

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION,  
ANDREW HARRIS, and SPENCER TATUM,  
Complainants

v.

DOCKET NO. 94-SEM-0589  
94-SEM-0590

CITY OF WORCESTER POLICE DEPARTMENT,  
Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER OF THE HEARING OFFICER ON REMAND**

**I. INTRODUCTION**

On April 26, 2002, the undersigned hearing officer issued a decision and order dismissing the above-referenced case. Harris v. City of Worcester, 24 MDLR 122, 129 (2002). Complainants Andrew Harris and Spencer Tatum had alleged that Respondent, City of Worcester (“Respondent” or the “City”), engaged in unlawful discrimination on the basis of race and color when it failed to promote them to the position of sergeant in the police department. In that decision, I concluded that Complainants had proved a prima facie case of disparate impact discrimination, but the City established that its practice of strictly promoting candidates by order of rank on the civil service eligibility list constituted a lawful business necessity. *Id.*, at 126-128.

Complainants appealed to the Full Commission. On August 4, 2003, the Full Commission remanded the case to the Hearing Officer to consider and review the claims under a disparate treatment analysis. 25 MDLR 261, 263

(2003). In accordance with the decision of the Full Commission, another Public Hearing was held before me on January 6, 2004, in Springfield, MA, at which time the parties offered supplemental testimony and exhibits into evidence.<sup>1</sup>

In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at both Public Hearings and the stipulations of the parties. In reaching my decision, I have likewise considered the proposed Findings of Fact and Conclusions of Law submitted by the parties after each of the Public Hearings. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

In consideration of the decision of the Full Commission and after a review of the record in this matter, I hereby amend my decision by including the following additional findings:

## **II. FINDINGS OF FACT**

27. As previously addressed, in 1988, the City of Worcester and the Commission entered into an Agreement “Relative to Equal Opportunity and Affirmative Action” (the “Agreement”). For many years prior to the execution of the Agreement, the City and the Commission had worked together to develop various affirmative action policies and plans. For example, the City submitted evidence that from 1976 to 1982, it had worked or complied with the Commission in developing policies with respect to Private Subsidized Housing, Affirmative

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<sup>1</sup> Similar to the first Public Hearing, the parties did not dispute most of the evidence introduced at the second Public Hearing and jointly introduced most of the exhibits.

Action Programs and Fair Employment Practices, and Housing Assistance Programs. The City also developed and maintained an “Affirmative Action Plan for Minority Business Enterprise Utilization, Minority Manpower Utilization, and Contract Compliance.” In addition, correspondence between the City and the Commission indicated that they had previously entered into a Memorandum of Agreement (“MOU”). Although the MOU expired in 1986 and likely pertained to matters similar to those contained in the 1988 Agreement, the parties did not submit any evidence regarding the specific contents of the MOU. After the MOU expired, a significant period of time elapsed before the parties entered into the 1988 Agreement. By letter dated March 11, 1988, MCAD Commissioner Fredrick Hurst informed Worcester City Manager William Mulford, “Since [October 1986], our respective staffs have been discussing a revised agreement to govern the City and Commission’s involvement over the next three year period.” Subsequent correspondence to and from the City and the Commission indicated that the City Manager along with Bertram Walker, the City’s Director of Equal Employment Opportunity (“EEO”), assisted in resolving this matter and executing the 1988 Agreement.

28. Section 4.1 of the 1988 Agreement states:

[The City agrees to] forthwith adopt and keep in place departmental hiring goals, consistent with applicable affirmative action/equal opportunity regulations, for minorities until such time as parity is reached.

Section 4.2 of the Agreement states:

In order to achieve hiring goals set forth in the City’s Affirmative Action Plan, the City agrees to the Division of Personnel Administration Rules PAR 10, the Selective Certification option, and any other option

reasonably designed to meet the goal of this Agreement as provided by law.

Section 5.4 of the Agreement states:

The city shall immediately process the filing of Civil Service vacancies where an eligible list is in existence and appointments are to be made therefrom as provided in Article 4.2 above.

29. As previously discussed, Massachusetts Personnel Administration Rule ("PAR") 10, entitled, "Special Certifications in the Civil Service", is designed as an affirmative action tool for appointing authorities to appoint members of protected groups, including African-Americans, from civil service eligibility lists. PAR 10 provides, in pertinent part:

(1) Prerequisites for special certifications based on race, color, national origin or sex shall be made whenever:

(a) an appointing authority shall make requisition to fill one or more positions included in said appointing authority's affirmative action plan on file with the administrator, and;

(b) the administrator has made a written determination substantiating that previous practices of the department and/or of said appointing authority with respect to the filling of such position or positions have discriminated against members of a group, hereinafter referred to as a protected group, on the basis of race, color, sex, or national origin in contravention of any provision of the Constitution of the United States or the Constitution of the Commonwealth, Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. 2000e) or any other federal or state statute the administrator may then certify, in addition to names certified in accordance with PAR.09, the names of a like number of individuals who are members of the protected group and are on an eligible list for such position, in order of their standing.

30. The City has stipulated that it has not used PAR 10 to make any promotions in the police department. The City has also admitted that it has never submitted a request to the Massachusetts Division of Human Resources ("HRD")

to use a PAR 10 certification.<sup>2</sup> Moreover, despite promoting ten (10) officers to sergeant during the term of the Agreement (1988 to 1991), the City did not promote any minority officers to a supervisory position during this period. The parties did not, however, submit any credible evidence that minority officers during the term of the Agreement had taken and passed the civil service promotional exam for the position of sergeant and would otherwise have been eligible for placement on a PAR 10 certification list. Complainants also did not submit any credible evidence that had the City made a PAR 10 promotional appointment of minority officers during the term of the Agreement, their chances of being promoted would have increased during the period of time (1992-1995) that they actively sought a promotion.

31. The City has maintained that it was not obligated under the 1988 Agreement to use PAR 10 certification list to make promotions. It also contended that it complied with the provisions of the Agreement in all respects. For example, it adopted and kept department hiring goals in accordance with section 4.1 of the Agreement, through the revision of its Affirmative Action Plan. It also apparently complied with section 4.4 of the Agreement by regularly submitting to the Commission quarterly "Affirmative Action Reports on Municipal Employment Activities." In addition, the City appointed an Affirmative Action Director in accordance with Section 6.1 of the Agreement and the City has continually filled that position since 1988. Except with respect to the City's obligation to both use

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<sup>2</sup> The Commonwealth of Massachusetts Division of Human Resources, ("HRD"), administers the statewide civil service examination program and ConTest, the statewide merit system continuous testing program. The Division of Human Resources was previously known as the Department of Personnel Administration ("DPA").

PAR 10 for promotional appointments and develop hiring goals with respect to the supervisory ranks of the police department, Complainants have not introduced any credible evidence that rebutted the City's contention that it otherwise complied with the provisions of the Agreement.

32. During the term of the Agreement, Lawrence Raymond worked for the City as the Director of the Office of Handicapped Affairs. Raymond testified that in approximately 1990, he assisted the City's designated Affirmative Action Officer in monitoring the City's employment hiring practices. In 1993, Raymond became the City's Affirmative Action Officer. Raymond claimed that when he first became involved with the City's employment practices in the early 1990's, he consulted with the Police Department's Affirmative Action Officer to strategize on how to get more minorities and woman to apply for the police entrance examination. In addition, Raymond claimed that he signed-off on all positions being filled by the Department, including promotions. I credit Raymond's testimony.

33. Raymond testified that in the mid-1990's, when he became the Assistant Director of Human Resources, the City discussed using PAR 10 to increase minority promotional appointments, but it ultimately decided against it. According to Raymond, one reason the City did not use PAR 10 was its belief that the rule could not be used to promote African-American officers to supervisory positions. He claimed that Janice Silverman, the City's Human Resources Director, initially received information from HRD that it could not utilize PAR 10 for affirmative action purposes. Raymond's testimony is

consistent with Silverman's testimony at the initial Public Hearing. Specifically, she stated:

There is some...sentiment at HRD that you may not be able to use PAR 10 for promotion unless there has been a prior showing of past discrimination in the promotional ranks. And while we entered into the consent decree for hiring, there has never been a prior showing of discrimination in the promotional public safety ranks in Worcester. So there was an issue raised as to whether we were even eligible to use PAR 10 process.<sup>3</sup>

...

There was also a discussion with HRD at one point in time about whether, if we could use PAR 10 process, whether my office is the delegated personnel administrator, could we do that ourselves, or whether the state had to run the process for us.

Raymond admitted that he questioned the information that Silverman had obtained from HRD. Although he had no specific recollection of those inquiries, he remembered speaking to Marie Gregg or Elizabeth ("Betty") Dennis of HRD and being informed that PAR 10 could not be used to reach minority candidates for affirmative action purposes. Although I believe the City could have lawfully used a PAR 10 certification assuming it otherwise complied with HRD's rules and regulations, I credit Raymond and Silverman's testimony with respect to the information they received from HRD.<sup>4</sup>

34. Raymond testified that City also considered the likelihood that if the City used PAR 10, then the police officer's union would oppose the process and possibly file a reverse discrimination action against the City. Raymond could not

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<sup>3</sup> As stated in § 1(b) of PAR 10, the Personnel Administrator must make a written determination substantiating that "previous practices of the department and/or of said appointing authority with respect to the filling of such position or positions have discriminated against members of a group, hereinafter referred to as a protected group."

<sup>4</sup> See ¶¶ 41-42, *infra*, with respect to HRD apparently providing erroneous or inconsistent information to the parties in this proceeding.

recall ever seeing or hearing any statement by a Union official that expressed any opposition to using PAR 10. But Silverman testified at the initial Public Hearing that “every time [the City] broach[ed] the subject with the public safety unions they have been adamantly opposed to us doing anything that departs from past practice. They want the first individual on the list promoted in each and every instance. They have been opposed to PAR 10’s as recently as the current round of collective bargaining, where we raised it as an issue again.” I credit Raymond and Silverman’s testimony.

35. Raymond claimed that the City also discussed the possibility that the promotion of African-American officers from a PAR 10 list – instead of promoting officers with the highest ranks and scores on the exams – would have an adverse effect on the morale of the department. Specifically, Raymond testified that if the City bypassed many white officers with higher scores in order to appoint minorities, the bypassed white officers would experience tremendous resentment that would dilute the authority of the minority candidates and create a rift between the minority and nonminority officers. Police Chief Gardella likewise testified that promoting someone who scored much lower would raise a question of “fairness” and cause a morale problem in the Department. Although the City never conducted a study to analyze this potential problem, Raymond stated that the City did have discussions regarding possible morale problems with personnel in the cities of Boston and Springfield in the mid-1990’s. Raymond also admitted that the City’s impression that the department would experience morale problems was based on hearsay and anecdotal information. Although Raymond and

Gardella testified credibly regarding this matter, I do not believe the potential for morale problems constitutes a legitimate reason for not using a PAR 10 appointment to promote minorities.

36. Raymond claimed that rather than using PAR 10, the City attempted to develop a mechanism to get police officers better prepared for the promotional exams. I credited Raymond's testimony that he believed that the City's emphasis on getting officers better prepared had resulted in higher scores for minorities. For example, five (5) minority officers passed the 1994 exam as compared to three (3) minority officers in 1992, and both Harris and Tatum's scores had improved.<sup>5</sup> Notwithstanding the higher scores, as discussed in my original decision, during the period of 1993 to 2000, the City did not promote any minorities to the position of sergeant because they all ranked lower than the selected white candidates.

37. Despite the City's decision not to use PAR 10, Raymond testified credibly that the City has considered the benefit of having a racially-diverse police force including a police force with racial diversity among the superior officers. Specifically, with respect to the City's efforts to promote diversity in the police department, Raymond testified:

... I can tell you that with my involvement with this the people that I sat with were always very positive and favorable to doing whatever we could do to try to diversify our police force and have minority candidates score adequate numbers in order to be reached. It was a large frustration for us that we were not able to make the necessary [sic] promotions to reflect the

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<sup>5</sup> Harris' score improved from 74 (ranked 46) in 1992 to 78 (rank) 29 in 1994. Tatum's score slightly improved from 72 (rank 53) to 74 (rank 49).

diversity of our community. There was absolutely never a time when we didn't try to strategize to find a way to do this.

Silverman similarly testified:

I have done a lot of research over the years to try to figure out how we could, within the bounds of Civil Service, get better representation of minorities in the promotional ranks of the police and fire. I have found myself stymied at just about every opportunity for a variety of reasons..."

I credit Raymond and Silverman's testimony on this matter.

38. Raymond also testified credibly that the City acted in compliance with the consent decree applicable to the hiring of minority police officers to entry level positions and did a good job in attracting minority candidates to both take the entrance examination and attend the police academy. Raymond claimed that the City successfully diversified the Police department, but not at the supervisory ranks.<sup>6</sup> He further testified that the City had established affirmative action goals for entry level appointments, but did not recall if the City established any goals for promotional opportunities due to the frustrations of the civil service regulations. He also claimed that informal study groups in the Police Department, created to assist police officers studying for the promotional examinations, did not single out minority officers. In addition, Raymond stated that the Police Department encouraged minority officers to get involved with study groups and further their education. Raymond further claimed that "minority officers were well informed of

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<sup>6</sup> In 1993, the police department had a total of 274 police officers (i.e., patrolmen) and 28 of the 274 officers (10.2%) were minorities. In 1997, the department had a total of 362 police officers and 45 of the 362 officers (12.4%) were minorities. Thus, of the approximately 88 officers hired from 1993 to 1997, approximately 17 officers (19%) were minorities. Pursuant to the 1990 census data for the City of Worcester, "minorities", meaning Blacks and Hispanics, accounted for 14.1% of the City's population.

when the test was going to occur [and] encouraged to take the test...” I credit Raymond’s testimony.

39. The City introduced evidence that from 1991 to 2000, Chief Gardella made active efforts to recruit minorities to work in the Police Department. Specially, he created a team consisting of predominately minority officers (including African-American, Hispanic and female officers) that went to minority communities, colleges, high schools, churches, YMCAs, and other places in the City frequented by kids and minority populations. The Police Department also had an Affirmative Action Officer responsible for handling race-related issues, including complaints from officers.

40. Raymond was not aware of any discussions between the City and the Commission related to extending the Agreement after it expired in 1991. The parties also did not submit any credible evidence as to the reasons the City and the Commission failed to extend the Agreement.<sup>7</sup> In fact, the parties did not produce any credible evidence that the City or the Commission even considered an extension of the Agreement. Although Raymond was not directly involved with the City’s relations with the Commission in 1991, he surmised that during this period, both the city and the state (including the Commission), were experiencing dire financial circumstances resulting in a substantial number of

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<sup>7</sup> In an attempt to discover facts related to the expiration of the Agreement and the reason(s) the City and the Commission did not seek an extension, the attorneys for the parties jointly reviewed voluminous files made available by the Commission. Despite their industrious efforts, they apparently found little pertinent documentation.

layoffs.<sup>8</sup> He speculated that the Commission and the City may have laid-off, reassigned, or transferred the individuals familiar with the Agreement. Raymond also believed that the Commission may have been satisfied with the City's affirmative actions plans and, thus, did not see a need for continuing the Agreement. Although Raymond could not provide sufficient credible evidence as to why the City or the Commission did not seek an extension of the Agreement, I found him to be a highly credible witness.

41. The parties jointly submitted the affidavit of Sally McNeely, the Director of the Organizational Development Group for HRD. McNeely stated that she reviewed the stipulated testimony of Elizabeth ("Betty") Dennis introduced at the first Public Hearing.<sup>9</sup> McNeely claimed that Dennis' description of the formula used by HRD to determine whether a municipality qualifies to use a PAR 10 list contained an error. Specifically, McNeely indicated that instead of using the "General population in Worcester's SMSA" as a denominator in the right-half of the formula, the "Total number of individuals employed in the protective services EEO category in Worcester's SMSA" should be used. Thus, the parties now agree that the following formula would be used to determining whether the City would qualify for a PAR 10 promotional list:

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<sup>8</sup> On April 11, 1990, Bertram Walker, the City's EEO Director, wrote to John Ahearn at the Commission to inform him that due to the "budget situation", the City was unable to place someone in the position of "Fair Housing Officer." In a subsequent letter from Walker to Ahearn dated May 2, 1990, Walker wrote: "As you know the fiscal crisis in Worcester has caused the supposed closing of the Equal Opportunity Office. Since this will take place July, I would like to know what will be expected of the City of Worcester's Memorandum of Agreement with the MCAD? Also, what policy must be followed until the end of that time in connection with the quarterly report due June 30, 1990? We are also without a Housing Officer." The parties did not submit any evidence indicating that Ahearn or anyone else from the Commission responded to Walker's letters.

<sup>9</sup> Dennis likewise worked for HRD.

$$\frac{\text{Number of minority sergeants}}{\text{Number of tenured police officers}} \div \frac{\text{Number of minority individuals employed in the protective services EEO category in Worcester's Standard Metropolitan Statistical Area ("SMSA")}}{\text{Total number of individuals employed in the protective services EEO category in Worcester's SMSA}}$$

According to McNeely, "if the above formula produces a ratio that is less than .800 (using the four-fifths rule of thumb guideline set forth in the EEOC's Uniform Guidelines on Employee Selection Procedures), HRD will allow a municipality to make a sufficient number of minority promotions from an alternative list to achieve a ration that meets the .800 guideline."

42. According to data from the U.S. Census Bureau, a total of 4,042 individuals of all races worked in protective services occupations in the City of Worcester in 1990. The census data also indicated that only 126 "Blacks" worked in protective services occupations in the City in 1990, constituting 3.12% of the total population. From 1993 to 1996, the City had approximately 260 "tenured" police officers, but had no minority sergeants. Pursuant to Complainants' calculations, which I credit, during the period from 1993 to 1996, the City would have been eligible to promote at least six Black officers to sergeant using a PAR 10 certification list.<sup>10</sup> Respondent has not submitted any credible evidence to rebut this analysis. However, I also find that the discrepancies in the information provided by HRD to the parties in this case further support the City's contention that the agency sometimes provided the City

<sup>10</sup> Complainants' mathematical analysis was attached to their Proposed Findings of Fact and Conclusions of Law.

with inconsistent advice and information regarding the City's ability to use PAR 10 to promote minority officers.

43. As discussed in my initial decision, the City made a total of eighteen (18) promotions from the eligibility list composed after the 1992 exam (Announcement No. 4856), which contained the names of 56 police officers. On or about November 23, 1993, the City first promoted fourteen (14) police officers to sergeant and the persons promoted ranked 1 through 14, respectively, on the eligibility list. The officers selected for promotion had scores ranging from 92.66 through 87.13. All of the fourteen officers selected were white. Subsequently, on September 4, 1994, the City promoted another four police officers to sergeant using the same list. The officers selected for promotion ranked 15, 17, 18, and 21, and had scores ranging from 87.00 to 86.00.<sup>11</sup> Again, all four of the police officers selected (three (3) males and one (1) female) were white. Three minority officers passed the 1992 exam, but all ranked significantly lower than the selected white candidates: Nelson Quinones<sup>12</sup> (scored 84.00 and ranked 32), Tatum (scored 74.00 and ranked 46), and Harris (scored 72.00 and ranked 53). The City selected no minorities for promotion and all of the minority candidates ranked lower than the selected white candidates. However, considering that eighteen officers were promoted by the City during this period, I find that Tatum and Harris would likely have been promoted had the City solely relied on a PAR

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<sup>11</sup> The officers on the list ranked 17 - 21 all had the same test score (86.00). The City bypassed Linda Jackson ranked 16, with a score of 87.00. Officer Jackson subsequently filed a handicap discrimination claim against the City as a result of her non-promotion. Her claim was dismissed after a public hearing. Jackson v. City of Worcester, 23 MDLR 242 (2001). In Jackson, the Commission discussed in detail the civil service promotional and by-pass procedures utilized by the City of Worcester for the selection of sergeants from the 1992 promotional exam.

<sup>12</sup> Officer Quinones is Hispanic.

10 certification list instead of strictly promoting officers by rank and score from the 1992 promotional exam.

44. Similarly, the City promoted twelve (12) officers from the 1994 promotional exam and all were white males. Consistent with the City's practice of selecting candidates by rank, the persons selected ranked 1 to 12, respectively, on the eligibility list and had scores ranging from 95.00 to 84.00. The five minority officers that had passed the 1994 exam again scored significantly lower than the selected candidates: Tatum (score 78.00, rank 29), Rosario (score 76.00, rank 39), Maddox (score, 76.00, rank 40), Logan (score 75.00, rank 42), and Harris (score 74.00, rank 49). Considering the City promoted 12 officers to sergeant from the 1994 promotional exam, I find that the City would have likely been able to promote Tatum and Harris from a PAR 10 certification had it used such a list instead of strictly promoting officers with the highest rank and score.

### **III. CONCLUSIONS OF LAW**

The Conclusions of Law are hereby amended as follows:

Massachusetts General Laws ch. 151B, § 4(1), provides that it shall be an unlawful practice for an employer because of the race, ethnicity, or national origin of any individual "to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification."

In a disparate treatment case where no direct evidence of discrimination exists, as in the present matter, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Lipchitz v. Raytheon Co., 434 Mass. 493, 503 (2001); Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000); Wheelock College v. MCAD, 371 Mass. 130, 137-138 (1976). First, Complainants must establish a *prima facie* case of disparate treatment discrimination. In order to prove a *prima facie* case, Complainants must show that (1) they are members of a protected class; (2) they were qualified to perform the duties of the job at issue; (3) they were subjected to an adverse employment action; and (4) they were treated differently from other similarly situated persons not of their protected class. Lipchitz, 434 Mass. at 503; Abramian, 432 Mass. at 116, Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 441 (1995); Bingham v. Lynn Sand & Stone Co., 25 MDLR 123, 129 (2003); Jones v. Glowacki, 23 MDLR 296, 297 (2001).

Once Complainants have established a *prima facie* case of discrimination, Respondent must articulate a legitimate non-discriminatory reason for its failure to promote Complainants. Respondent is required to "produce not only evidence of the reason for its action, but also underlying facts in support of that reason." Abramian, 432 Mass. at 116-117; Wheelock College, 371 Mass. at 136. Respondent must also "produce credible evidence that the reason or reasons advanced were the real reasons." Wheelock College, 371 Mass. at 138.

If Respondent meets its burden of production, then Complainants must show by a preponderance of the evidence that Respondent's employment decision was the product of discrimination based on Complainant's membership in a protected group. Abramian, 432 Mass. at 116-118. Because proof of unlawful discrimination can rarely be established by direct evidence, Complainants may prove that Respondent's discriminatory animus was the determinative cause by establishing that one or more of Respondent's stated non-discriminatory reasons were false, or not the real reasons for its action. Lipchitz, 434 Mass. at 499, 504-505; see, Abramian, 432 Mass. at 118 (finding by jury that at least one of the reasons advanced by defendant was false, in addition to proof of *prima facie* case, sufficient to permit inference that real reason for defendant's action was discrimination). However, Complainants retain the ultimate burden of proving that Respondent's failure to promote them to sergeant was the result of discriminatory animus. Lipchitz, 434 Mass at 504; Abramian, 432 Mass at 117.

I find that Complainants have established a *prima facie* case of disparate treatment discrimination. Both Tatum and Harris are members of a protected class based on their status as African-Americans. I also find that both Complainants were qualified for the position of sergeant in the City of Worcester by virtue of their passing the promotional exams in 1992 and 1994, notwithstanding their relatively low scores. Furthermore, the City subjected Complainants to adverse employment actions when it failed to promote them to the position of sergeant during the period of 1993 to 1995, despite promoting

many other police officers, all of whom were white. Lastly, I find that Complainants established that the City's failure to promote any minority officers to sergeant during this period, while promoting numerous white officers, sufficiently proves that the City treated Complainants differently from other similarly situated persons not of their protected class.

Having established a prima facie case of racial discrimination, the City must articulate a legitimate non-discriminatory reason for its failure to promote Complainants. I find that the City has met this burden. First, as discussed in detail in my initial decision, I found that the City strictly adhered to the practice of promoting candidates by order of rank on the civil service eligibility list in order to comply with fundamental goal of the civil service process, which is to ensure the exclusion of political considerations, favoritism, and bias in the promotional process. Harris, 24 MDLR at 126-127. The City articulated that if it had promoted Complainants or any other minority candidates ahead of the higher scoring non-minority candidates, without the existence of a consent decree, affirmative action plan or binding agreement, then the City would have violated civil service laws and faced possible legal action. *Id.*, at 127

The parties recognized, however, that appointing authorities have deviated from basic merit principles to promote minorities to rectify racial imbalance. See, Massachusetts Association of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001) ("MAMLEO") (provided a consent decree, an affirmative action plan, or some other enforceable agreement is in existence that would justify racial considerations when making promotions). As

discussed above, PAR 10 specifically authorizes “Special Certifications in the Civil Service” so an appointing authority may further its affirmative action goal to appoint members of protected groups, including African-Americans.<sup>13</sup> With respect to the City’s decision not to use PAR 10, I credited Silverman and Raymond’s testimony that they received inconsistent and conflicting information from HRD as to whether the City could have used the special certification process. I also credited their testimony that the City considered the police officer’s union opposition to the use of PAR 10. As Silverman stated, “every time [the City] broach[ed] the subject with the public safety unions they have been adamantly opposed to us doing anything that departs from past practice. They want the first individual on the list promoted in each and every instance.”

Since the City has met its burden of production by articulating legitimate non-discriminatory reasons for its actions, Complainants must show by a preponderance of the evidence that the City’s articulated reasons were the product of discrimination based on Complainants’ race. I find that Complainants have failed to meet this burden. In particular, Complainants have failed to establish that Respondent’s stated non-discriminatory reasons were false, or not the real reasons for its action.

With respect to Complainant’s burden of establishing racial animus, motive or state of mind, it is well established that Complainants may use events that occurred prior to the applicable limitations period as background evidence of discrimination even though they cannot recover damages for those time-barred

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<sup>13</sup> Complainants did not offer any other legitimate or legal means of promoting minority officers in the City of Worcester other than through the City’s use of PAR 10.

events. Harris, 25 MDLR at 263 (Full Commission); see also, Cuddyer v. The Stop & Shop Supermarket Co., 434 Mass. 521, 530, n.10 (2001) (a plaintiff who has a seasonable claim may use events that occurred prior to the limitations period as background evidence to establish a hostile work environment, even though she cannot recover damages for the time-barred events), *citing*, Sabree v. United Bhd. of Carpenters & Joiners, Local No. 33, 921 F.2d 396, 400, n.9 (1st Cir. 1990). In the case at bar, Complainants had the admittedly difficult task of attempting to uncover background information regarding pertinent matters that occurred many years ago. In addition, the lack of relevant and material documentation maintained by the City and by the Commission with respect to its interactions from 1988 through the early 1990's and the apparent unavailability of witnesses with actual knowledge of these matters, made it particularly difficult to establish how the City operated under and complied with its Agreement with the Commission.<sup>14</sup>

Nevertheless, the 1988 Agreement between the City and the Commission clearly obligated the City to use the PAR 10 special certification option to promote minorities. The City also admitted that it neither promoted a minority to the position of sergeant during the duration of the Agreement, nor attempted to pursue the PAR 10 option. I find that the City's failure to pursue this option constituted a breach of the Agreement. Although Complainants argued that the City's breach is indicative of the City's discriminatory animus, I decline to give this evidence significant weight. First, the parties did not submit any credible

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<sup>14</sup> As discussed above, I found that both parties engaged in a zealous effort to discover these materials and review the information pertaining to the City and the Commission's interactions both during and after the expiration of the 1988 agreement.

evidence that minority officers during this period had taken and passed the civil service exam for promotion to sergeant and would be eligible for placement on a PAR 10 certification list. Additionally, the City has put forth un rebutted evidence that it otherwise complied with all of the other provisions of the Agreement.

Moreover, Complainants have not introduced any other credible evidence that the City engaged in a history of racial discrimination that would suggest its promotional decisions were motivated by racial animus. To the contrary, Complainant's have not rebutted the City's assertions that it had a long-standing relationship with the Commission, and made good faith efforts to promote equal employment opportunity and racial diversity through the development of Affirmative Action Plans and other accomplishments. For example, Raymond testified credibly that the City complied with the consent decree applicable to the hiring of minority police officers to entry level positions and did a good job in attracting minority candidates to both take the entrance examination and attend the police academy. The City also introduced evidence that from 1991 to 2000, Chief Gardella made genuine efforts to recruit minorities to work in the Police Department by establishing a team of officers that actively recruited minorities throughout Worcester. As discussed above, during the period of 1993 to 1997, the percentage of the number of minorities hired by the City as police officers (19%) exceeded the percentage of minorities residing in the city (14.1%). Moreover, by 1997, the total number of minority police officers in the police department closely approximated the percentage of minorities in the City (12.4% to 14.1%).

In addition, Complainant has failed to demonstrate that the City's failure to seek an extension of its Agreement with the Commission constituted evidence of racial animus. In fact, the record fails to shed any light on the reasons the parties did not seek an extension. Although the Commission may have been satisfied with the City's overall response to promoting equal employment opportunities, I also find it highly plausible that the parties simply overlooked or ignored the expiration of the Agreement given the apparent fiscal crisis that existed at the time. Notwithstanding, clearly no credible evidence exists to support the assertion that the City avoided an extension in order to avoid hiring minorities under PAR 10. Furthermore, Complainants have not introduced any credible evidence to support the assertion that the City had some lawful or contractual obligation to pursue an extension. Under these circumstances, I believe Complainant's contention that the City failed to seek an extension of the Agreement for nefarious or discriminatory purposes to be without foundation and based purely on unsubstantiated conjecture.

With respect to the specific reasons articulated by the City for failing to use PAR 10, I found that the City could have likely pursued a PAR 10 certification list, which would have likely resulted in Complainants being promoted. However, Raymond and Silverman testified that the City received conflicting and misleading information from HRD regarding its ability to use PAR 10 and Complainants did not offer any credible evidence to the contrary. I also found that Raymond and Silverman testified credibly that the City considered the police officers union's opposition to the use of PAR 10 and the possibility of a reverse

discrimination case. See, e.g., MAMLEO, 434 Mass. at 259 (nonminority officers sued the City of Boston after it promoted minorities to the ranks of superior officers in order to achieve affirmative action goals by “bypassing” the nonminority candidates with higher civil service exam scores).

It must be emphasized that the reasons articulated by the City for not using PAR 10 may seem “unsound or even absurd”, or their actions may appear “arbitrary or unwise”; however, Complainants cannot prevail unless they establish that these reasons are discriminatory or pretextual. Matthews v. Ocean Spray Cranberries, Inc., 426 Mass 122, 129 (1997), *quoting*, Lewis v. Area II Homecare for Senior Citizens, Inc., 397 Mass. 761, 766-68 (1986); Blare, 419 Mass. at 441-442; Scott v. Boston Housing Authority, 56 Mass. App. Ct. 287, 292 (2002); Yeskevicz v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001). In this case, I credited Raymond and Silverman’s testimony that notwithstanding the City’s obvious lack of success in promoting minorities to supervisory positions in the police department and being “stymied at just about every opportunity” by civil service regulations, the City desired to diversify the police force and increase representation of minorities in the promotional ranks. While the use of a PAR 10 list arguably could have resulted in the promotion of minority candidates, including Complainants, absent any credible evidence that the City’s failure to pursue that option was motivated by discriminatory or nefarious reasons, Complainants have failed to establish that the City engaged in unlawful discrimination in violation of M.G.L. c. 151B, § 4(1).

With respect to the specific questions put forth by the Full Commission, I note the following:

1. Is there sufficient evidence to establish that the City's failure (following the expiration of the Consent Decree in 1991) to create an affirmative action plan and apply for a PAR 10 special certification for its promotions in 1993, 1994, and 1995 amounts to a discriminatory animus against the hiring and promotion of racial and ethnic minorities?<sup>15</sup>

As discussed above, Complainants have failed to produce sufficient credible evidence that the City's failure to request an extension to the Agreement was motivated by discriminatory racial animus. In particular, the record sheds no light whatsoever on the reasons the parties did not seek an extension. Although I found, in my initial decision, that a gross disparity existed between the racial composition of the officers who were eligible for promotion to sergeant and the racial composition of the officers who actually worked as sergeants in the department, Complainants have not been any able to produce sufficient credible evidence that the disparity was the product of racial animus. Moreover, Complainants have not introduced any credible evidence that the City had a history of engaging in discriminatory or nefarious hiring or promotional practices.

2. Assuming *arguendo* that the MCAD answers question one above in the affirmative, is there sufficient evidence to establish that Complainants Harris and Tatum were harmed by the City's conduct?

Since I have answered question one in the negative, the issue of whether a casual connection existed between the City's failure to seek an extension and Complainant's failure to obtain promotions is rendered moot.

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<sup>15</sup> I have construed the Full Commission's reference to "the Consent Decree in 1991" to mean the 1988 Agreement between the City and the Commission that expired in 1991.

#### **IV. ORDER**

This decision constitutes an amendment of the Decision and Order dated April 26, 2002, and is incorporated by reference therein. Wherefore, the complaints in this matter are hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 13<sup>th</sup> day of August, 2004.

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EDWARD R. MITNICK  
Hearing Officer