delay in processing his reimbursement request, ultimately concluding that none of these factors demonstrated unlawful animus.

Bryan disagrees with virtually all aspects of the Hearing Officer's analysis. We address his arguments below.

Direct Evidence Standard

Bryan contends that the Hearing Officer erroneously found there to be no direct evidence of discrimination. He argues that, under the standard set forth in Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000), DeMelo's failure, as head of the travel office, to respond to his emails for many months despite admittedly receiving them, demonstrates that a forbidden bias was present in the workplace. We disagree because the record contains no evidence that any **University** agent, including DeMelo, engaged in any type of expressive conduct, including making disparaging remarks or threats expressing hostility or displeasure towards Bryan's union activities or towards unions or union activity in general. See, e.g., Town of Carver, 35 MLC at 48 (direct evidence of unlawful motivation found where during a grievance hearing addressing intra-union dispute, selectman stated to new union president that he ought to lay off the entire police force and let the State Police take over); Town of Brookfield, 28 MLC at 327-328, (selectman's statements to charging party that it was "not wise for him to start a union before his reappointment;" that "unions were trouble" and that "employee might not be around to enjoy a union," constitutes direct evidence that failure to reappoint was unlawfully motivated); Town of Dennis, 29 MLC 79, 83, MUP-01-2976 (October 10, 2002) (finding direct evidence of discrimination where supervisor's statements linked charging party's low evaluation score to the grievances he had filed); City of Easthampton, 35 MLC 257, MUP-04-4244 (April 23, 2009) (direct evidence of union animus found where supervisor told employee filing a grievance over being denied a transfer that "you are a new employee and you are already putting in a grievance?" "I am the one who decides who gets a job around here. You are not going to get this job and I will fight you every way I can."). Under this well-established standard, the **University's** protracted response to Bryan's request to be reimbursed does not constitute direct evidence of unlawful motivation.

General Retaliatory Context

***9** Throughout his appeal, Bryan also contends that the Hearing Officer either ignored or understated the "retaliatory context" in which the complained-of events occurred. With respect to the travel count, Bryan argues that Hearing Officer improperly glossed over the significance of the fact that there had also been a one-month delay in getting approval for the rental car *before* he took his trip, which resulted in his being unable to make hotel arrangements prior to his departure. Bryan argues this is significant for two reasons: first, it demonstrates the "environment of rapidly-increasing hostility against him at high levels in the administration," and second, it counters other aspects of the Hearing Officer's decision that Bryan argues wrongly suggest that he was responsible for the delay in hotel reimbursement.

We disagree because the Hearing Officer acknowledged that Bryan was unable to make his hotel arrangements until after he received the rental car approval on October 11, and accurately set forth the timing of all events leading up to that approval. Further, in his December 17, 2013 email seeking hotel expenses, Bryan explained to DeMelo that he was, "*as usual* ... unclear until the last moment about [his] flight and hotel situation." (Emphasis added). Bryan argues in his supplementary

statement that DeMelo's "late approval created chaos" in his travel arrangements. However, regardless of the cause, Bryan's email to DeMelo suggests that such "chaos" was the norm rather than the exception. We therefore disagree that the Hearing Officer either ignored or underplayed the significance of the three weeks that transpired between the time Bryan requested approval of his rental car and the time he received it, or that this sequence of events could reasonably be viewed as part of an escalating scheme of retaliation.

We finally decline to infer any evidence of a retaliatory atmosphere from Bryan's serious and sweeping allegations that the "former Provost, former Dean, current Dean and Associate Dean" perjured themselves in testimony or affidavits they gave to the DLR or through false arbitration testimony.[33] The Hearing Officer made findings regarding Davis-Street's and Alexander's testimony that, for reasons noted above, we have found no basis to disturb. Town of Carver, 35 MLC at 30 (citing Vinal v. Contributory Retirement Appeal Board, 13 Mass. App. Ct. 85) (declining to disturb hearing officer's credibility determinations where the reasons for the determinations are clearly stated and the record evidence does not require a contrary finding). Moreover, the Provost and former Dean did not testify at the hearing, so there was no need or basis for the Hearing Officer, much less the CERB on appeal, to assess their credibility. Under these circumstances, any alleged discrepancies between the **University's** stated policies and the actions taken by employees implementing those policies, were appropriately addressed by the Hearing Officer in terms of whether these discrepancies constituted circumstantial evidence of unlawful motivation, either through disparate treatment or deviation from past practice. We address these issues below.

The Relationship Between Bryan and the **University**

***10** Circumstantial evidence of unlawful motive may be shown by, among other things, an "employer's general bias or hostility toward the union or toward employees engaged in concerted activity." Town of Halifax, 1 MLC 1486, 1490, MUP-2059, (June 30, 1975)((citations omitted). While acknowledging that Bryan believed that there was a hostile work environment between him and management, the Hearing Officer declined to infer unlawful motivation based on this environment because Bryan failed to present evidence that DeMelo or management showed hostility toward him or the Union in general. Bryan disputes this finding but provides no evidence to the contrary.[34] We therefore decline to disturb it. See 456 CMR 13.19 (3)(a).

Timing/Disparate Treatment[35]

The Hearing Officer rejected Bryan's argument that unlawful motivation should be inferred from the fact that there had been no prior problems with his travel reimbursements. Bryan argues that this mischaracterizes his argument because it fails to take into account other deviations from practice that occurred during the same period. Assuming Bryan is referring to his car rental approval, we have rejected that argument for the reasons stated above. Moreover, given the scope of Count I, the Hearing Officer correctly limited his analysis to whether the delay in hotel reimbursement was unlawfully motivated. Finally, even though the **University** may have processed/approved Bryan's travel expenses more slowly than it had on previous occasions, these are insufficient grounds upon which to infer unlawful intent for several reasons. First, there is no evidence that DeMelo was even aware of Bryan's activities in December 2013 or that upper levels of management who did know were involved with reimbursing him. Second, Bryan's claim that the **University's** retaliation was escalating around this time ignores the fact that in September 2013, just one month after his August 2013 arbitration hearing, the **University** awarded him a travel grant to go to Ireland, DeMelo promptly responded to his rental car inquiry and offered to help him with other aspects of his trip. Moreover, within five months of the arbitration hearing and, critically, around the same time that DeMelo initially failed to respond to Bryan's email, the **University**, through the combined efforts of Anderson and Arndt working with Bryan, approved $1422.25 of his other Ireland expenses. When viewed as a whole, therefore, we agree with the Hearing Officer that neither the timing of the delay nor the **University's** conduct in connection with approving or reimbursing expenses for his trip to Ireland support an inference of union animus.

Triviality of Reasons

We also reject Bryan's argument that the Hearing Officer improperly failed to infer an unlawful motive from the fact that the Employer offered multiple reasons for the delay. In its post-hearing brief, the Employer does not rely on any of these theories, instead conceding that the delay was unexplained, but, ultimately, the result of non-discriminatory oversight. For all the reasons stated above, we agree and affirm the dismissal of Count I of the Complaint.

Count II: Teaching Schedule

***11** The Complaint alleges that the **University** discriminated against Bryan for engaging in protected concerted activity based on two incidents: 1) its April 8, 2014 refusal to approve Bryan's fall 2014 schedule because it included a Tuesday evening course; and 2) its June 6, 2014 approval of a schedule containing the same Tuesday evening course, subject to the condition that the course was sufficiently enrolled by students. With respect to this count, the Hearing Officer concluded that Bryan had met the first two elements of his prima facie case, but failed to establish that the scheduling assignment was an adverse action. The Hearing Officer further found no direct evidence of discrimination by Davis-Street or Alexander and that Bryan had not proven unlawful discrimination through circumstantial evidence of timing, disparate treatment or triviality of reasons. Bryan disagrees with virtually all aspects of this analysis. We treat his arguments in turn.

Adverse Action

As the Hearing Officer correctly stated, an adverse action must be an adverse personnel action that materially disadvantages the employee in some way. City of Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009) (citing City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (January 9, 2009)). The Hearing Officer found that Bryan was not materially disadvantaged by his inability to get the schedule he wanted because his compensation was not affected, and he taught the courses that he requested to teach, but at different times. Bryan complains in his supplementary statement that he was not "merely inconvenienced" by his unwanted schedule, as the Hearing Officer found; rather, the Employer's refusal to give him access to scheduling purportedly afforded to all other faculty was "intended to diminish his status in juxtaposition with his colleagues and to demoralize him." He further claims that this "carefully-orchestrated event" separated him from the stature of his colleagues and denied him contractual and seniority-earned scheduling preferences. However, there is no evidence in the record that Bryan's colleagues knew about his scheduling dispute or that his inability to obtain that schedule was a violation of the contract or his seniority rights. As critically, the determination of whether an action is adverse does not turn on the Employer's intended result, but rather, upon whether, due to the employer's action, the employee suffered an actual and material disadvantage in his terms and conditions of employment. City of Boston, 35 MLC at 291. In this regard, for all the reasons stated in the Hearing Officer's decision, we agree with that Bryan did not suffer an adverse action when he did not get the teaching schedules he requested in the fall of 2014. City of Holyoke, 35 MLC at 156 (rejecting union's argument that action was adverse because the alleged discriminatee had been "made sport" of by other officers as a result of transfer).

***12** Bryan's citation to Burlington Northern v. White, 548 U.S. 53, 126 S. Ct. 2405 (2006) is inapposite because that case arose under Title VII of the Civil Rights Act of 1964 and concerns the scope of an employer's prohibited conduct under that statute's anti-retaliation provision, 42 U.S.C. §2000e-3(a), and not the core-anti-discrimination provision, 42 U.S.C. §20003-2(a), whose counterpart, Section 10(a)(3) of the Law, is at issue here.

Even if we were to assume, that Bryan's inability to teach on consecutive days constitutes an adverse employment action, for the reasons set forth below we affirm the dismissal of this allegation due to Bryan's failure to establish that the scheduling disputes were unlawfully motivated.

Unlawful Motivation: Timing/Disparate Treatment/Triviality of Reasons

The Hearing Officer found no direct evidence of discrimination under Count II. Bryan argues this is error, claiming that "the willingness of the Dean and the Associate Dean to pursue the ripping away of Dr. Bryan's schedule - a schedule that met all of the so-called policy - in the face of sworn evidence provided to them indicating they were on a dangerous path" demonstrates direct evidence of discrimination. Once again, however, there is no evidence showing that either Davis-Street, Alexander, or any other agents of the administration made statements or otherwise engaged in expressive conduct demonstrating expressing hostility to Bryan's grievances or to unions or union activity generally. The Hearing Officer properly found there to be no direct evidence of discrimination in Count II.

The Hearing Officer also found that Bryan had not been treated differently, and that Alexander's and Davis-Street's application of the rules, though mistaken, was understandable due to their newness on the job and consistent with their understanding of those rules. Bryan disputes these conclusions, claiming that the Dean and Associate Dean's relative newness on the job ought not to excuse their behavior since Bryan himself had explained the rules to them. We reject this argument for the reasons noted above.[36] Further, despite repeatedly asserting that he was treated differently than other

employees, Bryan does not point to any evidence in the record to refute the Hearing Officer's finding that the **University** applied the rules, "as it understood them" to Bryan "in the exact same manner that they were applied to all other employees." The Hearing Officer further found that there was no evidence that Alexander or Davis-Street selectively enforced or misapplied any rules to punish Bryan.[37] In the absence of such evidence, Bryan's argument that he was treated differently fails.

Finally, we disagree that the Dean's failure to grant Bryan a waiver to allow him to teach an evening course is circumstantial evidence of unlawful retaliation. First, as noted above, the Investigator found no probable cause to believe that the failure to grant this waiver was unlawfully motivated and Bryan did not seek further review of the dismissal of this allegation. As critically, unlawful discrimination is, at its essence, the failure to treat similarly-situated persons similarly for impermissible reasons. Bryan's argument that the Employer engaged in unlawful discrimination when it refused to accord him more *favorable* treatment than other similarly-situated employees has no support in common sense or the Law.[38]

Conclusion

***13** For the foregoing reasons, the Hearing Officer's decision is affirmed and the Complaint dismissed.

SO ORDERED.

Marjorie F. Wittner
Chair
Katherine G. Lev
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.

Footnotes

1 The **University** did not file a responsive supplementary statement.

2 Except as noted below, we adopt the parties' stipulations and the Hearing Officer's detailed findings as summarized and supplemented below. Further reference may be made to the facts set out in the Hearing Officer's decision, reported at 43 MLC 23 (July 22, 2016).

3 RCOB had a new Dean by the time the events at issue in this charge took place.

4 We take administrative notice of the pleadings in SUP-12-2192. They show that Bryan filed a judicial appeal of the CERB's ruling, but withdrew that appeal on January 26, 2016.

5 As the Hearing Officer explained, CARS awards travel grants, but relies on the travel office to approve airfare and other travel expenses before actually reimbursing the grant recipient.

6 The findings reflect that Bryan, who previously had a career as an airline pilot, was familiar with how to travel to domestic and foreign destinations at a significantly reduced cost. Before the incidents at issue here, Bryan had previously made his own travel arrangements for overseas academic seminars and education conferences, initially paid out-of-pocket and then requested reimbursement from the Employer for part of these costs. The record reflects Bryan was reimbursed for hotel stays at conferences in Bosnia in 2012 and Lithuania in 2013.

[7] On appeal to the CERB, Bryan complained that the Hearing Officer improperly omitted details about his efforts to attain approval of his rental car before he departed for Ireland. The parties' joint exhibits include emails documenting his efforts and we have supplemented the findings based on these emails for the sake of completeness. The parties stipulated that the emails in the joint exhibits were authentic. Neither Bryan's charge nor the Complaint alleges that the **University's** conduct in connection with the rental car was unlawful.

[8] Bryan claims that he was unable to seek advance approval of his hotel arrangements before he left due to the fact that the travel office did not approve his rental car expenses until three days before his departure. Bryan's contention on review that the Hearing Officer improperly ignored this fact or its implications are addressed below.

[9] The reference to "Martina" is to Martina Arndt (Arndt), a physics professor who also holds the title of Coordinator of CARS. The reference to ""Pam" is to Pamela Russell, who appears on other emails, but is not otherwise identified in the record.

[10] The record shows that Bryan paid for hotel stays at conferences in Bosnia in 2012 and Lithuania in 2013 in the same manner and the **University** reimbursed him promptly for both stays.

[11] Those reimbursements included meals, gas, tolls and tips.

[12] The Hearing Officer found that DeMelo did not become aware that Bryan had not been paid until Bryan contacted him in September 2014. The Hearing Officer further noted that Bryan did not explain why he waited until September 2014 to contact DeMelo regarding this matter. The email record reflects, however, that after Bryan wrote to DeMelo in December 2013 regarding the hotel expenses, DeMelo reached out to Bryan in September 2014 regarding those expenses, not the other way around. Paragraphs 10-17 (Count I) of Bryan's post-hearing brief confirms this sequence of events. On appeal, Bryan complains that the Hearing Officer's statement that Bryan failed to explain why he did not contact DeMelo earlier is an inappropriate attempt to exculpate DeMelo. We disagree. This statement is both factual and relevant to the issue of whether DeMelo's failure to respond to Bryan was unlawfully motivated or simply a mistake or oversight. On page 5 of his supplementary statement, Bryan references paragraphs 30 and 31 (Count I) of his post-hearing brief to argue that he did reach out. However, paragraph 30 concerns the **University's** communications to him regarding reimbursement after his DLR hearing, which occurred in May 2015, not 2014, as erroneously stated twice in that paragraph. These 2015 post-hearing communications are not relevant to the Hearing Officer's point that Bryan did not explain why there was a nine-month lapse between Bryan's first query regarding hotel reimbursement in December 2013 and the resumption of communications regarding this matter in September 2014.

[13] Paragraph 30 (Count I) of Bryan's post-hearing brief indicates that the **University** reimbursed him on May 8, 2015.

[14] Bryan challenged the Hearing Officer's finding that the Employer demonstrated that others had received delayed reimbursements, claiming it is not supported by the record. We agree and therefore do not rely on it in dismissing this count.

[15] Bryan disputes this finding, arguing that that the **University's** knowledge should be imputed to DeMelo and further that matters were not in DeMelo's hands. However, the Hearing Officer credited DeMelo's testimony to this effect and there is no evidence in the record that supports a contrary finding. We therefore decline to disturb it. Vinal v. Contributory Retirement Appeal Board, 13 Mass. App. Ct. 85 (1982) (CERB will not disturb a hearing officer's credibility findings if the reasons for the findings are clearly stated and the evidence does not require a contrary finding).

[16] Bryan claims that the Hearing Officer made a "gross mischaracterization" of this meeting in a way favorable to the **University** when he noted in footnote 10 of his decision that both Alexander and Bryan testified that Alexander was "sympathetic" to Bryan's concerns. In his supplementary statement however, Bryan does not deny that, during his testimony, he "noted that the Dean purported to be sensitive to his claims of retaliation." We disagree that the Hearing Officer grossly mischaracterized Bryan's testimony. Moreover, the crux of the footnote was to explain the basis of the Hearing Officer's finding regarding knowledge, and not motivation, which the Hearing Officer addresses later in the decision.

[17] The Hearing Officer found her testimony credible because she came from a different department of RCOB and did not work in the business department until 2013. Bryan challenges this finding on appeal, claiming it was "not credible" to believe that Davis-Street did not know about Bryan's earlier protected, concerted activity, given her office's proximity to Alexander's and the former Dean (whose motivation on a different scheduling matter was at issue in Bryan's earlier charge, SUP-12-2192). We decline to disturb this finding because the Hearing Officer's decisions were clearly stated and the evidence does not require a contrary finding. See Vinal v. Contributory Retirement Appeal Board, supra.

[18] Web hybrid courses are taught partially in the classroom and partially online.

[19] Bryan's charge alleged that the initial rejection of his schedule was unlawfully motivated. The Investigator dismissed this aspect of

the charge finding that the rejection was based solely on Davis-Street's application of scheduling guidelines and that Bryan did not provide sufficient information to show that the **University's** conduct was unlawfully motivated. Bryan did not appeal from this or any other aspect of the partial dismissal.

20 Throughout this period, Bryan continued to propose schedules that would have enabled him to teach on consecutive days.

21 For example, in an email that Alexander sent to Bryan on April 8 at 4:08 p.m., Alexander wrote, "You are required to teach at least 50% of your day course load in face-to-face courses. Undergraduate evening courses may not substitute for day courses in meeting the requirement that 50% of your day course load must be face-to-face courses."

22 All of Bryan's references to the "Provost" are to then-Academic Dean Howard London (London or Provost).

23 The hearing record includes several excerpts from London's arbitration testimony. In the email referenced in footnote 21, Alexander also stated that Bryan had misquoted London's testimony. Alexander quoted the Provost as stating: "There are some graduate courses that typically are taught in the evening that constitute part of the required 12 credit hours that a faculty member is to teach according to the Collective Bargaining Agreement." Bryan disputed this in an email he sent on April 8 at 6:34 p.m. in which he quoted from and attached another excerpt from the Provost's arbitration testimony that appears to relate to the application of the three-day rule, evening courses and continuing education courses. The Hearing Officer made no findings regarding the substance or meaning of the Provost's testimony. He noted, however, that Davis-Street's and Alexander's responses to Bryan's emails referencing that testimony did not contain anti-Union sentiments. Bryan does not contest this. The CERB also declines to make findings regarding the substance or meaning of the Provost's testimony because the Provost did not testify in this hearing, the excerpts are incomplete and, ultimately, Davis-Street and Alexander acknowledged that evening courses could count towards the requirement that at least half of a professor's workload should consist of face-to-face and not web/web-hybrid courses.

24 In his charge, Bryan alleged that the Dean's refusal to grant Bryan a waiver was unlawful. The Investigator dismissed this aspect of the charge because 1) the **University** presented evidence showing that it had adhered to **University**-wide scheduling guidelines when it denied the waivers and acted in the best interests of the students; and 2) there was insufficient evidence of unlawful motivation.

25 It is not clear from the record who initiated this email chain.

26 The Hearing Officer noted that, although the **University** acknowledged this to be the case, no evidence was presented demonstrating that other Bridgewater State **University** Colleges counted undergraduate night courses as part of the regular day load prior to the fall of 2014. Bryan argues that this finding is wrong, claiming such evidence could be found in the schedules he subpoenaed and introduced as Exhibit CP-6. Bryan, however, does not identify any specific schedule that support a contrary finding. Even assuming that these schedules demonstrate that professors in other departments taught undergraduate evening courses, there is no accompanying evidence showing that these courses were counted as part of their day load. Indeed, as noted below, other than information regarding RCOB Management Department professors who taught in the fall of 2014, the record contains no information about the particular circumstances under which certain professors taught night classes. We therefore decline to disturb the finding.

27 Bryan claims this finding is wrong because he repeatedly informed Davis-Street in April that undergraduate evening courses could count as part of the day load. However, it is evident from the record that Davis-Street and Bryan disagreed about this policy. Thus, the fact that Bryan may have told Davis-Street what he believed the policy to be does not render erroneous the Hearing Officer's finding that Davis-Street did not realize that she had been misapplying this policy until the Provost told her otherwise. Bryan also disputes the finding on grounds that the refusal to allow him to use an undergraduate evening course to satisfy his day load was retaliatory and not mistaken. Because this argument goes to the crux of whether the **University** acted unlawfully, we address it in the Opinion section below.

28 Bryan argues that Davis-Street's claim that there was never a dispute over whether evening classes would satisfy the three-day requirement referenced in her June 9 email is at odds with her May 26 email stating that during her time as Dean, evening courses were not used as part of faculty's member's day load. Bryan claims that this purported disparity between these two emails "extinguishes" Davis-Street's credibility and impeaches her testimony. We disagree that the two emails contradict each other because the May 26 email states that evening courses were not used as part of the day load but makes no mention of whether they otherwise counted towards the three-day on campus rule. These emails therefore provide no basis to disturb the Hearing Officer's findings based on Davis-Street's testimony.

29 Bryan claims this fact is misleading because it does not reflect that the professors who had non-consecutive classes chose this schedule and that he was the only professor who lost his schedule due to the "so-called rules." Bryan does not, however, point to any portion of the record supporting this assertion. We therefore decline to supplement it. We address Bryan's assertions as to

disparate treatment below.

30 During the hearing, Davis-Street provided testimony explaining the circumstances under which other professors in the Management Department had schedules in the fall of 2014 that included evening classes. The Hearing Officer found that one common reason was that they were being permitted to ""spend banked credits." The Hearing Officer explained that if a professor taught more courses than they were required in any one semester, they could ""bank" those credits and "spend" them in a later semester to meet their teaching load requirement. The Hearing Officer further found, and Bryan does not refute, that Bryan did not seek to "spend" any "banked credits" in the fall of 2014. Bryan nevertheless argues that, based on documents he subpoenaed and introduced, the evidence shows that other professors teaching evening courses as part of their regular caseload was not an exception but rather "standard operating procedure." As noted above, however, although Bryan's post-hearing brief and supplementary statement repeatedly references this 127-page exhibit, he does not identify any professors by name, or include any specific reference to the page or pages in CP-6 that support this assertion regarding **University**-wide practices. His factual challenge fails on these grounds alone. See 456 CMR 13.19 (3) (a) ("A party claiming that the hearing officer has made erroneous findings of fact shall identify the specific findings challenged and clearly identify all record evidence supporting the party's proposed findings of fact."). Moreover, as discussed infra, in order to prove disparate treatment based on these schedules, it would not be sufficient for Bryan merely to provide schedules showing that other professor taught evening courses. Rather, he would have had to show that these unidentified professors who were teaching these classes either did not have recognized exceptions or were doing so in contravention of the scheduling rules, as the **University** (including Alexander and Davis-Street prior to June 2014) understood them. Because there is no such evidence in the record, we decline to disturb the finding.

31 The CERB's jurisdiction is not contested.

32 Regarding the first three elements, the Hearing Officer found that the delayed payment constituted an adverse action. As to the knowledge element, although the Hearing Officer found that DeMelo did not know about Bryan's activities until Bryan filed the instant charge, and that there was no basis to impute the **University's** knowledge of these activities to DeMelo, he did not rest his dismissal of this count solely on lack of knowledge. Rather, assuming that the parties' stipulation was sufficient to satisfy the knowledge element, the Hearing Officer dismissed Count I based on Bryan's failure to present evidence that the delay was unlawfully motivated. Given this holding, we need not address Bryan's arguments regarding this element of the prima facie case. We note however, that for reasons stated above, we decline to disturb the Hearing Officer's finding that DeMelo did not know about Bryan's protected, concerted activities until June 2014.

33 In his introduction to the supplementary statement, Bryan argues that these individuals "were so obsessed with injuring Dr. Bryan that they resorted to perjury, a criminal activity with a lengthy statute of limitations . . . that could lead to imprisonment." He further argues that the willingness of these individuals to perjure themselves "can only be viewed as extraordinary, if not unique in the level of risk that [the Employer] was willing to pursue in order to demean, injure and retaliate" against him and "affirm the high level of retaliatory cabal."

34 In paragraph 28 (Count I) of Bryan's post-hearing brief, cited in footnotes 6, 7, 12, 13, 14, 47, 49, 60, 68, 70, 71, 73 and 83 of his supplementary statement, Bryan claims, without any specific reference to the record, that he testified at hearing that "the isolation, non-communication, and policy migration surrounding the unpaid expenses experienced in the fall of 2013 were representative of the emboldened escalation of retaliation following several years of Respondent's retaliatory attack." In the same paragraph, referring to himself in the third person, Bryan further states:
Dr. Bryan stated he was made aware that the animus of the Respondent against the union's grievance efforts had risen at the highest levels of the **University**. As a result of that animus, the union grievance chairperson was confronted by the Respondent about her vigorous grievance representation and, in a reversal of past practice, thence limited her access to **University** leadership.
Bryan provided no further details, testimony or evidence in support of this assertion, e.g., the identities of the individuals involved or precisely what was stated and when. This statement is therefore insufficient to support Bryan's assertions of purported retaliatory intent emanating from higher levels of administration that were directed at his grievance-filing activity.

35 The Hearing Officer also rejected Bryan's argument that the timing of the delay in reimbursement established unlawful motivation. Bryan does not appeal from this aspect of the decision.

36 See footnote 27.

37 Indeed, the fact that Davis-Street took steps to correct her earlier error upon learning that she had been misapplying scheduling rules belies Bryan's post-hearing argument that "Respondent's agents had their marching orders and continued, like the Titanic, on their assigned course and at full speed ahead, on their voyage of unlawful retaliation."

38 To the extent that we have not addressed the Charging Party's other contentions, "they 'have not been overlooked. We find nothing in them that requires discussion."' Department of Rev. v. Ryan R., 62 Mass. App. Ct. 380, 389 (2004) (quoting Commonwealth v.

Domanski, 332 Mass. 66, 78 (1954)).

2016 WL 7094056 (MA LRC)

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