

COMMISSION AGAINST DISCRIMINATION
COMMONWEALTH OF MASSACHUSETTS

Massachusetts Commission Against Discrimination and
James Malone,

Complainant

Docket No. 96-BEM-2664

v.

City of Boston Public Facilities Department,

Respondent

APPEARANCES

Counsel for the Complainant

Robert S. Mantell, Esquire
ROGERS, POWERS & SCHWARTZ

Counsel for the Respondent

Amy Joyce, Esquire
CITY OF BOSTON LAW DEPARTMENT

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 7, 1996, James Malone (“Complainant”) filed a Complaint with this Commission, against the City of Boston Public Facilities Department (“Respondent”), alleging that he was denied a promotion because of his age, (over 40)¹ in violation of M.G.L. c.151B and the Age Discrimination in Employment Act. The Commission

¹ Complainant was 62 years of age at the time he was denied the promotion.

investigated the matter. Probable cause was found to credit the allegations of discrimination and the matter was certified for public hearing. A public hearing was held before the undersigned hearing officer on April 8, 9 and 10, 2002.

Having reviewed the record in this matter, and based upon all the credible evidence and the reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. The City of Boston Public Facilities Department (“Respondent”) is an employer within the meaning of M.G.L. c. 151B, s.1 (5). (stipulated)
2. James Malone (“Complainant”) is a male over 40 years of age (d.o.b. 05/31/34).
3. Complainant served in the army from 1954 to 1956 and was honorably discharged.
4. After his military service, Complainant attended a training program at the Springfield National Bank in Springfield, Massachusetts, where he worked in the loan department, handled consumer loans, learned customer lending and reviewed business plans for loan eligibility. Complainant completed the training period and was promoted to the position of “loan officer”, which position he held for two years, 1956 to 1958.

5. Complainant received a Bachelor of Science degree in landscape architecture from University of Massachusetts in 1963. His course of study included urban and town planning. Complainant attended graduate school at Michigan State University and received a Master of Urban Planning degree in 1965.

6. After completing his Master's degree, Complainant worked as a project manager for the Springfield Redevelopment Authority and was assigned to manage the planning and development of an urban renewal project. This was a major project that involved improvements and renewal in an area of approximately two square miles with an estimated population of 6,000 people, and some major industries and commercial businesses. Complainant supervised a staff of approximately 8 people to survey the area, and assess conditions of the buildings.

7. As part of his duties at the Springfield Development Authority, Complainant met with citizen groups and business owners. An important aspect of Complainant's role was to develop a budget for the urban renewal program.

8. Complainant worked for the Springfield Development Authority until the spring of 1969. Complainant's time at the Authority was considered for purposes of his pension calculation in later employment with the Commonwealth of Massachusetts.

9. From 1969 through 1971, Complainant served as Commissioner of Planning for the City of Mount Vernon, New York. Complainant was responsible for all the functions of the planning department, which included developing a master plan, overseeing the administration of the zoning ordinances, and working closely with other city departments. He successfully completed the “Community Renewal Program”, which was an urban renewal planning program required by the federal government of cities applying for federal grants.

10. For the next two years, Complainant served as Executive Director for the Wissahickon Valley Watershed Association, developing a plan for land management. He next worked as Director of Planning with James Purcell Associates of Hartford, Connecticut. In this planning position, Complainant was involved in community outreach, including meetings with city councils and business groups. He returned to the Springfield Redevelopment Authority, in 1973, where he served as Deputy Development Administrator. Over the next four years, 1973 – 1977, Complainant worked on four major projects utilizing federal community development block grants and supervised 80 employees.

11. In 1977, Complainant’s family moved to Boston where he began a consulting business working on urban renewal projects, including developing a course of action for “Laughing Brook”, an organization under the aegis of the Massachusetts Audubon Society. The Audubon Society subsequently used “Laughing Brook” as a model to demonstrate how to establish better community

relations. From 1984 to 1985, Complainant lived in Washington, D.C., and worked on a project for the National School Boards Association, managing the production and publication of a book.

12. Upon returning to Massachusetts in July of 1985, Complainant was hired as Deputy Assistant Secretary of the Commonwealth for Economic Development. He was responsible for managing a staff of approximately 30, preparing and overseeing budgets, maintaining communications with other agencies and departments, and administering new programs. Under the auspices of community development block grant programs, he and his team reviewed and approved loans for industrial businesses that wanted to locate, build, or improve their facilities. The loans were subject to the condition that a specified portion of the jobs created was to be given to low and moderate-income individuals. Complainant handled transactions with the lender banks, and attended meetings with those banks along with business leaders. In this capacity, Complainant was the Massachusetts representative to the Board of Directors for the Community Development Finance Corporation. At that time, Complainant met Charles Grigsby who was Director of the Community Development Finance Corporation. After a few years as Deputy Assistant Secretary, Complainant was promoted to Assistant Secretary for Economic Development for the Commonwealth. He supervised approximately 50-60 people and retained responsibility for the economic development division as well as other divisions within the area of municipal development. Complainant was separated from this

employment due to a change in administration, which resulted in the resignations of all senior management personnel.

13. In 1991, Complainant performed consulting work for the Massachusetts Department of Mental Health where he set up and managed a program to deliver mental health services to victims of the “Perfect Storm.” Although he initially assumed the position as a consultant, he was eventually hired as a state employee and placed in a management position.

14. Complainant began his employment with the City of Boston Public Facilities Department (“Respondent”) in 1993. Complainant was hired as Senior Project Manager for Housing and Neighborhood Development, which was classified as a union position. His duties included reviewing and analyzing proposals for business loans, disbursing loan proceeds and managing budgets for those proposals that developed into projects. Complainant was responsible for performing the required fiduciary and due diligence exercises to validate the loans, making recommendations to his superiors as to the acceptance and/or rejection of those loans, and overseeing three other project managers and a clerical staff.

15. Complainant’s position as Senior Project Manager required supervisory skills, interaction with banking leaders, problem solving with his staff and third parties, and an understanding of the community’s business needs.

16. As Senior Project Manager, Complainant was often called upon to handle proposed project plans that were flawed. Complainant testified that through his interactions with banks, as well as with the business owners who submitted the proposals, he and his team were frequently able to resolve problems with the project plans. I credit his testimony in this regard.

17. Sometime in August 1994, Charles Grigsby became the Director of the Public Facilities Department (Stipulation of the Parties). Grigsby's job history with the City of Boston began in 1991, when he was hired to be the Project Director for the new police headquarters project. His functions, at that time, included managing the project managers who were then engaged in planning, designing and constructing the police headquarters. He testified that, while serving as a project director, he "participated" in decisions to hire and fire, but he did not have the full authority to make those decisions.

18. Grigsby did not hire Complainant, who had begun working in Public Facilities in September 1993. At the time Grigsby became the Director of Public Facilities, Tom McColgen was the Deputy Director of the combined housing and business division. McColgen was in his forties. Soon after Grigsby arrived at the public facilities division, he terminated McColgen for unsatisfactory performance. Grigsby testified that he did not fill McColgen's spot immediately because a reorganization of the agency had begun and a decision was made to

separate the functions into two divisions: into a housing division and a business and commercial division. Grigsby testified that the process took quite a while because it involved negotiation with the union about categorizing the positions.

19. In September 1994, Complainant received a performance appraisal (Exhibit 16) written by his then supervisor, Debra Guarder. Guarder's evaluation included the comment that, "Jim's skills greatly exceed expectations for Senior Project Manager." She further stated that Complainant was thoughtful and intelligent, had common sense and "a commitment to and understanding of neighborhood development."

20. In October 1994, after Guarder left the agency, Grigsby became Complainant's direct supervisor. Grigsby testified that he first met Complainant in the fall of 1994, when Complainant was a Senior Project Manager in the business and commercial development portion of the division. Grigsby testified that initially Complainant performed his job in a satisfactory manner.

21. As Director of Public Facilities, Grigsby had the right to fire employees and make hiring recommendations to the Public Facilities Commission. The Commission had the final authority to hire.

22. On or about October 12, 1994, Complainant sent Grigsby a letter (Exhibit 2) and resume (Exhibit 1), expressing his interest in having a more senior position

with the Public Facilities Department. Sometime subsequent to Grigsby's receipt of the letter, he spoke with Complainant about it. Complainant testified that Grigsby asked him about his ideas for the agency.

23. Complainant spoke with Grigsby about handling business loans in the commercial section. There were additional activities in the agency relative to neighborhood business, which were managed in other sections of the agency, and not solely in Complainant's division. Grigsby proposed taking all business activities and incorporating them into one section that he intended to name the Neighborhood Business Development Section.

24. Grigsby distributed a memorandum, dated July 14, 1995, announcing the reorganized neighborhood business development division (Exhibit 4). The memorandum stated, "I have asked Jim Malone [Complainant] to take a lead role in coordinating the transition and start up."

25. Complainant and Grigsby had several meetings and, at some point in November 1994, Grigsby asked Complainant to take on some additional responsibilities. Complainant sent Grigsby a note (Exhibit 3, letter of December 3, 1994) to thank him for the meeting.

26. The reorganization Grigsby had proposed took place and all of the business loan activity was concentrated into one division. A new business neighborhood

development area was formed. Grigsby told Complainant that he was going to announce this reorganization, put forward the necessary documentation for establishing the position of Deputy Director For Neighborhood Development and, in the interim, asked Complainant to take responsibility until all the final documentation was resolved. Complainant agreed to take on additional tasks. It was his understanding, after speaking with Grigsby, that he would receive additional compensation and that the position would be as “acting deputy director”. Grigsby told him he could not be referred to as the acting deputy director until a position was formally established. I credit Complainant’s testimony in this regard.

27. In or about July 1995, Kevin McColl (“McColl”), one of the deputy directors, sent a memorandum to some of his staff, explaining that they had been transferred to Complainant’s division and would now be reporting to Complainant instead of him.
28. Complainant assumed responsibility for business development activities, which were essentially the neighborhood contacts that were made by the business managers new to this reorganization. Complainant had managerial responsibility for a total of eight people and approximately three additional programs, as well as the oversight of management and budget development responsibilities. In addition, Grigsby took Complainant to major policy meetings, concerning activities being organized under the new enterprise zone legislation, and to

senior management meetings where all deputy directors met with Grigsby on a regular basis for his oversight and supervisory feedback.

29. Grigsby testified about Complainant's job performance during the fall of 1994 through the fall of 1995 and acknowledged that he regarded Complainant's overall job performance during that time period as satisfactory. He testified that the longer he worked with Complainant, the less convinced he was that Complainant was the "positive development finance type." Grigsby testified that, from project to project, he had problems with Complainant's work. As one example, Grigsby cited a meeting regarding the Roslindale Village Market. Though he did not attend, he was told that Complainant was "negative" at the meeting. Complainant testified that this meeting took place prior to Grigsby's request that Complainant serve as "point person" to perform the duties of the deputy director. Grigsby testified that he was disappointed with Complainant's approach at a community meeting the two attended regarding the Jamaica Plain Supermarket site. When asked if he observed Complainant act as a creative problem solver during his work on these projects, Grigsby indicated that Complainant did come up with a creative solution in the Jamaica Plain Supermarket project by deferring other projects and covering costs out of the current budget. Grigsby also testified that, although Complainant performed very well on one particular project, the Blue Hill initiative, Grigsby felt that Complainant was not proactive about the project until Grigsby himself drove around the neighborhood with Complainant and another project manager.

Complainant testified that he wrote the handbook and ran the training sessions for staff working on the Blue Hill Initiative. Complainant and the entire Blue Hill initiative team received commendation letters from the Mayor of Boston. I credit Complainant's testimony regarding his performance on these projects. I find Grigsby's testimony about Complainant's performance to be inconsistent and not credible.

30. While performing the additional duties as requested by Grigsby, Complainant played a major role in developing the budget and received information from his subordinates, which he reviewed and analyzed, making sure that they included what was required and ensuring that they were not overestimating costs.
31. Serving in the position he perceived to be the "acting deputy director", Complainant reviewed and approved time sheets of approximately twelve individuals. He also managed and supervised staff performing special assignments.
32. Complainant completed enrollment forms, which were budgetary statements that alerted financial personnel of a project under formal consideration, and appropriated funds for the project in the budget process. Once a project was enrolled, Complainant's staff began the task of determining whether the project was one that could be completed. The oversight of a project often required a business assistance grant, helping a business owner obtain new signage, or

fixing up a storefront. Complainant and his staff worked on the specifics of the plan, developed a firm budget and timetable, and a final proposal.

33. Complainant's increased duties (Exhibit #5) included reviewing performance evaluations of individuals whom he had not previously reviewed and dealing directly with employees demonstrating performance problems. His role also changed from that of managing three or four people and their respective projects, to managing ten or twelve individuals with much larger projects.
34. The agency kept records known as "enrollment forms", which documented the designation of money for specific projects. While performing his additional duties, Complainant signed enrollment forms relating to projects he submitted to the budget division. He signed these forms on November 2, 1995, December 1, 1995, and January 4, 1996, (Exhibit #9) in the space marked "deputy director".
35. In the early part of 1996, Complainant approached Grigsby to discuss the development of an enterprise program. A new city office was opened and was scheduled to become the enterprise zone center. Grigsby moved the project staff responsible for business assistance, which had previously been supervised by Complainant, to the new location. Grigsby told Complainant that, because of the distance, he was going to transfer the day-to-day supervision of these individuals to a person who was on site at the new locale, but he indicated that Complainant would still sign off on their budget requests and time sheets.

36. While Complainant was performing the duties attributable to an acting deputy director, he inquired about applying for the deputy director's position. He was informed that he could not make a formal application until the position was posted. The personnel department drafted the posting and the language was reviewed and approved by Grigsby. In April 1996, Complainant received the posting for the position of deputy director of neighborhood business development (Exhibit #6) from the personnel department. This posting set forth the following minimum entrance requirements: "Boston Residency Required; Minimum of five (5) years demonstrated senior management experience, required; Master's Degree in Community Planning, Development, Government, Public Policy or Business Administration; Excellent negotiation, writing, presentation, organizational and supervisory skills; Knowledge of neighborhood business district issues, business finance and commercial real estate development; demonstrated ability to develop and implement neighborhood development strategies and projects; and proven leadership experience at the local level with significant community planning and development experience." The maximum weekly salary for the position was listed as \$1,379.31. (\$71,742.12 annually) The salary range was \$66,000 to \$71,742.12 annually.

37. Complainant testified that he met the minimum entrance requirements. After he received the posting, on April 20, 1996 Complainant sent Grigsby another copy of his resume and an enclosure letter, indicating his interest in the position

(Exhibit # 7). Grigsby testified that although he did not formally interview Complainant, he observed Complainant's work and considered this to be in the nature of "on-the-job" interviews. Complainant testified that he was not given an interview at any time after April 20, 1996. Grigsby did not ask him about his commercial banking experience or background in finance. I credit Complainant's testimony.

38. Complainant testified that he had been performing the functions set forth in the posting's job description (with the exception of duties under the "Main Streets Program", which was managed by Catherine Kottaridis)². Though he did not supervise her performance activities, Complainant signed off on Ms. Kottaridis' time sheets. He had also signed the time sheets of Janice McKitrick, Timothy Long, and John Lynch. (Exhibit 11) Complainant testified that signing these time sheets was one of the duties of a deputy director. I credit his testimony.

39. Grigsby testified that Complainant was technically qualified for the position, but that he and Complainant approached projects differently. He testified that he wanted someone who would be very positive and very proactive. Grigsby testified that he initially wanted Complainant to be deputy director of the division and thought Complainant would demonstrate that he would be a strong leader. Grigsby testified that he became disappointed with Complainant's

² Kottaridis reported to the mayor and was at the same level as Complainant was when he served as a senior project manager

performance and, as a result, he “needed to go in another direction.” I do not credit Grigsby’s testimony in this regard.

40. Complainant testified that, throughout his performance of the deputy director’s duties he was never informed that he had a negative attitude about projects or that he was performing his job functions in a substandard manner. While working as a senior project manager and performing these additional duties, Complainant received the same cost of living increases given to other senior project managers but no supplementary compensation for his extra responsibilities.

41. At various times during 1995 and 1996, Complainant asked to be relieved of the functions of the deputy director position because he believed that he was not being fairly compensated for the additional duties he was being asked to perform. He spoke with Grigsby who appeared sympathetic to his position. Grigsby told Complainant that the reorganization and the official creation of the separate divisions was taking longer than he had expected and that many things were going on of equal or higher priority. Grigsby asked Complainant to continue performing these duties but did not give Complainant additional compensation.

42. Complainant also expressed concern to Grigsby about attending the senior management meetings. The individuals attending these meetings were officially

in senior management positions with the exception of Complainant who, as a senior project manager, was in a union position.

43. Complainant signed budget amendment forms on the line that designated the signature of the deputy director. (Exhibit 10) Complainant testified that as a senior project manager he would not have been in the position to sign these types of documents. I find that reviewing and signing budget amendment forms was a task attributable to the Deputy Director position.

44. Grigsby testified that he considered several candidates for the position of Deputy Director. His first choice was an “external” candidate, William Luster. Grigsby testified that he regarded Luster as more qualified for the position than the Complainant. He testified that he was confident that Luster could have managed the community development and community process issues, which would have allowed Grigsby to spend more time on the financial aspects of the job. He did not testify that Luster was a candidate who had a strong banking or commercial lending background

45. Ralph Rivera (Rivera), age 30, d.o.b. 6/22/66 was hired on or about September 27, 1996 as the new Deputy Director. Rivera was also an “external” candidate. Grigsby told Complainant that he had hired a deputy director for business development. At that time, Complainant was not given any reasons for his non-

selection.³ Complainant testified that Grigsby told him the new hire was a “younger man with banking experience” and was a “minority person.” Though Grigsby testified he mentioned Rivera had banking experience, he denied referring to Rivera as a younger man. I credit Complainant’s version of the conversation.

46. Grigsby testified that numerous individuals over the age of 40 had been hired and promoted between August 1, 1994 and October 31, 1996. Grigsby referred to a chart that set forth names of employees, ages and dates of promotion, indicating that approximately 39% of individuals promoted within the Public Facilities Department were over 40 (Exhibit 26, Tab 40, Exhibit E). This list included union and nonunion employees. Though it was a list of promotions, it was not a list of all the personnel decisions made by Grigsby nor does the list include names or ages of outside candidates for available positions. Grigsby did not recall many of those individuals and, of the individuals he remembered, he could not specify whom he personally had recommended for promotion.

47. By the time Rivera assumed his duties in October 1996, Complainant no longer had supervisory oversight of the business assistance staff. Rivera had responsibility for signing off on time sheets and documents for funding enrollment and commitment forms, budget amendment approvals, and time sheets.

³ Though Complainant was not provided with any reasons at the time, Respondent has since set forth several reasons for not hiring Complainant in the response it filed with this Commission (Exhibit 12), and through sworn testimony by Grigsby.

48. Rivera testified⁴ that he had known Grigsby for a year or two prior to being hired by the Respondent. He had a lunch meeting with Grigsby in January or February of 1996, during which Grigsby told him about the Deputy Director position. Grigsby told Rivera that he wanted someone who could read financial statements, knew lending, and had some knowledge of, and a relationship with, a community based organization.

49. Rivera testified that Grigsby told him, in general, that Complainant was not performing up to standards. Rivera stated that Grigsby had asked him about his work experience prior to approaching him about the Deputy Director position. Rivera had worked for Recall Management Corporation, a subsidiary of Fleet Bank, as a work out officer. His previous experience included working for BayBank/Bank Boston as a credit analyst.

50. Rivera testified that he had done lending for MEIC, the Minority Enterprise Investment Corporation, for approximately two or three years. MEIC was later known as Massachusetts Business Development Corporation. He was considered a “Vice-President” of this corporation.

51. While at MEIC, Rivera managed lending in the inner city urban communities by preparing credit memoranda, gathering financial information, checking for debt

⁴ Rivera did not testify in person. Rivera’s deposition was admitted as Exhibit 25 and parts of the deposition were also read into the record.

service coverage, presenting the financial packages to the loan committee, obtaining closing documents from attorneys and monitoring the loan after it was closed for documentation. Rivera supervised six law students who helped him prepare the loan closing documents.

52. Complainant met with Rivera, shortly after Rivera's hire, to discuss the transition of responsibilities. Complainant testified that based on that conversation, and some subsequent conversations with Rivera, he felt that Rivera did not seem to have the knowledge or understanding necessary to carry out the position of deputy director. Specifically, Complainant was concerned that Rivera's experience appeared to be more in consumer credit and that he had no understanding of the community development block grant processes or requirements. I credit Complainant's testimony.

53. Complainant testified that, once Rivera was hired as the deputy director Complainant believed that any opportunity for him to move to a more senior position was foreclosed. Complainant found himself in an intolerable situation. He had been with the agency for over three years and had served as "acting" deputy director for approximately eighteen months. Complainant was further embarrassed by the sympathy and condolences his colleagues offered him when he did not receive the position. Though Complainant had worked many times over the years under supervisors who were younger than he was, and had no problems doing so, he testified that in this situation it was embarrassing to be

reporting and subordinate to someone who he believed was less competent. He felt betrayed, and degraded professionally. He shared these feelings with his wife and a few friends. I credit Complainant's testimony as to the uncomfortable work environment and his resulting distress.

54. Concurrent with the Complainant's emotional distress, he had an outbreak of hives. He sought medical treatment and, when asked if he was under any particular stress, told the doctor about his job situation. Complainant testified that he continued to experience this emotional distress for one year.

55. Shortly before Rivera began as deputy director, there was an option for early retirement offered by the City of Boston as a budget cutting measure. Complainant testified that he initially did not have any interest in early retirement. Complainant testified that he had intended to continue working for at least three years because his retirement benefits would be greater based upon his last and best three years' earnings. I credit Complainant's testimony that he intended to continue working and had no interest in early retirement prior to Rivera's appointment.

56. After Rivera was hired, Complainant decided to seriously consider the early retirement option and eventually applied for it.

57. Complainant's retirement was calculated by adding the number of years of service he had in the retirement system at the time, which was 18, to the early retirement incentive of 5 years, giving him a total of 23 years of service. The total service (23 years) was multiplied by 2.2; the factor assigned to Complainant's age (62), to arrive at the percentage number, 50.6. Complainant's early retirement allowance was calculated by taking the average salary of Complainant's best three years multiplied by 50.6. According to this formula, Complainant's annual early retirement allowance was \$26,325.15 per year. Had Complainant worked till age 65, the factor assigned to his age would have been 2.5 and he would have completed 21 years of service. (Exhibit #17, pages 23-25)

58. The annual maximum salary for the Deputy Director position was posted as \$71,724.12. Complainant believes he would have been paid between \$71,500 and \$71,700. His belief was based on the fact that Rivera, with no graduate degree or comparable experience, was paid \$66,000. (Stipulation of the Parties) In January 1997, Rivera received a three per cent raise. Business records show that other Deputy Directors received a 3% annual cost of living adjustment.

59. Complainant testified that, notwithstanding mild hypertension, he is in good health. His weekly exercise routine includes swimming and walking. Approximately four times per year, he hikes the White Mountains, Appalachian Trails, and Green Mountains. He has been married to the same woman for 19

years and has a sister who is 82 years of age. According to the Statistical Abstract of the United States Bureau of Census (Exhibit # 18)⁵, using 1998 figures, the life expectancy for a male age 65 is 16 years.

60. Following Complainant's early retirement from his position with the Respondent, he worked for a real estate developer assembling business plans to assist the developer in obtaining financing for improvements to a small shopping center in Roxbury. Complainant also assisted a business owner in Dorchester with writing a business plan and compiling information needed to apply for financing. Complainant's income, from all sources including early retirement and earned income, was as follows: between October 1, and December 31, 1996, \$13,276.77; in 1997, \$41,112.15; in 1998, \$60,201.15; in 1999, \$62,005.15.

61. Sometime in June 1998, Rivera was demoted (Stipulation of the Parties). Rivera was placed as a special assistant with no staff reporting to him. Catherine Kottaridis was hired as the Deputy Director. At that time, Ms. Kottaridis was 35 years of age (Stipulation of the Parties). Kottaridis did not have experience as a loan officer or as a commercial credit analyst. Grigsby testified that his perception of what was needed for the position had changed. I do not credit his testimony.

62. Grigsby testified that he resigned his position as Director of Public Facilities around December 1998 or January 1999. He then commenced employment with

⁵ Exhibit 18 was admitted over the objections of Respondent's counsel since it is a public record.

the Massachusetts Capital Resource Organization. Though he has not been employed by the City of Boston since that time, the mayor appointed him to serve as a Commissioner on the Public Facilities Commission and he served in that position for two years.

III. CONCLUSIONS OF LAW

A. Liability

General Laws c. 151B, Section 4 (1)(C) states that it shall be an unlawful practice: *for the Commonwealth or any of its political subdivisions, by itself or its agent, because of the age of any individual, to refuse to hire or employ or to bar or discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless pursuant to any other general or special law.* The statute protects persons age 40 and over. Complainant alleges that he was denied a promotion and that the position was given to another individual who was under the age of 40. The Complainant has the burden of setting forth the elements of a prima facie case of age discrimination. In order to establish a prima facie case of age discrimination, Complainant must show that he was (1) a member of the class protected by G.L. c. 151B, in this case over 40 years of age; (2) that he applied for an open position; (3) that he was not selected; (4) that the position was filled by a similarly or lesser qualified younger person. Mitchell v. TAC Tech. Servs. Inc., 50 Mass App. Ct. 90, 92 (2000); Tardanico v. Aetna Live & Cas. Co., 41 Mass. App. Ct. 443, 447 n.4 (1996). In Knight v. Avon Products Inc. 438 Mass. 413 (2003), the Court evaluated the “pivotal” fourth element necessary for a plaintiff to establish a prima facie case of age discrimination under G.L.

c.151B and concluded that, in a case where the Complainant is terminated, he must show that he was replaced by someone who is at least five years younger, or present other evidence that the termination occurred under circumstances that would raise a reasonable inference of unlawful age discrimination. Complainant is a member of a protected class in that he was 62 years old at the time he did not receive the promotion. He was adequately performing his job as Senior Project Manager. In addition, he adequately performed duties attributable to the Deputy Director's position for approximately eighteen months. Complainant was not selected for the Deputy Director position, which was awarded to an individual outside the protected class (a male, age 30). Complainant met the qualifications posted for the position and had more experience than the successful applicant. Age, unlike gender or race, is a relative term. Knight, supra. Age discrimination may only logically be inferred when a plaintiff is replaced by someone who is "substantially younger." Id., quoting O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311-312 (1996). The greater the difference in age, the stronger the possible inference of discrimination. In the fact situation before me, the age disparity of over 30 years is so significant that it permits an inference that age was a determining factor in Respondent's choice of Rivera over Complainant. Therefore, I conclude that Complainant has established a prima facie case of age discrimination.

Once Complainant has established a prima facie case of age discrimination, the burden of production shifts to Respondent to articulate legitimate, non-discriminatory reasons for its conduct. Wheelock College v. MCAD, 371 Mass. 130, 136 (1976). Blare v. Husky Injection Molding Systems Boston Inc., 419 Mass. 437 (1995). If Respondent meets this burden, Complainant must then show that the proffered reason was not, in fact,

the real reason for Respondent's action and that Respondent acted with discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 501 (2001); Abramian v. President and Fellows of Harvard College, 432 Mass 107 (2000) (in an indirect evidence case, if the fact-finder is persuaded that one or more of the employer's reasons is false, it may [but need not] infer that the employer is covering up a discriminatory intent, motive or state of mind). Jacqueline B. Thomas and MCAD v. King Arthur's Motel and Lounge, Inc., 24 MDLR 66 (2002).

Respondent has articulated a legitimate non-discriminatory reason for its conduct, asserting Grigsby's belief that Rivera was the more qualified applicant. However, the articulated reason must be supported by credible evidence. I conclude that Respondent's reasons were not supported by any credible evidence.

The evidence in this case demonstrates that Rivera did not even meet the minimum qualifications for the position. He did not possess the "required" five years of demonstrated senior management experience nor did he possess a graduate degree. According to Grigsby, the position was awarded to Rivera because he had commercial banking experience. Grigsby testified that he was also looking for someone who had experience working with neighborhood businesses and who would be creative and proactive. The job posting for the position of Deputy Director sets forth the requirement for experience with community based development. The Complainant had over 30 years of experience in all types of community based programs, including, but not limited to, serving as the Deputy Development Administrator with the Springfield Development Authority working on projects utilizing federal community development block grants, enhancing community relations in urban renewal projects for a division of the

Massachusetts Audubon Society, and committing himself to community outreach as executive director of the Wissahickon Valley Watershed Association. Rivera, on the other hand, was 30 years of age with only a few years of experience in neighborhood projects. With regard to commercial banking experience, Rivera's background consisted of preparation of financial statements and closing documents. Grigsby never interviewed Complainant about his background or his commercial lending experience, which included his tenure as a loan officer with the Springfield National Bank, his dealings with lender banks while serving as Deputy Assistant Secretary and Assistant Secretary for Economic Development, and his experience with the Respondent, performing many of the duties of a Deputy Director at the Public Facilities Department for eighteen months.

With regard to senior management experience, Rivera had merely supervised a few law school interns with document preparation as opposed to Complainant's extensive history in key management positions, including supervision of numerous professionals at various levels, at times managing 50-60 employees. (Finding of Fact # 12).

Respondent has set forth a statistical analysis of the age pool attempting to demonstrate that it promoted workers over the age of 40. Grigsby could not identify many of the individuals in that analysis. Of the workers he was familiar with, he didn't recall whether or not he recommended them for promotion. In addition, many of the employees were in union positions, meaning that other factors, such as seniority, would have impacted the promotion process. The relevance of this circumstantial evidence, suggesting that Grigsby's past promotional decisions were not based on age, is questionable. Even if Grigsby's past promotional decisions are relevant, I conclude that there are too many unknown variables to accord substantial weight to this evidence.

Respondent asserts that initially there was a delay in looking for a Deputy Director for the Neighborhood Business Development Division as a result of a reorganization of the housing and business divisions. Grigsby also testified that there was an unforeseen delay in filling the position due to union negotiating over positions. (Finding of Fact #18). Yet, Rivera testified that Grigsby had discussed the position with him in January or February of 1996. I conclude that Grigsby intended to hire a younger candidate and that the delays, due to reorganization and union classification, even if true, are not the real reasons for Complainant's non-selection.

Respondent also claimed that Complainant's job performance was not satisfactory. There is no evidence to support this contention. Respondent did not issue any written warnings or any documents that were critical of Complainant's performance. Though Grigsby testified that, in December 1995, he had decided Complainant was not the optimal candidate for the Deputy Director position, he continued to allow Complainant to perform most of the Deputy Director functions for eighteen months without awarding Complainant any additional compensation or the senior management title.

I am persuaded that Grigsby's purported dissatisfaction with Complainant's performance is an exaggerated post-hoc justification for his discriminatory decision. Thomas, supra at 75. I am convinced that, if Complainant's performance was substandard, as Grigsby claimed, Respondent would not have made Complainant the "point person" and would not have allowed him to retain responsibility for the additional duties until October 1996.

The Respondent has proffered multiple reasons why it did not choose Complainant for the position. I conclude that all of the reasons advanced by the Respondent for

selecting Rivera over the Complainant are false. Lipchitz, supra. I conclude that Respondent has not met its burden of articulating legitimate, non-discriminatory reasons for its conduct.

B. Discriminatory Animus

As a result of the foregoing conclusions, I may infer discriminatory animus without additional proof. However, in this case, the Complainant did set forth substantial evidence, which would support a finding of animus based on age.

When Grigsby initially told Complainant that he was not selected, he told Complainant that he had hired a “younger” man for the position. Further, Respondent’s argument, that Complainant was not selected because he did not have commercial banking experience, is belied by the fact that when Rivera was demoted, in 1998, his replacement Catherine Kottaridis was only 35 years of age and did not have the commercial banking experience that Grigsby had claimed was a significant qualification for the position. I conclude that the commercial banking experience was never a legitimate consideration in choosing Rivera over the Complainant. Complainant has persuaded me that Respondent’s articulated reasons for his non-selection were pretextual.

Based on my review of the hearing record in its entirety, I find that Complainant has proven by a preponderance of the evidence that Respondent denied him his promotion because of his age. I conclude, therefore, that Respondent has engaged in unlawful discrimination in violation of G.L. c.151B.

C. Constructive Discharge

Complainant also alleges that he was constructively discharged from his position on or about October 1996. The prohibition against age discrimination applies to a broad scope of employment actions, including constructive discharge. A constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Donna Morrissey v. Holiday Inn, 23 MDLR 74 (2003). Accordingly, a constructive discharge is "legally regarded as a firing rather than a resignation." Morrissey, supra; GET Products Corp. v. Stewart, 421 Mass. 22, 35 (1995), citing Turner v. Anheuser-Busch, Inc. 7 Cal 4th 1238, 1244-1245 (1994). Proof of constructive discharge requires a showing that the employer deliberately made the employee's working conditions so intolerable that a reasonable person would have felt compelled to resign. Holt v. Minuteman Flames Minor Hockey Association, 22 MDLR 373 (2000). Constructive discharge depends largely on the specific factual situation. "Unpleasant" terms of employment have not been found to be sufficient for a finding of constructive discharge. (see Estate of Douglas McKinley v. Boston Harbor Hotel, 14 MDLR 1226, 1240 (1992)).

The Complainant's workplace environment, following the selection of a 30 year old to serve as his supervisor, was more than unpleasant. Complainant possessed a graduate degree, had 30 years work experience and 10 years management experience. He had performed many of the functions of the Assistant Deputy Director for 18 months, during which time he supervised numerous senior project directors. Once Rivera was hired for the position, Complainant was essentially demoted and was assigned to work as a project director, a position held by the same individuals he had been supervising. He was forced to report to Rivera, who was over 30 years his junior, and found Rivera lacked

the knowledge and experience to provide him with supervisory direction. Complainant's colleagues actually offered him sympathy and the atmosphere clearly interfered with his ability to do his job. As a result of Respondent's actions, Complainant suffered emotional distress and harm to his health. Fluet v. Harvard University, et al. 23 MDLR 145 (2001).

To prove his constructive discharge claim, Complainant must also establish that he exhausted his alternatives to continue his employment with the Respondent.

Alternatively, Complainant must show that such possibilities were untenable and that leaving his employment was his only reasonable choice. See Estate of Douglas McKinley v. Boston Harbor Hotel, supra at 1241. I am convinced that Complainant had no other options. There were no other positions available which were comparable to that of deputy director. This was a situation where Complainant's direct supervisor, Grigsby, was the decision maker and knew of Complainant's distress. Complainant had no ability to change Grigsby's decision. I am satisfied that working under Rivera would have been so difficult for Complainant that a reasonable person in his situation would have felt compelled to resign. I conclude that the workplace environment and the level of Complainant's injury in this case support a finding of constructive discharge.

IV. DAMAGES

A. BACK PAY

G.L. c. 151B, section 5 authorizes the Commission to award damages to make complainants whole, including damages for lost pay and benefits. This includes an award

of damages to Complainant for lost wages suffered as a direct and probable consequence of Respondent's actions. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982) citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

Complainant testified credibly that, had he not been forced from the workplace in 1996, he had planned to retire on or about December 31, 1999. Complainant's contention that he would have worked for at least 3 more years is credible. At that time, he would have been 65 years of age

Complainant applied for and accepted early retirement benefits when he did not receive the promotion and the workplace became intolerable for him. He had not intended to retire in October 1996. He made diligent efforts to mitigate his damages from October 1, 1996 through December 31, 1999, by accepting early retirement payments and working in consulting positions in his field.

I conclude that Complainant is entitled to back pay commencing from October 1, 1996, when he should have been promoted, through December 31, 1999, when he would have retired.

Rivera was hired as Deputy Director, in or about October 1996 and was paid \$66,000 annually. I find that Complainant would have been promoted October 1, 1996, had he not been the victim of age discrimination. Though the posting for the position listed a salary range, and Complainant testified as to his belief that he would have received \$71,500, I have determined that randomly picking a salary within the range is too speculative, and I decline to do so. For purposes of awarding damages, I conclude that Complainant would have received at least \$66,000, the same annual salary as Rivera.

As of December 1996, Complainant was receiving an annual salary of \$53,107.08. Between October 1, 1996, and December 31, 1996, his earnings were \$13,276.77.

Respondent shall pay Complainant the difference between his 1996 income for the last quarter of 1996 and the income for that quarter which he would have received as Deputy Director. Had Complainant been promoted in October 1996, and paid \$66,000 annual salary, he would have earned \$16,497 (13 weeks @ \$1,269) The pay differential between \$16,497 (what he would have earned had he been awarded the position) and \$13,276.77 (what he did receive) is **\$3,220.23**.

Respondent shall pay Complainant the difference between his 1997 income and the income he would have received as Deputy Director. Had Complainant served as Deputy Director in 1997, he would have received the \$66,000 salary plus a 3% COLA. His compensation would have been \$67,980. Complainant did mitigate his damages and received \$41,112.15 income. The pay differential between \$67,980 (what he would have earned had he been awarded the position) and \$41,112.15 (his 1997 income) is **\$26,867.85**.

Respondent shall pay Complainant the difference between his 1998 income and the income he would have received as Deputy Director. Had Complainant served as Deputy Director in 1998, he would have received \$70,019.40 (\$67,980 plus COLA). Complainant did mitigate his damages and received \$60,201.15 in total income. The pay differential between \$70,019.40 (what he would have earned had he been awarded the position) and \$60,201.15 (his 1998 income) is **\$9,818.30**.

I find that had Complainant served as Deputy Director in 1999, he would have earned \$72,119.98 (\$70,019.94 plus COLA). In 1999, he received pension and earnings totaling \$62,005.15. The pay differential between 72,119.98 (what he would have earned had he been awarded the position) and \$62,005.15 (his 1999 income) is **\$10,114.83**.

The evidence provided by the parties supports an award of **\$50,021.21** in back pay damages to be paid to Complainant by the Respondent.

B. LOST PENSION BENEFITS

Absent the discriminatory action by Respondent and the resulting constructive discharge in October 1996, Complainant would have continued to work for the Respondent through December 31, 1999. Working three additional years would have impacted the amount of Complainant's pension benefits. Lost pension benefits are compensable and, in this case, are not speculative. See Proudy v. Deerfield Academy, 19 MDLR 83 (1997); Woodason, supra.

Complainant presented credible evidence regarding his lost pension benefits and the calculation of his retirement. Complainant's early retirement pension was calculated by taking the average of three year's salary and multiplying it by his years of service. He received a "bonus" of 5 years of service as an early retirement incentive. Complainant had 18 years of service plus the additional five-year incentive, totaling 23 years of credited service. That number was then multiplied by an assigned factor based on age. The factor for age 62 was 2.2%. His current annual retirement pension is \$26,325.00.

The same formula of years of service, and average three years salary, multiplied by a specified "age factor" (2.5%) can be used to calculate what Complainant's yearly

retirement allowance would have been had he been promoted in October 1996 and retired on December 31, 1999.

Had Complainant retired on December 31, 1999, at age 65, he would have had 21 years of credited service. The factor for age 65 was 2.5. His last three years of salary would have totaled \$210,119.38. The average salary for those three years is \$70,039.97. Utilizing the prescribed formula ($2.5 \times 21 = 52.5\% \times \$70,039.79$), Complainant's annual retirement would have been \$36,770.08.

The difference between Complainant's current annual retirement (\$26,325.00) and the annual retirement he would be receiving absent the discriminatory act (\$36,770.08) is \$10,445.08. The Complainant has suffered an annual loss of pension retirement benefits of \$ 10,445.08. His loss for the past four years (2000, 2001, 2002, 2003) equals \$41,780.32. Complainant will continue to suffer a loss of \$10,445.08 for each and every year he receives his "early retirement" benefits. I find that Complainant is entitled to receive \$10,445.00 for the years 2000 to the present and to continue annually, until such time as he is deceased, as an enhancement to his future annual pension benefits.

C. EMOTIONAL DISTRESS

An award of monetary damages is appropriate to compensate Complainant for the emotional distress he suffered as a victim of the Respondent's unlawful discrimination. See e.g. College-Town v. MCAD, 400 Mass. 156 (1987); J.C. Hillary v. MCAD, 27 Mass. App. Ct. 204 (1989). Such a damage award does not need to be based on expert testimony; it can be based solely on the Complainant's testimony as to the cause of his

own distress. See College-Town, 400 Mass. At 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

No proof of physical injury or psychiatric consultation is necessary to sustain an award for emotional distress. See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997) quoting Buckley Nursing Home Inc. v. MCAD, 20 Mass. App. Ct. 172, 182 (1985) (a finding of discrimination, by itself, permits an inference of emotional distress as a normal adjunct of such discrimination). Permissible considerations include such factors as the nature, severity, and duration of Complainant's emotional distress. See Baldelli v. Town of Southborough Police Dept., 18 MDLR 167, 169 (1996).

Complainant testified credibly about the emotional impact of the Respondent's choice of the younger applicant for the Deputy Director position. The Complainant was sincere in his desire to serve as Deputy Director. The record is clear that Respondent did not wish to stop working. He was "angry" and "devastated" that a younger man without comparable experience was chosen over him. He also felt used and degraded because he performed the tasks of a Deputy Director for approximately eighteen months without the title or additional compensation. His distress manifested itself by a breakout of hives for which he sought medical treatment and reported the reasons for his upset to his physician. I conclude that he suffered emotional distress during the course of his employment with the Respondent, which was particularly heightened when he found that the successful applicant was not capable of handling the senior management role.

I have also considered the length of Complainant's employment with the Respondent (three years)⁶, which was not significantly longer than any other positions he

⁶ See DeRoche v. Town of Wakefield, et al, 24 MDLR 176 (2002) where Hearing Officer considered breakdown of employment relationship lasting almost fifty years as "severe".

had held over a 30-year period. Based upon all these factors, I conclude that Complainant is entitled to \$50,000 in damages for in compensation for the emotional distress he incurred as a direct and probable consequence of the Respondent's unlawful conduct.

V. ORDER

Pursuant to the authority granted to the Commission under Massachusetts General Laws, chapter 151B, section 5, it is ordered that:

1. Respondent is hereby ordered to cease and desist from further acts of age discrimination in the workplace.
2. Respondent shall pay to Complainant the sum of \$50,021.21 in back pay damages within sixty (60) days of receipt of this decision.
3. Respondent shall pay to Complainant the sum of \$50,000 in emotional distress damages within sixty (60) days of receipt of this decision.
4. Respondent shall pay to Complainant the sum of \$41,783.52, representing the lost differential in pension for the years 2000, 2001, 2002 and 2003, within sixty (60) days of receipt of this decision.
5. Respondent shall pay to Complainant the annual sum of \$10,445, in addition to his current retirement pension, for so long as the Complainant shall receive retirement under the current plan. Payments shall coincide with payments made to Complainant under the existing pension plan schedule, and are subject to the same rules and regulations that apply to the current "early" retirement benefits.

Because the Respondent is a municipal entity, no interest accrues on the damage award. See Boston v. MCAD, 39 Mass. App. Ct. 234, 245 (1995) (in absence of express statutory authorization, interest does not lie against the instrumentalities of the Commonwealth and there is no express statutory authorization for interest on awards).

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made or if Respondent fails to comply with the terms of this order. The parties shall notify the Clerk of the Commission if the ordered payments are not made.

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 26th day of February 2004.

HELENE HORN FIGMAN
HEARING OFFICER