

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MASSACHUSETTS COMMISSION )  
AGAINST DISCRIMINATION and )  
MARTIN B. KRAFT )  
Complainant )  
v. ) Docket No. 97-BEM-2826  
BOSTON POLICE DEPARTMENT )  
Respondent )

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Appearances:

Harold L. Lichten, Esq., for Complainant Martin B. Kraft  
William V. Hoch, Esq., and Betsy J. Facher, Esq., for  
Respondent Boston Police Department

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 27, 1997, Complainant Martin B. Kraft filed a complaint with the Massachusetts Commission Against Discrimination (hereafter: the Commission). The complaint charged the Boston Police Department (hereafter: the "Department" or "Respondent") with discrimination based on unlawful retaliation in violation of Massachusetts General Laws, Chapter 151B, §4, paragraph 1. Complainant alleged that the Department discriminated against him when it confined him to a position in its Operations Division for five years in retaliation for the Commission complaints and lawsuits that he

successfully brought against the Department in 1988, 1991 and 1992.

On December 30, 1999, the Commission issued a finding of probable cause in this complaint. The Commission held a conciliation conference in this matter on April 27, 2000. On July 19, 2001, Investigating Commissioner Walter J. Sullivan, Jr., certified this case for a public hearing.

I held a public hearing in this case on August 5-6 and 8-9, September 23 and 27, and October 23, 2002. On February 10, 2003, Complainant and the Department filed their proposed findings of fact, rulings of law and post-hearing briefs with the Commission. On February 19, 2003, the parties moved to file and filed additional briefs.

I have carefully reviewed and considered the entire record before me, including the testimony, all exhibits, proposed findings of fact, conclusions of law and supporting argument. To the extent the proposed findings and conclusions of law are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings and conclusions of law as not relevant or unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions of law to render them acceptable. Based on the credible evidence in the public hearing record and reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law and order.

## II. Findings of Fact

1. On March 30, 1983, the Boston Police Department (hereafter: the "Department") appointed Complainant Martin B. Kraft to a police officer's position. (Respondent's Exhibit No. 8). Complainant is married and lives in Mansfield, Massachusetts with his spouse and two children.<sup>1</sup>

2. In 1987, Complainant received a bachelor's degree in criminal justice from Northeastern University. In 1994, Complainant received a master's degree in criminal justice from Boston University.

3. Between 1983 and 1995, Complainant took the following courses at the Massachusetts Criminal Justice Training Council: homicide investigation, court room testimony, rape investigation, crime scene investigation, fingerprint identification and crime photography. During his tenure with the Department's joint drug task force, Complainant completed training offered by the United States Department of Justice in basic and advanced narcotic investigations and undercover techniques. (Complainant's Exhibit No. 35). Complainant also received training from the Federal Bureau of Investigations in techniques for arresting violent criminals.

4. Paul F. Evans, Jr., has served as the Department's Police Commissioner since February of 1994. Commissioner Evans was appointed to the Department as a police officer on December 30, 1970. Commissioner Evans graduated from Boston State College in 1973 and received a law degree from Suffolk University in 1977

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<sup>1</sup>Complainant's spouse is the daughter of former Police Commissioner Francis M. Roache.

or 1978. The Department appointed Commissioner Evans as the acting Police Commissioner when Commissioner William J. Bratton resigned in December of 1993 and made his appointment permanent in February of 1994.

5. During the time period relevant to the instant complaint, the Department was an employer within the meaning of Massachusetts General Laws, Chapter 151B, §1, paragraph 5.

#### Organization of the Boston Police Department

6. During 1995 to 2000, the Department was organized into five major bureaus that were under Commissioner Evans' command: the Bureau of Administrative Services (BAS), the Bureau of Field Services (BFS), the Bureau of Internal Investigations (BII), the Bureau of Professional Development (BPD) and the Bureau of Investigative Services (BIS). The BII includes the Internal Affairs Division (IAD) and the Anti-Corruption Division (ACD). The BIS includes all of the Department's criminal investigation units such as the Major Investigation Division, the Criminal Investigation Division (including the Homicide Unit) and the Drug Control Investigation (DCU). The BFS includes the Special Operations Division, the Operations Division and 11 district police stations. The BPD includes the Training and Education Division, Regional Round Tables and the Regional Community Policing Institute. (Respondent's Exhibit No. 1).

7. The BII includes sergeants and sergeant-detectives who investigate crimes but are not the primary responders to "911" calls. In the Department, the following units do not have sergeants who are the primary responders to crime scenes: the Accrued Investigations Unit (conducts background checks for new

employees), the ACD (investigates internal corruption), Auditing Review Division, the IAD (investigates misconduct by police officers), the Training and Education Division (trains new recruits and provides in-service training for active police officers), the Regional Round Tables or Regional Community Policing institutes, the Fleet Management Division, and the Information and Technology Division. The DCU includes the homicide, sexual assault, drug and domestic violence units and the task force with the United States Drug Enforcement Agency (DEA). The DCU also includes a financial evidence unit and a drug depository unit that documents seizures and street arrests in which money is seized.

8. Each bureau except for the BAS is commanded by a bureau chief who is a veteran officer and holds the title of Superintendent. Each bureau also has a deputy superintendent who reports directly to a superintendent.

9. Under the Department's command structure, Commissioner Evans is the highest-ranking employee in the Department. The second highest-ranking employee is the Superintendent-in-Chief. The Superintendent-in-Chief and the bureau chiefs constitute Commissioner Evans' command staff. The superintendents report to Commissioner Evans through the Superintendent-in-Chief. The Office of Night Superintendent, the Office of Media Relations, the Office of Strategic Planning and the Office of Research and Evaluation also report directly to the Superintendent-in-Chief. (Respondent's Exhibit No. 1).

10. The Office of Legal Advisor, the Office of Labor Relations, the Office of Administrative Hearings and the Community Disorders Unit report directly to Commissioner Evans.

(Respondent's Exhibit No. 1).

11. Commissioner Evans appoints the Superintendent-in-Chief, the superintendents and deputy superintendents. Commissioner Evans is the final authority for personnel transactions and must approve all assignments, selections or transfers of officers within these bureaus.

12. As patrol officers advance within the Department, they are divided into and promoted based on the civil service rank of patrol officer, sergeant, lieutenant, and captain which is the highest civil service rank. The Department's sergeants, lieutenants and captains are collectively referred to as "superior officers." Officers move up in their ranking by successfully taking a civil service examination. While police officers are promoted primarily based on their civil service scores, Commissioner Evans has the discretion to bypass them if they have problems with discipline or they are inappropriate for a promotion based on their background.

13. During the time period relevant to this complaint, there was a practice within the Department that a patrol officer could attain the rank of a detective, without taking a civil service examination, by performing investigative work in a specialized investigative unit for six months to one year. When the Department promotes officers from one civil service rank to another, they lose their detective rating and have to start over again. Once the officers cease to be a member of Commissioner Evan's command staff, they return to their civil service rank.

14. Within the Department, a sergeant's primary role is to provide immediate supervision over subordinate officers,

coordinate their activities and assume responsibility for their actions and performance. As part of this role, sergeants are expected to "perform activities in the areas of administration, supervision of criminal investigations, crime prevention, personnel management, conflict intervention, public service and training." (Respondent's Exhibit No. 2). Only one of the fifteen examples of a sergeant's responsibilities and duties listed in the Department's Rule 104 refers to assuming "command of police responses in field situations of a particularly complex or sensitive nature as well as at the scene of major crimes." (Respondent's Exhibit No. 2, Section 3, example 5). When sergeants become patrol supervisors who have a greater role "on the street," they still perform significant administrative and supervisory duties. (Respondent's Exhibit No. 2A, sections 1 and 2).

15. While patrol officers are the Department's first responders to crime scenes, sergeants are responsible for supervising the work of the patrol officers. Once patrol officers choose to move up the promotion ladder, their responsibilities become more administrative.

Complainant's Work History with the Department Under Former Police Commissioner Roache from 1983 to March 1995

16. When Complainant graduated from the Police Academy in 1983, the Department assigned him to District A1 where he remained for six months until he transferred to District C11. Complainant remained in District C11 for approximately one and one-half years until the Department transferred him to the Anti-Crime Unit where he worked on street crime such as bag snags, underage drinkers and illegal distribution of drugs and answered "911"

calls. I credit Complainant's testimony that he enjoyed working as a patrolman in Districts A1 and C11.

17. On October 28, 1985, the Department detailed Complainant to the DCU where he was certified to carry a firearm.

(Complainant's Exhibit No. 2). On January 22, 1986, the Department reassigned Complainant to the DCU where he investigated the distribution of street level narcotics.

(Complainant's Exhibit No. 1).

18. Complainant remained in the DCU for approximately 10 months until the Department selected him, in 1985 or 1986, to work on a multi-agency task force with the DEA, the Massachusetts State Police, the Massachusetts Bay Transportation Authority (MBTA), Police Customs and the United States Alcohol, Tobacco and Firearms (ATF). As a result of Complainant's work on the drug task force, he qualified for a detective rating.

19. On June 21, 1988, Police Commissioner Francis M. Roache terminated Complainant for failing to disclose on his job application forms that he had voluntarily admitted himself to Veterans' Administration hospitals and had received psychological treatment on five occasions between April 1976 and March 1978. On October 31, 1988, Complainant filed a civil action in Suffolk Superior Court, No. 88-6213, against the Department and Commissioner Roache in which he alleged that the Department unlawfully discharged him.

20. In the late 1980's, Commissioner Evans learned first learned about Complainant's unlawful discharge and his civil action against the Department for reinstatement and damages.

21. On May 24, 1990, Judge John C. Cratsley ruled that Complainant's discharge was unlawful under Chapter 151B, §4(9A),<sup>2</sup> even though he lied about his hospitalization for mental illness, because the Department could not lawfully ask questions on its application forms about his hospitalization for mental illness. Judge Cratsley ordered Commissioner Roache and the Department to reinstate Complainant to his former position as a detective assigned to the DCU without a loss of benefits or seniority. Judge Cratsley also awarded damages to Complainant for lost wages, benefits, overtime, paid detail and emotional distress in the amount of \$167,297.21 up to and including January 16, 1990. (Exhibit No. 68). Judge Cratsley stayed his reinstatement order pending an appeal to the Supreme Judicial Court.

22. On July 12, 1990, Judge Cratsley amended his order, after a hearing held on July 2, 1990, and ordered the Department to reinstate Complainant to the position of detective by rank, title, salary and without loss of benefits or seniority. (Complainant's Exhibit No. 68).

23. On May 15, 1991, the Supreme Judicial Court affirmed Judge Cratsley's decision and order in Kraft v. Police Commissioner of Boston, 410 Mass. 155 (1991). (Complainant's Exhibit No. 79).

24. On June 13, 1991, the Department reinstated Complainant to his detective's rank. On June 27, 1991, the Department reassigned Complainant to training at the Police Academy for one week and then assigned him to the Identification Unit (IU),

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<sup>2</sup>Chapter 151B, §4(9A) provided, in relevant part, that no application for employment shall contain any question or request for information concerning an applicant's admission to any facility for the care and treatment of mentally ill persons, subject to an exception that was not relevant to Complainant's case.

where he rolled fingerprints and responded to crime scenes. The IU does not require a firearm certification. (Respondent's Exhibit No. 9).

25. After Complainant's reinstatement, Commissioner Roache ordered him to undergo a psychological evaluation to determine if he was fit to carry his weapon. On August 19, 1991, the Department denied Complainant's re-certification for use of a service revolver. The Department's action was based on a psychologist's report that recommended that the Department not return Complainant to his detective position at the DCU and not certify him for the use of a firearm. Without a service revolver, Complainant was unable to obtain overtime and/or detail work in other divisions within the Department. (Complainant's Exhibit No. 68).

26. On September 27, 1991, Complainant filed a petition for contempt and/or motion to clarify and enforce Judge Cratsley's judgment. On January 29, 1992, Judge Cratsley awarded further damages for lost overtime and detail pay for the period beginning January 17, 1990 up to and including August 19, 1991 in the amount of \$38,668.73, plus interest. Judge Cratsley also dismissed Complainant's petition and ruled that he had no authority to interfere with Commissioner Roache's administrative prerogative to decide who can carry a firearm, absent no evidence that Commissioner Roache abused his managerial powers when he refused to re-certify Complainant to carry a weapon. (Complainant's Exhibit No. 68).

27. On March 13, 1992, Complainant filed a civil action in Suffolk Superior Court, No. 92-16161-F, against the Department, Commissioner Roache and the Department's psychologist. In his

complaint, Complainant alleged that the Department discriminated against him based on unlawful retaliation, handicap discrimination, defamation, libel and slander. (Complainant's Exhibit No. 69).

28. In June of 1993, Commissioner Roache resigned and was replaced by Commissioner Bratton.

29. On January 3, 1994, the Department reassigned Complainant to the MIS Department. (Complainant's Exhibit No. 3; Respondent's Exhibit No. 8). On July 27, 1994, the Department reassigned Complainant to the Warrant Unit where he filed paper warrants but was not allowed to serve warrants, make arrests or have a service revolver. (Complainant's Exhibit No. 4; Respondent's Exhibit No. 8). I credit Commissioner Evans' testimony that he was not involved in the Department's decision to reassign Complainant to the ID or Warrant Units.

30. On March 10, 1994, the Supreme Judicial Court ruled that Commissioner Roache had acted in good faith in the exercise of his managerial discretion when he required Complainant to demonstrate his fitness to carry a service revolver. Kraft v. Police Commissioner of Boston, 417 Mass. 235, 236 (1994). (Complainant's Exhibit No. 78).

31. On January 13, 1995, Complainant settled his superior court complaint with the Department after Commissioner Evans approved it. (Complainant's Exhibit No. 70). When Commissioner Evans settled Complainant's lawsuit, he did not have any concerns about Complainant's fitness to be a police officer.

32. As part of the settlement, the Department paid \$37,500.00

to Complainant for emotional distress and attorney's fees in the amount of \$18,750.00. The agreement also established a procedure by which Complainant was successfully re-tested and the Department returned his service revolver in February of 1995. Once the Department returned Complainant's service revolver, he was eligible for details and could again perform "street duty" because he had full police powers. (Complainant's Exhibit No. 70).

#### Background Information Regarding the Operations Division

33. From 1993 until 2000, James M. Claiborne was the Superintendent of the BFS.<sup>3</sup> In this position, Superintendent Claiborne was part of Commissioner Evans' command staff and reported directly to Commissioner Evans from 1993 to 1997. Superintendent Claiborne reported directly to Superintendent-in-Chief Fahey from 1997 to 2000.

34. As part of his job duties, Superintendent Claiborne supervised the commanders or captains of the Special Operations Division, the Operations Division, and the police districts throughout the City of Boston. The 11 districts include the following geographic areas: A1 covers downtown Boston, Beacon Hill, Chinatown and Charlestown; District A7 covers East Boston; District B2 covers Roxbury and Mission Hill; District B3 covers Mattapan and North Dorchester; District C6 covers South Boston; District C11 covers Dorchester; District D4 covers Back Bay, South End and the Fenway; District D14 covers Allston-Brighton; District E5 covers West Roxbury and Roslindale; District E13 covers Jamaica Plain; District E18 covers Hyde Park.

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<sup>3</sup>Superintendent Claiborne appeared at the public hearing and testified pursuant to a subpoena.

35. In the police districts, there were sergeants who served as patrol supervisors and supervised the work of uniformed police officers. There were also community service supervisors in the districts who were in charge of community outreach and oversaw responses to crime and citizens' needs for police help. There were no sergeants in the Support Services Division when Superintendent Claiborne commanded the BFS. (Respondent's Exhibit Nos. 2 and 2A).

36. The Operations Division is the command and call center for the Department. It is the primary contact for citizens in Boston through the "911" telephone system. The Operations Division also provides dispatch support to police officers as they respond to calls for assistance. Civilian call takers talk to victims on emergency lines before police officers respond to a crime scene. The Operations Division includes the mounted police, the K-9 dog unit, the strike force, the bomb squad, the tow unit, the gang units and the "neighborhood crime watch." I credit Commissioner Evans' testimony that the Operations Division is the primary contact for any major incident and has tremendous "power" over the entire City of Boston particularly during weekends and overnight when the senior command staff is not available from 1:00 a.m. to 6:00 a.m. I also credit Complainant's testimony that the Operations Division "is the lifeline of the troops."

37. Prior to 1998, the Operations Division was located in the "turret" at 154 Berkeley Street in Boston. On July 18, 1998, the Operations Division moved to Schroeder Plaza in Boston. When the Department transferred the Operations Division to its new headquarters, it significantly updated the quality of its new computer rated dispatch system. The Department provided its

equipment operators, "911" call takers and sergeants with specialized training in the Operations Division's new dispatching system.

38. The Operations Division is commanded by a captain who reports to either a deputy superintendent or the BFS superintendent, in the absence of the deputy superintendent.

39. According to the Department's witnesses, the estimated time period for training new sergeants in the Operations Division ranged from six months to one year. Superintendent Claiborne testified that, in his experience, it took up to six months to be trained as a sergeant in the Operations Division. Captains Argery Spring and Frank Daniels testified that it took up to one year to train a sergeant in the Operations Division because of the complexity of the computer equipment and the diversity of the civilian employees. Captain Daniels also testified that it took longer to train a sergeant in the Operations Division than in other districts. I credit their testimony.

Reputation of the Operations Division Within the Department  
During 1995 to 2000

40. Patrol officers and superior officers whom the Department assigned to the Operations Division do not have significant in-person contact with the public. To meet the Department's staffing requirements and accommodate an individual's needs, the Department sometimes reassigns officers to the Operations Division who were unable to respond to "street calls" because of their medical or physical restrictions, allegations of misconduct, charges of domestic violence and/or pending disciplinary issues.

41. Prior to 1995, Complainant believed that the Operations Division had a reputation within the Department for being a "dumping ground" for patrol or police officers with disciplinary, psychological and/or medical problems.

42. Commissioner Evans testified that, in 1995 to 2000, he did not consider the Operations Division to be a "dumping ground" for supervisors nor did he consider it a "rubber gun squad" for supervisors. Commissioner Evans testified that the Department sometimes transferred officers who had physical or mental impairments to the Operations Division to best fulfill its' staffing needs and accommodate the officers' needs. I credit Commissioner Evans' testimony.

43. Commissioner Evans testified that the sergeant's position in the Operations Division was good training for a supervisor-sergeant in a district. Commissioner Evans testified that a sergeant in the Operations Division received invaluable experience on how to respond to and handle incidents that occurred throughout the City. Commissioner Evans believed that sergeants in the Operations Division, other than those who were on light or restricted duty, could be assigned to duty in the districts. I credit Commissioner Evans' testimony.

44. During the time that he was at the BFS, Superintendent Claiborne heard the Operations Division referred to as the "rubber gun squad" because some officers in the Operations Division did not carry service revolvers. Superintendent Claiborne considers this characterization to be demeaning and disagrees that it currently applies to superior officers. (Complainant's Exhibit No. 75). I credit Superintendent Claiborne's testimony that while the Operations Division may

have been a "dumping ground" in the past, it was his goal to make it a place that where qualified officers wanted to work. (Complainant's Exhibit No. 86).

45. Since 1998, Ann Marie Doherty has served as the Superintendent of the BPD. Superintendent Doherty received her law degree in 1979 and was sworn into the Massachusetts bar. Superintendent Doherty commanded the Operations Division from 1992 to 1998 when the Department promoted her to command the BII.

46. Superintendent Doherty testified that, while she was the commander of the Operations Division, it had a reputation within the Department as a "dumping ground" for patrol officers. Superintendent Doherty testified that the Operations Division had patrol officers who could not perform full police duties on the "street" for a variety of reasons and it had a number of excellent officers who came from different districts. Superintendent Doherty testified that the Operations Division also had very good superior officers. I credit her testimony.

47. I also credit Superintendent Doherty's testimony that the Operations Division's reputation within the Department has improved since 1992 because of various improvements in its technology and procedures although some employees within the Department continue to hold the opinion that it is a "dumping ground" for patrol officers.

48. John A. Gifford is a captain and has worked in the Office of the Police Commissioner, Staff Inspections, since November 1998. Among his various assignments in the Department, Captain Gifford worked as a sergeant in the Operations Division from

July 1977 until February 1978 when the Department promoted him to lieutenant and assigned him to District B3. Captain Gifford also served in the Operations Division as its acting commander from November 10, 1993 until February 14, 1995, when he assisted in the implementation of a new computer aided dispatch system. In September 5, 1997, the Department promoted him to captain and reassigned him to District B2 where he remained until November 1998.<sup>4</sup>

49. Captain Gifford testified that the Operations Division was historically considered a "dumping ground" for officers who had recent or long-standing disciplinary or personal problems. Captain Gifford also testified that the Operations Division is probably the most important position in the Department for a supervisor to learn how the Department operates or functions as a whole. Captain Gifford testified that the most stressful jobs in the Department were those that were held by dispatchers, supervisors and the emergency call takers in the Operations Division. I credit Captain Gifford's testimony.

50. Argergy Spring currently works on the Central Artery Tunnel Project, Detail Office, in the BAS. In 1993 and 1994, Captain Spring worked in the Operations Division as a lieutenant. In February 1998, the Department reassigned Captain Spring to the Operations Division where he served as the commander for 18 months. In this position, Spring reported directly to Superintendent Claiborne and worked with Complainant.

51. Captain Spring denied that the Operations Division was a

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<sup>4</sup>Captain Gifford is the headquarters representative for approximately 50 uniformed sergeants, lieutenants and captains assigned to the headquarters area and citywide. Captain Gifford also holds the captain's position on the bargaining committee for the Superior Officers' Federation in collective bargaining with the City of Boston. He also serves on the Executive Board of the Superior Officers' Federation.

"dumping ground" for sergeants. I credit Captain Spring's testimony that the Operations Division was a "good place" for sergeants because they gained a lot of experience working with the Department's computers, worked with a wide diversity of civilian employees, including single parents, and had to be highly motivated.

52. Charles J. Cellucci currently serves as a deputy superintendent and is the commander of the Special Operations Division. Superintendent Cellucci worked as the day commander in District D4 from 1992 until the Department promoted him to his current position in January 2001.

53. Superintendent Cellucci testified that, in his experience, the Operations Division was critical to his ability to function in the districts and the Special Operations Division. Superintendent Cellucci testified that the superior officers in the Operations Division were very capable and that he never heard of or had negative experiences with any of them. Superintendent Cellucci testified that, in his opinion, there is no stigma within the Department to being a superior officer in the Operations Division. I credit Superintendent Cellucci's testimony.

54. Based on his experience, Captain Daniels testified that he would be happy to have sergeants with five years experience in the Operations Division in his district because of their broad background and that they would be well suited to be supervisors in a district.

55. Willie H. Bradley currently works as the Deputy Superintendent in charge of dispatch in the Operations Division.

Superintendent Bradley worked as a uniform dispatcher in the Operations Division from 1992 to 1995. Beginning in 1995, Superintendent Bradley began to work with Deputy Superintendent Casey in the BFS as a project manager for the new computer-aide dispatch system and as a part-time dispatcher. When Superintendent Casey created the information systems group (ISG), Superintendent Bradley continued to work with him. Bradley was promoted to sergeant in 1996 and the Department assigned him to District 13 as a supervisor. After six months in District 13, Superintendent Bradley moved back to the ISG, at Casey's request, where his primary responsibility was to manage the move of the dispatch center to the new police headquarters. After the move, Superintendent Bradley managed the Y2K project which was the change of century project. The Department promoted Superintendent Bradley to his current position on January 24, 2000.

56. Superintendent Bradley testified that a sergeant working in Operations Division would be an attractive candidate for a patrol supervisor's position. Superintendent Bradley testified that sergeants who worked in Operations Division would have significant value in a district based on their understanding of the strategy used to address 911 calls which is the primary vehicle for providing service to the citizens of Boston. Superintendent Bradley also testified that these sergeants would know how the Department addresses the territorial boundaries of the City of Boston and how it handles the strategy that relates to team and community policing. These sergeants also know how calls are being dispatched to the police officers, what the officers need to do to interact with the communications center and when an officer has encountered a situation that requires more than the allotted time to deal with the situation.

57. I credit Captain Spring's testimony that he had "volunteers" who wanted to work in the Operations Division for various reasons. I also credit Superintendent Cellucci's testimony that he had responsive and professional police officers in District D4 who requested an assignment to the Operations Division during 1996 through the late 1990's.

58. I credit Complainant's testimony that he believed that the majority of the sergeants who worked in the Operations Division could have been patrol supervisors.

59. I credit the testimony of Superintendents Claiborne and Doherty that a number of current commanders in the Department have worked previously in the Operations Division: Superintendent Doherty, Superintendent Willie Bradley, Captain Dunford, Captain Frank Daniels, Captain John Gifford, Captain Ryan, Captain Sweeney, Captain Robert Dunford, Captain Ronald Stapleton and Lieutenant Frank Armstrong, Commissioner Evans' Chief of Staff, the Deputy Superintendent for Labor Relations and the Deputy Superintendent. I also credit Superintendent Claiborne's testimony that two superior officers requested a transfer into the Operations Division during the time period relevant to the instant complaint: Superintendent Bradley and Lieutenant Armstrong who is currently the commander of the DCU.

I. Complainant's Assignment to the Operations Division in March 1995

60. Sometime in 1995, Superintendent Claiborne recalled a meeting with Commissioner Evans during which Commissioner Evans stated, "Marty [Complainant] is suing us again." Superintendent Claiborne did not recall when Commissioner Evans made this

statement or the context for it. Commissioner Evans testified that he may have made this statement but he did not recall it.

61. On the last day of new sergeant training in early 1995, Superintendent Claiborne made a short speech to the new sergeants at the Police Academy about their upcoming assignments. During his speech, Superintendent Claiborne told the new sergeants that the Department was going to assign some of them to the Operations Division but that, if assigned, they would probably only have to remain in it for one or two years. I credit Superintendent Claiborne's testimony that he made this statement because: (1) the Operations Division was generally not a first choice for an assignment; (2) the Department had a plan in which it intended to rotate all sergeants through the Operations Division; (3) the Department was implementing a new system in the Operations Division as part of its community policing program and it wanted "buy in" from sergeants for the system.

62. On February 14, 1995, Commissioner Evans promoted Complainant from detective to sergeant along with 60 other new sergeants. Commissioner Evans promoted Complainant to his sergeant position in the order that his name appeared on the civil service list. (Complainant's Exhibit No. 6). Complainant's promotion was independent of his settlement agreement, dated January 13, 1995, and was based on the results of Complainant's promotional examination.

63. Pursuant to its practice, the Department reassigned Complainant and the newly promoted sergeants to the Training and Education Division, effective February 15, 1995 and then gave them new assignments. (Complainant's Exhibit Nos. 6, 7 and 80).

Under the practice in 1995 through 2000, once the Department promoted new sergeants, it reassigned them from the district or unit where they were working immediately prior to their promotion. (Complainant's Exhibit No. 7). Once the new sergeants received their first new assignments, they are no longer differentiated based on whether they were a detective or a police officer. (Complainant's Exhibit Nos. 6, 7 and 80).

64. On March 3, 1995, the Department reassigned Complainant to the Operations Division, effective March 8, 1995. (Complainant's Exhibit No. 8).

65. Complainant knew that, under the Department's policy, he lost his detective rating once he was promoted him to the rank of sergeant. (Respondent's Exhibit No. 8). While Complainant worked in Operations Division, he earned \$40.00 a week more than a patrol supervisor as required under the Department's collective bargaining agreement.

66. I credit Complainant's testimony that he was angry, "very upset" and "devastated" when he learned that he was reassigned to the Operations Division. Complainant testified that he objected to being assigned to the Operations Division because he felt it was a "dumping ground" where officers were restricted to their desks and that his reassignment was a continuation of the type of "desk work" that he had performed for the previous seven years.

67. Each new class of sergeants provided the Department with the opportunity to assign newly promoted sergeants and transfer existing sergeants as needed. When a new class of sergeants completed, the superintendents identify their staffing needs and

make recommendations for assignments to Commissioner Evans. While Commissioner Evan made the final decision regarding the assignments for new sergeants, he rarely rejected the recommendations of his superintendents. I credit Commissioner Evans' testimony that it was "not unusual" for a sergeant to be unhappy with his or her assignment because he had to staff all positions, even the less attractive ones, to meet the Department's needs.

68. Under the Department's policy or practice in 1995, Superintendent Claiborne would ordinarily have made recommendations to Commissioner Evans regarding the assignments of new sergeants in the Operations Division. I credit Superintendent Claiborne's testimony that he made various recommendations, in writing, to Commissioner Evans regarding the assignments for the entire class of 60 sergeants who were promoted in February 1995. I also credit Superintendent Claiborne's testimony that he made his recommendations to ensure that there was fairness in assignments between the residential districts and the districts such as the South End, Back Bay and downtown that were considered more popular. I further credit Superintendent Claiborne's testimony that he based his recommendations on the Department's need to maintain efficiency and that he assigned sergeants where they could "best benefit" the Department.

69. I credit Superintendent Claiborne's testimony that he may have recommended to Commissioner Evans that he reassign Complainant to the Operations Division and he did not recall Commissioner Evans rejecting his recommended assignment for Complainant. I credit Commissioner Evans' testimony that he did not recall whether Superintendent Claiborne recommended

Complainant's reassignment to the Operations Division but that it was the normal practice within the Department for bureau chiefs to make this recommendation.

70. At the time of the new sergeant assignments in February-March 1995, Superintendent Claiborne knew about Complainant's initial lawsuit against the Department after his discharge. Superintendent Claiborne also knew that Complainant had filed a second lawsuit against the Department related to Commissioner Roache's order for a psychological examination. In February 1995, Superintendent Claiborne also knew the Department did not allow Complainant to use a service revolver and he erroneously assumed that such prohibition was part of an ongoing internal affairs investigation. Superintendent Claiborne also knew, by February 1995, that the Department had settled Complainant's second lawsuit and that he had regained use of his service revolver.

71. When the Department reassigned Complainant to the Operations Division, Captain Ronald Stapleton was the commander of the Operations Division. On March 6, 1996, the Department reassigned Captain Stapleton to District E18. (Complainant's Exhibit No. 81). Captain Daniels served as the commander of the Operations Division from March 6, 1996 to February 4 1998. when the Department reassigned him to command District E18. (Complainant's Exhibit 83).

72. I credit Complainant's testimony that he had a "beautiful" working relationship with Captain Stapleton.

73. On June 3, 1997, Complainant's attorney sent a letter to Commissioner Evans to inform him of Complainant's intention to

file a retaliation claim unless he was provided an opportunity to transfer out of the Operations Division to an appropriate position in a district office. (Complainant's Exhibit No. 72). On July 15, 1997, the Department replied to Complainant's letter and stated that the assignment of personnel was solely within the discretion of Commissioner Evans based on the needs and demands of the Department. The Department's letter also stated that the decision to assign Complainant to the Operations Division was based on Commissioner Evans' determination that his assignment was in the best interests of the Department. (Complainant's Exhibit No. 73).

74. I credit Complainant's testimony that, by July 1997, he had "reached the end of [his] rope" and felt "buried" in the Operations Division. I also credit Complainant's testimony that he made it known, orally and in writing, that he was interested in a transfer. During 1995 through 2000, Complainant reviewed various Commissioner's Memoranda and the postings for vacancies in specialized units. Complainant also talked to a number of supervisors and commanders about vacancies in their districts and made requests in districts where they were short in patrol supervisors.

#### Complainant's Work Performance in the Operations Division

75. As a sergeant in the Operations Division, Complainant supervised the day-to-day activities of uniform dispatchers and civilian call takers, conducted roll calls and acted as the duty supervisor when the lieutenant was off duty. Complainant's primary role was to ensure that dispatchers appropriately handled incoming calls and that the proper department personnel were notified regarding major incidents or priority calls to

ensure that sufficient resources were directed to the crime scene or incident. Complainant also interacted with district commanders and ensured the proper functioning of the "911" system. While Complainant worked in the Operations Division, his work as a sergeant conformed to the duties required of sergeants in the Department under Rule 104. (Oral stipulation of the parties).

76. While Complainant worked in the Operations Division, he worked overtime as a patrol supervisor in other districts when no one within a district indicated an interest in working overtime as a patrol supervisor in that district. Complainant also worked overtime on details and special events such as the Caribbean, Dominican and Puerto Rican festivals.

77. Commissioner Evans testified that Complainant was enthusiastic, very conscientious, committed and sometime overzealous in the performance of his duties in the Operations Division. Commissioner Evans also felt that Operations Division was a good assignment for Complainant because he "got very involved in things" and was not "bashful" about making decisions and committing resources.

78. Between 1996 and 1999, Commissioner Evans wrote responses to nine letters from various citizens who wrote him to thank or commend Complainant for his good job performance. (Respondent's Exhibit No. 4). Commissioner Evans inserted a copy of these letters in Complainant's personnel file. During this period, Complainant also received certificates for successfully completing training in Windows 1995 and Magic 2 User and the mandatory Massachusetts (16 hours) enhanced "911" telecommunication course. (Respondent's Exhibit No. 6).

79. Superintendent Claiborne had a lot of daily interaction with Complainant while he was assigned to the Operations Division. Superintendent Claiborne also received reports from various supervisors and commanders in the districts where Complainant worked on details or overtime about his supervisory methods or style.

80. Superintendent Claiborne described Complainant as a competent sergeant who acted professionally while he performed his duties in Operations Division. Superintendent Claiborne believed that Complainant would perform better with a "strong" captain because he had a "very strong personality." Superintendent Claiborne also described Complainant's style as a sergeant and a supervisor to be "very, very aggressive" with a tendency to "over supervise." Superintendent Claiborne testified that Complainant made decisions that were always within the bounds of discretion that was afforded to him but that he sometimes made decisions different from what the majority of other supervisors would have made. Superintendent Claiborne also testified that Complainant's reputation within the BFS was that he was "somewhat of a maverick" and was "basically nonstop working" that "kind of wears some people out." I credit Superintendent Claiborne's testimony.

81. I credit Captain Spring's testimony that Complainant was an excellent sergeant during 1998 and 1999 while they worked together in the Operations Division.

Reassignments Into and Transfers Out of the Operations Division  
Between 1995 and May 2000

82. Between 1995 and 2000, the Operations Division usually had one of the highest overtime budgets within the Department and Superintendent Claiborne was concerned about maintaining an adequate level of staffing level of sergeants. In May 1996, the Operations Division had a surplus of sergeants because the Department transferred nine sergeants into the Operations Division between March 1995 and March 1996 and none were transferred out of the Operations Division during this period.

83. Between March 8, 1995 and May 15, 2000, the Department reassigned 20 sergeants into the Operations Division, including Complainant. Eleven of these transfers involved newly promoted sergeants. During the same period, the Department only transferred eight sergeants, besides Complainant, out of the Operations Division. (Complainant's Exhibit Nos. 80-85). I credit Superintendent Claiborne's testimony that the Department assigned three of these newly promoted sergeants to the Operations Division on May 8, 2000, to meet the staffing needs within the Operations Division and not because of the sergeants' personal needs. (Complainant's Exhibit No. 85).

84. When the Department reassigned Complainant to the Operations Division in March 1995, it reassigned three other newly promoted sergeants to the Operations Division: James R. Driscoll, James P. Fitzgerald and Robert F. McCarthy. (Complainant's Exhibit Nos. 7 and 80).

85. On May 15, 1996, the Department reassigned Sergeant James Cullity and Sergeant Fitzgerald from the Operations Division to

District E18 and District A7, respectively, because these districts had a need for sergeants. (Complainant's Exhibit Nos. 8 and 80). Neither Sergeant Cullity nor Sergeant Fitzgerald had requested a transfer out of the Operations Division. Prior to their reassignments, Sergeants Cullity and Fitzgerald had worked in the Operations Division for three and one-half years and fourteen months, respectively. (Respondent's Exhibit No. 3).

86. I credit Superintendent Claiborne's testimony that he recommended a transfer of Sergeant Cullity to District E18 for more "seasoning" as a supervisor. Superintendent Claiborne did not recall the reasons why he recommended Sergeant Fitzgerald for a transfer to District A7 other than it had dropped below the minimum staffing level for sergeants. The Department did not replace Sergeant Cullity or Fitzgerald in the Operations Division because of its surplus of sergeants.

87. I credit Superintendent Claiborne's testimony that he did not recommend that the Department transfer Complainant to Districts A7 or E18 because he considered him to be "probably the best sergeant in Operations" and he was "reluctant" to lose him. I also credit Superintendent Claiborne's testimony that Complainant was "valuable" to the Department in his role as a sergeant in the Operations Division. I do not credit Superintendent Claiborne's testimony that he did not know whether Complainant had expressed an interest in a transfer out of the Operations Division before May 1996.

88. On November 6, 1996, the Department reassigned Sergeant Richard P. Connolly from the Operations Division to District C6. (Complainant's Exhibit No. 81). I credit Superintendent Claiborne's testimony that he recommended Sergeant Connolly

because he had more than the minimum number of sergeants in the Operations Division, there was a need in District C6, and the Captain of District C6 requested his transfer. I also credit Superintendent Claiborne's testimony that he tries to accommodate a captain's request for a transfer of an officer to his or her command, where possible. Prior to his reassignment, Sergeant Connolly had worked in the Operations Division for 9 months. (Respondent's Exhibit No. 3).

89. On February 12, 1997, the Department reassigned Sergeant Frederick J. Conley, Jr., from the Operations Division to District E13. (Complainant's Exhibit No. 82). On December 2, 1998, the Department reassigned Sergeant McCarthy to the Hackney Unit, BAS. (Complainant's Exhibit 83). Prior to their reassignments, Sergeants Conley and McCarthy had worked in the Operations Division for four and one-half years and two years and eight months, respectively. (Respondent's Exhibit No. 3).

90. On May, 15, 2000, the Department transferred Complainant to District E18. (Complainant's Exhibit No. 85).

91. From March 1995 to May 2000, Complainant was the only sergeant who requested a transfer out of the Operations Division but was not transferred.

92. When the Department assigned Complainant to the Operations Division, there were three sergeants who had already worked in the division for more than 10 years. (Respondent's Exhibit No. 3). Upon Complainant's transfer to District E18 in May 2000, there were 12 sergeants remaining in the Operations Division. They included four sergeants who were reassigned to the Operations Division upon their promotion to the rank of

sergeant, one sergeant who requested a transfer because of his expertise in computer science and six sergeants who were reassigned because of personal issues or medical conditions.

93. Commissioner Evans testified that he did not consider five years to be a long time for a sergeant to remain in an assignment. In Captain Spring's experience, five years was not a long time for a sergeant to be in the Operations Division. Captain Daniels believed that five years was an extraordinary time for a sergeant to remain in the Operations Division. I credit their testimony.

#### The Department's Transfer Process During 1995 to 2000

94. Unlike district positions, the Department normally posted vacancies for specialized positions through a Commissioner's memorandum so that candidates could submit a written notice of interest to the superintendent or commander of the unit where the vacancy existed. While the normal process was to conduct interviews for specialized positions, they were not required and did not occur in many vacancies. Some specialized positions are filled without a Commissioner's Memorandum because Commissioner Evans has the discretion to reassign officers within the Department. A candidate was not required to obtain a recommendation from his or her current commander to apply for a specialized position.

95. After the commanders screen and review the candidates, they forward recommendations to their superintendents who universally approve them and forward them to Commissioner Evans for his review and approval. Commissioner Evans approved their recommendations "in almost all instances."

96. If a district commander wants a specific individual for a specialized or a district position, he or she requests a transfer for the individual and places it on a routing slip that is also called a "record of concurrence." The routing slips are generally circulated among the superintendents and deputy superintendents and include a place for them to write comments, note their concurrence or their objections, as appropriate, even if they were not directly involved in the transfer. After the routing slips circulated through the superintendents, they were forwarded to Commissioner Evans for his approval because he has the "final say" on all transfers. The routing slips are destroyed once the human resources department prepares the personnel orders to effectuate the transfers.

97. Openings for vacant positions in the Department's districts are not posted. An officer in the BFS who wants to transfer within a district or to another district in a non-specialized unit must submit a Form 112, the "blue sheet," to his or her commander for review and approval. If the commander approves the Form 112 based on the district's staffing needs or requirements, he or she forwards the Form 112 to Superintendent Claiborne for action. If the commander does not approve the transfer request he or she sometimes forwards it to Superintendent with a favorable recommendation for the officer. I credit Superintendent Claiborne's testimony that captains overwhelmingly approved transfer requests and gave "glowing approvals" because they did not want to stand in the way of officers who wanted to move to another district.

98. Superintendent Claiborne testified that he sometimes consulted with the commander of the district to which the officer was seeking a transfer to determine whether the

commander wanted the officer although he made his decisions or recommendations based on the Department's needs and the commander could not block the transfer. Superintendent Claiborne also testified that he generally accommodated the requests of the captains within the BFS and approved the transfer requests. I credit Superintendent Claiborne's testimony.

99. Sometimes two captains within the BFS proposed a mutual swap in which they sought to exchange sergeants. If Superintendent Claiborne approved the swap, he forwarded it to Commissioner Evans.

100. If Superintendent Claiborne received a transfer request related to a division or specialized unit outside of the BFS, he forwarded it to the superintendent of the appropriate division or specialized unit.

101. After his review, Superintendent Claiborne made his recommendations to Commissioner Evans, in writing, and sometimes orally discussed his recommendations with him. If Commissioner Evans approved the transfer request, Superintendent Claiborne ultimately received a Department personnel order that described which officers received a transfer and the districts to which they were to be transferred.

102. If Commissioner Evans directly received a request for a transfer within a bureau, he sent it to the appropriate superintendent for handling within the chain of command. I credit Commissioner Evans' testimony that he rarely overturned a superintendent's recommendation for a transfer. I also credit Commissioner Evans' testimony that superintendents may orally

discuss transfers with him but he required a written recommendation to start the formal personnel process.

103. There is an informal practice within the Department of trying to accommodate the requests of police officers for transfers or reassignments to other districts. I credit Superintendent Claiborne's testimony that there was no informal practice within the Department of accommodating the requests of newly promoted captains for superior officers to serve under their command although it may have occurred. I also credit Commissioner Evans' testimony that such transfers occurred if a superintendent could accommodate a captain's request based on the Department's operational needs.

104. Sometimes the Department did not immediately take action on the Form 112s submitted by officers because of its staffing needs. It was "very common" for an officer to make a transfer request but never hear about it again. Even if a captain advocated for an officer's transfer request, there often a long delay before the Department acted on it, sometimes up to one year. The Department also deferred its action on transfer requests and waited for a new class of police officers following a promotional examination.

105. Commissioner Evans sometimes transferred a sergeant on his own initiative because of special circumstances like a physical problem or family concerns. Commissioner Evans also testified that he rarely initiated a transfer of a sergeant and estimated that it occurred less than 2% of all transfers. Commissioner Evans also testified that, during 1995 to 2000, he rarely rejected a sergeant's request for a transfer. I credit Commissioner Evans' testimony.

106. Commissioner Evans testified that he had three concerns about transferring Complainant to a specialized unit on his own initiative: (1) Complainant's off-duty arrest of a prostitute; (2) the number of hours that Complainant historically worked; (3) some districts did not want Complainant to work on details.

107. Commissioner Evans testified that he learned that Complainant had made an off-duty arrest of a prostitute that he believed was a very unusual and unwise practice. Commissioner Evans testified that such an off-duty arrest placed the arresting officer at risk by acting alone with a prostitute. Commissioner Evans testified that, if Complainant had concerns about prostitution in his neighborhood, the best response would have been to contact local police officers and ask them to respond. Commissioner Evans also testified that making a single off-duty prostitution arrest was not appropriate, was a "very dumb thing to do" and showed poor judgment. I credit Commissioner Evans' testimony.

108. Complainant testified that this incident occurred on July 14, 1995 while he was on a paid detail at the Park Plaza Hotel from midnight to 5:00 a.m. (Complainant's Exhibit No. 88). Complainant testified that he was on a detail because there was an influx of crime around the perimeter of the Park Plaza Hotel, including prostitution and drug dealing and the Hotel wanted a uniformed presence in the area. Complainant testified that the individual was arrested for common night waking and had default warrants. Following her arrest, she was convicted and sentenced to six months in the house of correction. (Complainant's Exhibit No. 89).

109. I credit Complainant's testimony that no one ever told

that any arrest he made of a prostitute was improper.

110. Commissioner Evans testified that he was also concerned about the number of hours that Complainant worked. While the hours Complainant worked were within the Department's rules and regulations, Commissioner Evans had concerns about the effectiveness of officers who work "long" hours and believed that police officers should be balanced regarding their priorities. I credit Commissioner Evans' testimony.

111. Commissioner Evans testified that he had learned, from anecdotes, that there were at least commanders who did not want Complainant to work overtime in their districts although he did not investigate these issues.

112. Commissioner Evans testified that he did not have concerns about Complainant when the Department assigned him to the Operations Division. While Commissioner Evans did not recall whether Complainant's off-duty prostitution arrest occurred prior to his assignment to the Operations Division, he did not believe that it was a sufficient reason to bypass Complainant for promotion to the rank of sergeant.

## II. Complainant's Transfer Requests from the Operations Division

113. It was "common knowledge" within the Department that Complainant was actively seeking to transfer out of the Operations Division. Between 1995 and 2000, Complainant filed multiple applications to transfer from the Operations Division. (Complainant's Exhibit Nos. 27-45). Complainant did not introduce any evidence that he took steps to establish a mutual swap during this period.

114. Commissioner Evans testified that he did not object to transferring Complainant out of the Operations Division as long as it did not create vacancies in the Operations Division. Commissioner Evans testified that Complainant's past and current lawsuits against the Department did not affect his decisions regarding whether to transfer Complainant out of the Operations Division between 1995 and 2000.

115. Superintendent Claiborne also testified that he did not object to Complainant's transfer from the Operations Division but was concerned about whether he would be replaced. Superintendent Claiborne acknowledged that had Complainant transferred out of the Operations Division he would not have needed to back fill his position because there was a surplus of sergeants in Operations Division.

116. Superintendent Claiborne never made a written recommendation to Commissioner Evans to transfer Complainant to a district position.

117. Sometime in 1999, Captain Daniels sent a memorandum directly to Superintendent-in-Chief Faherty in which he requested a transfer of Complainant to his command in District E18. During one of their weekly meetings, Chief Faherty raised Complainant's transfer with Commissioner Evans and Superintendent Claiborne. During the meeting, Chief Faherty advocated in favor of Complainant's transfer and told Commissioner Evans that he thought Complainant should "have a shot at going to a district." Superintendent Claiborne testified that he concurred with Chief Faherty's request to transfer Complainant to District E18 although Captain Daniels did not follow the chain of command when he sent his memorandum

directly to Chief Fahey .

118. Superintendent Claiborne testified that Commissioner Evans "smiled" but did not say anything in response to his Chief Faherty's discussion of Complainant's transfer and moved to another subject. Based on Commissioner Evans' "smile" and a change of subject, Superintendent Claiborne assumed that Commissioner Evans's response was a "no." Superintendent Claiborne testified that Commissioner had never "smiled" in this manner on other occasions while discussing transfer requests. Superintendent Claiborne testified that Commissioner Evans never said "yes" or "no" and never told Superintendent why he denied the request. Commissioner Evans did not recall this conversation. I credit Superintendent Claiborne's testimony.

119. I credit Commissioner Evans' testimony that Superintendent Claiborne and Chief Faherty told him that Complainant wanted to transfer to District E18 and that Captain Daniels wanted him in his new command. Commissioner Evans testified that he did not oppose the transfer and approved it although it did not occur until May 2000. Commissioner Evans also testified that he did not object to Complainant's transfer and that he waited for Superintendent Claiborne to put the transfer request in writing and forward it to him for his signature but he never received one. I do not credit Commissioner Evans' testimony that he orally approved Captain Daniels' request to transfer Complainant.

120. Commissioner Evans testified that he knew recalled two sergeants, in addition to Complainant, who wanted to transfer out of Operations Division during 1995 to 2000. Commissioner Evans also testified that one of these sergeants came to him

directly and requested a transfer to the DCU but he did not approve the request because he felt the sergeant did not have the experience that was needed for the position.

Complainant's Request to Transfer to District C11 in 1995

121. On July 20, 1995, Complainant submitted a written request to transfer to District C11 which Captain Stapleton approved on July 24, 1995. (Complainant's Exhibit No. 27). Complainant submitted no evidence that there was a vacancy in District C11 when he submitted his transfer request.

122. Captain Robert P. Dunford has served as the commander of District C11 since 1991. Captain Dunford also worked in the Operations Division from 1981 to 1983 and served as the Police Academy Commander from 1986 until 1991.

123. When the Department reassigned Complainant to the Operations Division on March 3, 1995, it also reassigned seven newly promoted sergeants to District C11. On October 11, 1995, the Department reassigned an additional sergeant to District C11. (Complainant's Exhibit No. 80).

124. Captain Dunford testified that, between 1995 and 2000, nearly all of the sergeants who transferred into District C11 were newly promoted sergeants. Captain Dunford also testified that, during this period, there was one mutual swap of a sergeant-detective for a sergeant. Captain Dunford did not recall a receiving a written request form submitted by Complainant to transfer to District C11. I credit Captain Dunford's testimony.

125. At some unspecified date after December 24, 1995, Superintendent Claiborne called Captain Dunford and told him that Complainant had made a request to transfer to District C11. Superintendent Claiborne asked Captain Dunford whether he was willing to accept Complainant in his command and Captain Dunford replied "no." Captain Dunford did not give any reasons why he was unwilling to accept Complainant under his command.

126. I credit Captain Dunford's testimony that his dissatisfaction with Complainant was based, in part, on an incident involving a home invasion on Alpha Road on December 24, 1995 which he believed was an example of Complainant's poor judgment in handling a crime scene. (Complainant's Exhibit No. 94). While Complainant worked on overtime as a patrol supervisor in District C-12, he directed the investigation and ordered 60 hours of overtime. Captain Dunford testified that Complainant put in for an overtime tour from 11:45 to 7:30 but also put in for another eight and one-half hours for this incident which he refused to pay. Captain Dunford called Complainant, at home, to express his unhappiness about the overtime.

127. On January 5, 1996, Complainant submitted a written report to Captain Dunford regarding his actions and decisions during this incident. (Complainant's Exhibit No. 95). After reviewing Complainant's report, Captain Dunford felt that Complainant's handling of the overtime for the police officers on the scene was an abuse. Complainant ultimately accepted four hours of overtime. Because of this incident, Captain Dunford had concerns about Complainant's judgment regarding the manner in which he managed crime scenes.

128. The Department did not discipline Complainant for his

129. Captain Dunford testified that, between 1995 and 2000, he told his lieutenants, some of his sergeants and a number of captains, including Captain Daniels, that he was dissatisfied with Complainant's work. Captain Dunford testified that when Captain Daniels was commander of the Operations Division, he told him that the sergeants and detectives in his district had complained that Complainant made poor judgments, allocated resources and officers that resulted in overtime costs and unreasonably interfered in their crime scene investigations. Captain Dunford believed that such actions were beyond the scope of Complainant's duties as a supervisor in the Operations Division. Captain Dunford also testified that he asked Captain Daniels to talk to his supervisors to ensure that they did not interfere with the crime scene investigations. I credit Captain Dunford's testimony.

130. Captain Daniels recalled that Captain Dunford called him on one occasion while he commanded the Operations Division and asked him not to send Complainant back to his district for overtime or a detail.

131. I do not credit Complainant's testimony that he never heard that Captain Dunford did not want Complainant in his district. Captain Daniels told Complainant that Captain Dunford was unhappy with his performance. Complainant also learned from supervisors in the Operations Division that Captain Dunford had told them that Complainant was "banned" from working in District C11.

132. Complainant also accepted overtime positions as a duty

supervisor in District C11. Based on Complainant's work in District C11 and discussion with his officers and supervisors, Captain Dunford believed that Complainant was overbearing and did not treat the uniformed officers under his command with respect. Captain Dunford also questioned Complainant's judgment about how incidents were to be handled when he was the supervisor "on the street." Captain Dunford testified that he discussed his concerns with the lieutenants under his command. I credit Captain Dunford's testimony.

133. Captain Dunford knew, prior to 1995, that Complainant had sued the Department and former Commissioner Roache. Captain Dunford testified that Complainant's litigation against the Department was not a factor in his statement to Superintendent Claiborne that he did not want to have Complainant under his command in District C11. Captain Dunford also testified that no one suggested to him that Complainant had to remain in the Operations Division. I credit Captain Dunford's testimony.

Captain Stapleton's Request in March of 1996 to Transfer Complainant

134. When the Department reassigned Captain Stapleton to District E18 on March 6, 1996, he asked Complainant whether he was interested in transferring to District E18 under his command. (Complainant's Exhibit No. 81). When Complainant responded affirmatively, Captain Stapleton sent a memorandum, dated March 11, 1996, directly to Commissioner Evans in which he requested the transfer of Complainant to District E18. (Complainant's Exhibit No. 55). In the same memorandum, Stapleton also requested the transfer of Sergeant Detective James P. Barry and Sergeant Nelson Carrasquillo who worked for

him in the Operations Division.

135. Commissioner Evans sent Captain Stapleton's request to Superintendent Claiborne for his review and recommendation. Superintendent Claiborne testified that it was unusual for a captain in the BFS to send a transfer request directly to Commissioner Evans. Superintendent Claiborne also testified that he returned Captain Stapleton's request to Commissioner Evans without a written favorable recommendation. I credit Superintendent Claiborne's testimony.

136. Commissioner Evans did not approve any of the three transfers requested in Captain Stapleton's memorandum. The Department did not reassign Complainant, Sergeant Barry or Sergeant Carrasquillo to District E18. The Department's records showed that Sergeant Barry remained in the Police Academy until he retired on February 17, 1998. On October 6, 1996, the Department transferred Sergeant Carrasquillo from the Operations Division to District E13 and then to the ID Unit on December 17, 1997. (Respondent's Exhibit Nos. 15 and 16).

#### Complainant's Request in July 1996 to Transfer to District D4

137. Superintendent Cellucci testified that he had very little turnover in District D4 and that he never had critical or long-term shortages in staff. Cellucci also testified that District D4 was the most desirable district to work in within the Department and that it was "extremely" common for officers to tell him about their interest in coming to District D4. I credit Superintendent Cellucci's testimony.

138. Superintendent Cellucci testified that Complainant worked

under his command as a sergeant on details or on major events. Cellucci testified that Complainant was personable and that he never had a problem or any issues with him. During his details in District D4, Complainant sometimes talked to Superintendent Cellucci about his interest in a transfer to Area D4. Complainant told Superintendent Cellucci that he "was still looking to come to 4," that he was "hoping to get there soon" and that he would "ask for [his] help when the time comes." Superintendent Cellucci testified that he told Complainant, "well if it comes to that, we'll talk, we'll do what has to be done." Superintendent Cellucci also testified that Complainant told him that he had requested a transfer from the Operations Division because he wanted to return to the "street" in a supervisory role. Superintendent Cellucci also knew that Complainant lived in District D4 at that time. I credit Superintendent Cellucci's testimony.

139. Superintendent Cellucci did not promise to help Complainant with a transfer to District D4 nor did he take any steps to facilitate a transfer.

140. On July 16, 1996, Complainant submitted a written request to transfer to District D4 (last half). On July 18, 1996, Captain Daniels approved Complainant's request and forwarded it to Superintendent Claiborne. (Complainant's Exhibit No. 31). Captain Daniel's practice was to try to accommodate all transfer requests, even if he was understaffed. He approved all transfer requests, provided favorable or positive comments and forwarded them up the chain of command. Captain Daniels also testified that he sometimes requested an officer in return so that he would not be shorthanded. I credit Captain Daniel's testimony.

141. Captain Daniels testified that he never discussed Complainant's transfer requests with Superintendent Claiborne or Commissioner Evans. Captain Daniels also testified that he was never told that Complainant was not to be transferred out of the Operations Division. Captain Daniels did not recall any instance where other captains "reached out and asked to take" Complainant from the Operations Division. I credit Captain Daniel's testimony.

142. Superintendent Cellucci also testified that no one in the Department's chain of command told him that Complainant would have to remain in the Operations Division. Superintendent Cellucci never told Superintendent Claiborne or Faherty that he did not want Complainant assigned to District D4.

143. During 1995 to 2000, Superintendent Cellucci knew that Complainant had successfully sued the Department during Commissioner Roache's tenure but did not have any details about it.

#### Captain Gifford's Request to Transfer Complainant to District B2

144. Captain Gifford testified that District B2 was the busiest district in Boston for arrests during 1995 through 2000 and was not considered a desirable assignment for patrol officers, sergeants, detectives or supervisors. Complainant told Captain Gifford that he was interested in leaving the Operations Division. Captain Gifford told Complainant that there was work for him in District B2. Captain Gifford testified that he wanted Complainant to work at District B2 because he was understaffed in sergeants based on the department's staffing levels. Captain Gifford also testified that he knew that

Complainant was "mercurial" and was an aggressive police officer and a hard worker. Captain Gifford testified that Complainant was the first person to ask him for a transfer into District B2 after his promotion. I credit Captain Gifford's testimony.

145. At some point between September 1997 and November 1998, Captain Gifford sent a written request to Superintendent Claiborne for Complainant to be transferred to District B2. Captain Gifford testified that he discussed his request with Superintendent Claiborne several times.

146. I credit Superintendent Claiborne's testimony that he discussed Captain Gifford's transfer request with Commissioner Evans. Superintendent Claiborne recalled that Commissioner Evans was willing to approve of Complainant's transfer to District B2 but it was part of a three-way transfer involving Complainant and two other sergeants but it did not "work out." Superintendent Claiborne did not submit a written recommendation to Commissioner Evans regarding Captain Gifford's request.

147. Captain Gifford denied that Superintendent Claiborne ever said anything to him about a potential three-way transfer involving Complainant. Captain Gifford testified that, at some point, he asked Superintendent Claiborne about the status of the transfer request who said "something to the effect, not in our lifetime." Captain Gifford testified that he considered Superintendent Claiborne's comment to be a denial. Captain Gifford did not ask Superintendent Claiborne to explain his comment and did not discuss his transfer request directly with Commissioner Evans. I credit Captain Gifford's testimony.

Complainant's Request in February of 1999 to Transfer to District A1

148. On February 1, 1999, Complainant submitted a written request to transfer to District A1, which Captain Spring approved on February 18, 1999. (Complainant's Exhibit No. 37). Captain Spring did not approve this request based on a "critical shortage of supervisors" in the Operations Division during the period that the Department was preparing to move the Operations Division into the new Police Headquarters. (Complainant's Exhibit No. 37). Captain Spring denied that he told Complainant that he would "absolutely or positively" approve this request. Captain Spring testified that he did not discuss this transfer request with Commissioner Evans or Superintendent Claiborne. Captain Spring also denied that he told Complainant that Commissioner Evans and Superintendent Claiborne would never allow Complainant to transfer out of the Operations Division. I credit Captain Spring's testimony.

149. On May 11, 1999, Complainant submitted a written request to transfer to District D4, which Captain Spring approved on May 13, 1999. (Complainant's Exhibit No. 39). Captain Spring approved the transfer request because the Operations Division had moved and Captain Spring had received a new lieutenant and a new sergeant. (Complainant's Exhibit No. 39).

150. When Captain Spring considered Complainant's two transfer requests in 1999, he knew about Complainant's successful lawsuit against the Department based on his unlawful termination and testified that it was common knowledge within the Department. Captain Spring denied that his knowledge of Complainant's lawsuit affected any employment decisions he made regarding

Complainant. I credit captain Spring's testimony.

151. Other than approving Complainant's second transfer request, Captain Spring did not take any actions to facilitate Complainant's transfer out of Operations Division. Captain Spring testified that Complainant mentioned to him that he had a conversation with Captain Conway about a mutual swap but that Captain Conway did not discuss it with him.

Complainant's Transfer in May 2000 to District E-18

152. When Superintendent Bradley assumed the command of Operations Division, he understood that it would become more "civilianized" and that the Department expected to gradually reduce the number of patrol officers in the Operations Division. Superintendent Bradley also understood that this plan was discussed within the Department as early as 1995 and 1996 and that part of his role was to help to effectuate this change.

153. Superintendent Bradley testified that Complainant's supervisory style was very autocratic, "hands on," and that he was a "nose to the grindstone type of" supervisor. Superintendent Bradley felt that Complainant's supervisory style was not helpful in the Operations Division because it had a predominately civilian staff. Superintendent Bradley testified that he had multiple complaints about Complainant's supervisory style each morning when he came into work about what happened on the previous shift. Superintendent Bradley felt that Complainant's style was better suited to supervising uniformed "iron clad personality" officers in a paramilitary organization and was contrary to what he wanted to accomplish in the Operations Division. Superintendent Bradley testified that he

went to Deputy Superintendent Crosson or Cunningham and told him that he wanted his "help" to move Complainant out of the Operations Division because Complainant was "hurting" it. I credit Superintendent Bradley's testimony.

154. Sometime after Superintendent Bradley assumed command of the Operations Division, Complainant told him that he was seeking a transfer out of the Operations Division during their casual conversations and supervisory meetings. Based on working with Complainant between January 2000 and May 2000, Superintendent Bradley believed that Complainant was an attractive candidate for a patrol officer position based on his "hands-on" style and his experience in the Operations Division.

155. On or about March 7, 2000, Complainant filed a written request to transfer to the DCU which Superintendent Bradley approved and gave him a favorable recommendation. (Complainant's Exhibit No. 44). Superintendent Bradley testified that he talked with Deputy Crosson or Cunningham about his problems with Complainant before he received his transfer request. Superintendent Bradley did not recall discussing Complainant's transfer request with Faherty or anyone in the DCU. Superintendent Bradley testified that he then learned that Captain Daniels was going to take Complainant to District E18. I credit Superintendent Bradley's testimony.

156. Bobbie Johnson was Superintendent Claiborne's successor as Superintendent of BFS. On March 30, 2000, Annie Wilcox, Johnson's administrative assistant, sent an e-mail message to Captain Crowley and other captains, superintendents and deputy superintendents in the Department. The memorandum listed several individuals, including Complainant, who had requested a

transfer and where they requested a transfer. The memorandum showed that Complainant had requested a transfer from Operations Division to the Drug Control Unit (DCU). (Exhibit No. 58). Superintendent Claiborne recalled that two of the individuals on the list received the transfers they requested but the overwhelming majority, including Complainant, did not receive their requested transfers.

157. On May 8, 2000, Commissioner Evans transferred Complainant to Area E18. (Complainant's Exhibit No. 12). Upon his transfer, Complainant lost his specialist title of sergeant-headquarters radio chief dispatcher. (Complainant's Exhibit No. 85). Complainant's transfer was made simultaneous with a class of new sergeants whom the Department promoted and reassigned from the Training and Education Division on May 15, 2000. (Complainant's Exhibit No. 11).

158. Captain Daniels testified that he did not request, verbally or in writing, for Complainant to be transferred to his command in District E18. Captain Daniels also testified that Superintendent in Chief Faherty told him about Complainant's transfer about one week before it took place but did not discuss the reasons for his transfer. While Captain Daniels had concerns about the effect of Complainant's supervisory style on the staff in District E18, he did not share his concerns with Chief Faherty. I credit Captain Daniel's testimony.

### III. Complainant's Applications to Positions in the BII

159. On November 13, 1995, Commissioner Evans issued a Commissioner Memorandum, No. 95-114, for open sergeant detective positions in the IAD. The positions were open to all sergeants

and sergeant-detectives. The posting directed candidates to submit a written notice of interest to Anne Marie Doherty, then Chief of the BII, no later than November 13, 1995.

(Complainant's Exhibit No. 14). Superintendent Doherty forwarded the applications for these positions to Captain Detective Melbert Ahearn (now retired), then the commander of the IAD, to screen and prepare a "short list" of recommended candidates. In November of 1995, Superintendent Doherty's general practice was to defer to or support Captain Ahearn's recommended candidates unless she had a specific reason to the contrary.

160. I credit Superintendent Doherty's testimony that Captain Ahearn submitted a "short list" of four recommended candidates to her and that she forwarded them to Commissioner Evans who approved them. The Department ultimately reassigned the four recommended candidates to the IAD, effective on February 20, 1996. (Complainant's Exhibit No. 81).

161. Superintendent Doherty knew that Complainant had applied for the posting under Commissioner's Memorandum No. 95-114. I credit Superintendent Doherty's testimony that Captain Ahearn did not include Complainant on his "short list" of four recommended candidates. I also credit Superintendent Doherty's testimony that she and Captain Ahearn discussed the four recommended candidates but did not discuss any candidates, including Complainant, who was not on Captain Ahearn's "short list."

162. Prior to making her recommendations to Commissioner Evans, Superintendent Doherty did not investigate Complainant's background. I credit Superintendent Doherty's testimony that no

one with the Department ever instructed her to not consider Complainant. I also credit Superintendent Doherty's testimony that she never discussed Complainant with Commissioner Evans, Superintendent Faherty or Superintendent Claiborne in any context.

163. On December 8, 1995, Complainant submitted a written notice of interest to Superintendent Doherty for a sergeant-detective position in the IAD. (Complainant's Exhibit No. 29). The Department did not reassign Complainant to this position.  
164.

165. James M. Hussey is currently the Superintendent-in-Chief for the Department and reported directly to Commissioner Evans. Hussey has held his position since 2001. The Department appointed Hussey as a police officer in April 1980. The Department promoted Hussey to sergeant and lieutenant in 1988 and 1992, respectively. In 1992, the Department transferred Hussey to the IAD where he remained until 1997 when the Department transferred him to the Community Disorders Unit (CDU). In 1998, the Department promoted Superintendent Hussey to superintendent in charge of the BII and promoted him to the rank of captain. (Complainant's Exhibit No. 83).

166. Superintendent Hussey testified that he has known Complainant for a number of years although he has never worked directly with him. Hussey knew prior to 2000 that Complainant had successfully sued the Department.

167. Thomas Dowd is the Chief of the BII and has held his current position since late in January of 2001. The Department appointed Superintendent Dowd as a police officer on September

19, 1979 and promoted him to sergeant in 1988. In 1995, the Department promoted Dowd to lieutenant and transferred him to the IAD. After working in the IAD for six months, Superintendent Dowd received a detective rating. Superintendent Dowd served as the commander of the Anti-Corruption Unit from January 1996 to April 1998 when he became the assistant bureau chief of the BII under Hussey. As part of his duties as assistant bureau chief, Dowd oversaw the Anti-Corruption Unit, the Recruitment and Investigations Unit and the Audit and Review Division. From January 2000 to January 2001, Dowd worked as the commander of the Special Operations Division.

168. On September 26, 1997, Commissioner Evans issued a Commissioner's Memorandum, No. 97-92, for a sergeant detective position in the ACU. The position was open to sergeants and sergeant-detectives. The posting directed candidates to send their written notices of interest to Superintendent Doherty no later than October 7, 1997. (Complainant's Exhibit No. 62). For this opening, Superintendent Doherty forwarded the applications to then ACU Commander Thomas Dowd for his review. Dowd served as the commander of the ACU from January 1996 until April 1998 when the Department promoted him to deputy superintendent of the BII under Hussey. Since January of 2001, Dowd has served as the superintendent of the BII.

169. Superintendent Dowd did not recall receiving a written notice of interest from Complainant for this position. I credit Superintendent Dowd's testimony that he recommended a sergeant for this position who had a background in arson investigations and was previously assigned to the Arson Squad and Area B3, a very busy district. Superintendent Doherty approved Superintendent Dowd's recommendation. On November 5, 1997, the

Department reassigned Superintendent Dowd's recommended candidate to the ACU. (Complainant's Exhibit No. 82).

170. On April 20, 1998, Commissioner Evans issued a Commissioner's Memorandum, No. 98-46, for open sergeants and sergeant-detective positions in the IAD. The positions were open to sergeants and sergeant-detectives. The posting directed candidates to send a written notice of interest to then James Hussey who was then the superintendent of the BII, no later than May 1, 1998. (Complainant's Exhibit No. 63). On April 23, 1998, Complainant submitted a written notice of interest in response to this memorandum. (Complainant's Exhibit No. 34).

171. Superintendent Hussey testified that he forwarded the applications to then Captain Ahearn for his initial review and screening. Based on his evaluation of the candidates, Captain Ahearn recommended three candidates to Superintendent Hussey who approved his recommendations and did not change them. On June 11, 1998, the Department reassigned Ahearn's three recommended sergeants to the IAD. (Complainant's Exhibit No. 83). I credit Superintendent Hussey's testimony that no one in the Department instructed him not to consider Complainant for one of the vacancies in the IAD and that he did not instruct Captain Ahearn not to recommend Complainant.

172. On June 11, 1998, Captain Ahearn sent a letter to Complainant to inform him that the IAD had filled the open positions and that he would consider Complainant's application for future positions in the IAD. (Respondent's Exhibit No. 14).

173. On November 9, 1998, Commissioner Evans issued a Commissioner's Memorandum, No. 98-130, for a sergeant detective

position in the ACD. The position was open to sergeants and sergeant-detectives. The posting directed candidates to send their written notices of interest to Deputy Superintendent Dowd no later than November 20, 1998. (Complainant's Exhibit No. 17). Superintendent Hussey delegated the screening and interviewing duties to then Deputy Superintendent Dowd and Lieutenant Lee, the day-to-day commander in the ACD. I credit Superintendent Hussey's testimony that he and Lieutenant Lee developed a list of questions and interviewed all candidates, including Complainant. I also credit Deputy Superintendent Dowd's testimony that the interview questions related to the candidates' investigation backgrounds and how committed they were to being in the ACD that he felt was not one of the most popular divisions in the Department.

174. I credit Superintendent Dowd's testimony that he and Lieutenant Lee screened, evaluated and recommended two sergeants for this position who they believed were stronger candidates than Complainant and Superintendent Hussey approved their recommendations. Deputy Superintendent Dowd testified that he determined that Complainant did not have as much investigative experience as some of the other candidates and that he did not demonstrate, during his interview, the same sense of a commitment for the ACD's work as other candidates. Deputy Superintendent Dowd also testified that he did not recall whether he knew that Complainant had a master's degree and had been previously assigned to the DCU as a detective when he considered Complainant's application for this vacancy. I credit his testimony.

175. One of the recommended candidates was Superintendent Doherty's stepdaughter. I credit Deputy Superintendent Dowd's

testimony that she submitted "a lot" of documentation regarding her investigative background, including letters from prosecutors or other agencies, and appeared "really committed" to the work in ACD.<sup>5</sup> While he did not recall the investigative background of the second candidate (male) whom they recommended, I credit Superintendent Dowd's testimony that he was "really impressed" by the sincerity of his commitment to performing the ACD's work and his high regard for the employees who worked in the ACD.

176. On February 10, 1999, Commissioner Evans reassigned the two candidates recommended by Superintendent Hussey to the ACD. (Complainant's Exhibit No. 84).

177. While Deputy Superintendent Dowd served as the commander of the ACD, he was not involved in the screening of applicants for positions in the IAD.

178. On February 29, 2000, Commissioner Evans issued a Commissioner's Memorandum, No. 00-013, for a sergeant/sergeant-detective position in the Anti-Corruption Division, BII. The position was open to sergeants and sergeant detectives and it had a closing date of March 15, 2000. Applicants were directed to send their written notices of interest to Hussey. (Complainant's Exhibit No. 22). Unlike the prior IAD vacancies positions in April and November 1998, Superintendent Hussey had the applications directed to him because he had recently reorganized the bureau. Hussey did not recall receiving a written notice of interest from Complainant for this position.

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<sup>5</sup>When Deputy Superintendent Dowd recommended Superintendent Doherty's step-daughter, Superintendent Doherty was the superintendent in charge of the Bureau of Professional Development and was no longer the superintendent of the BII.

179. While Superintendent Hussey was the chief of the BII, he attempted to get a three or four year commitment from individuals in the IAD or the Anti-Corruption Unit before they transferred out.

180. On April 26, 2000, Commissioner Evans issued a Commissioner's Memorandum, No. 00-29, for a sergeant position in the Youth Violence Strike Force. The position was open to sergeants who had held the rank of sergeant for at least two years. The posting directed candidates to send their written notices of interest to Deputy Superintendent Dowd no later than May 4, 2000. (Complainant's Exhibit No. 24). Deputy Superintendent Dowd screened applicants for this position along with Superintendent Paul Joyce. Deputy Superintendent Dowd did not recall receiving a written notice of interest from Complainant for this position.

181. Deputy Superintendent Dowd testified that he never worked with Complainant. I credit Deputy Superintendent Dowd's testimony that he knew, prior to 2000, that Complainant had successfully sued the Department but his knowledge was not a factor in any of his actions.

182. I credit the testimony of Superintendents Hussey and Dowd that they did not consider Complainant's experience in Operations Division to be a negative factor regarding his qualifications for vacancies in the IAD or the ACD. I also credit their testimony that they were never told by any one within the Department that they should not to consider Complainant for available positions in the IAD or the ACU.

Complainant's Applications to Positions in the BIS

183. In 1996, the Department promoted John F. Gallagher to the rank of lieutenant and lieutenant-detective and appointed him to replace Captain-Detective Maurice Flaherty as the Commander of the DCU. As commander of the DCU, Superintendent Gallagher reported to Superintendent Donald L. Devine. Superintendent Gallagher was the commander of the DCU until early in 2000 when the Department promoted him to the Chief of Detectives and Superintendent of the BIS.

184. Patrick J. Crosson succeeded Superintendent Gallagher as the Commander of the DCU at the beginning of 2000 and reported directly to Superintendent Gallagher. Since March of 2001, Crosson has worked as a Deputy Superintendent and Assistant Chief of the BFS.

185. Patrick J. Crosson is a deputy superintendent and the assistant chief of the BFS, the Patrol Bureau. Crosson has held this position since March 2001. Prior to his current position, Crosson was a deputy superintendent and was in charge of the DCU from the beginning of 2000 until March of 2001. Crosson took over the DCU when the Department promoted Superintendent Gallagher to his current superintendent position.

186. Superintendent Crosson testified that the DCU was a popular unit to work in while he was the commander. Superintendent Crosson also testified that Commissioner Evans wanted him to look for detective-sergeants first when filling vacancies in the DCU because he did not want to make more sergeant-detectives. Superintendent Crosson testified that he was the initial person to review candidates and make a

recommendation to Gallagher who submitted his recommendations to Commissioner Evans. Superintendent Crosson did not recall an instance in which Superintendent Gallagher overruled his recommendations. I credit Superintendent Crosson's testimony.

187. During the first five or six months of 2000, Superintendent Crosson hired a sergeant whom he had worked in Districts 2 and 11 and he knew was a very good supervisor and worker.

188. When Superintendent Crosson was filling the vacancies in the DCU in 2000, he knew that Complainant had sued the Department for his termination and then was reinstated. Superintendent Crosson testified that his knowledge of Complainant's lawsuit was not a factor in his decision not to select Complainant for a position within the DCU. Superintendent Crosson also testified that no one ever instructed her not to hire Complainant into the DCU. Gallagher also testified that he did not have a positive or negative opinion about the fact that Complainant worked in the Operations Division.

189. At some point, Superintendent Crosson recommended and hired Lieutenant Armstrong into the DCU from the Operations Division. Lieutenant Armstrong replaced Superintendent Crosson as the commander of the DCU when he left to assume his current position.

190. Superintendent Gallagher testified that he did not believe that working in the ID or Warrant Units or the Operations Division was not relevant experience for working in the DCU.

191. Superintendent Gallagher has worked for the Department since 1979 when he was appointed a police officer. Superintendent Gallagher previously worked in the DCU from December of 1986 to September of 1987 where he received a sergeant detective's rating.

192. While Superintendent Gallagher was the commander of the DCU, it consisted of 12 or 13 squads that had a sergeant, a detective and four or five patrolmen. Each squad was detailed to a district station except one squad was a citywide unit that is assigned during the day.

193. I credit the testimony of Superintendents Gallagher and Crosson that, during 1996 to 2000, the DCU was a popular unit within the Department to work in and received applications on a regular basis. When there was a vacancy in the DCU during this period, Superintendent Gallagher posted the vacancy by a Commissioner's Memorandum and solicited applications on a Department-wide basis. Gallagher testified that vacancy notices in the DCU directed that candidates send letters of interest to Superintendent Devine and to him. I credit Superintendent Gallagher's testimony that he reviewed the applicants and made recommendations regarding sergeant and sergeant-detective vacancies to Superintendent Devine who never overruled his recommendations. Once Superintendent Devine accepted Superintendent Gallagher's recommendations, he submitted them to Commissioner Evans. I also credit Superintendent Gallagher's testimony that Commissioner Evans never overruled a DCU recommendation during 1995 to 2000.

194. I credit Superintendent Devine's testimony that he sought skillful and mature officers, given the nature of the very

sensitive work in the DCU and its troubled history, including indictments and convictions for perjury. I credit Superintendent Gallagher's testimony that he did not conduct interviews for DCU vacancies but relied on his personal professional knowledge of each officer or on a recommendation of a colleague within the Department whose opinion he respected. I also credit Superintendent Gallagher's testimony that he looked for a candidate's "maturity, integrity, competency and dependability." I credit further Gallagher's testimony that he looked for candidates who had "tempered zeal" which he described as a high regard for their responsibilities and wanted to be "out on the street" but was unwilling to take "shortcuts" to achieve the goals of the DCU.

195. Superintendent Gallagher testified that the education level of candidates was not as important as their actual work experience in the Department and their capabilities. Superintendent Gallagher also testified that unless he had first hand knowledge about a candidate, he discounted rumors or innuendos about the candidate within the Department. Gallagher believed prior drug control experience was helpful for candidates as was their ability to make arrests and provide competent documentation. I credit Superintendent Gallagher's testimony.

196. On December 11, 1995, Complainant submitted a written request to Captain-Detective Flaherty for a transfer to the DCU and indicated a preference for an assignment to Area D14. (Complainant's Exhibit No. 30). I credit Superintendent Gallagher's testimony that he did not know that Complainant had applied for a transfer to a position in the DCU and that he did not see Complainant's letter of interest, dated December 11,

1995. (Complainant's Exhibit No. 30).

197. On September 26, 1997, Commissioner Evans issued a Commissioner's Memorandum, No. 97-98, for five sergeant-detective positions in the DCU. The position was open to sergeants and sergeant-detectives. The posting directed candidates to send their written notices of interest to Superintendent Devine no later than October 7, 1997. (Complainant's Exhibit No. 15).

198. On October 2, 1997, Complainant submitted a letter of interest in response to this memorandum. (Complainant's Exhibit No. 33). Superintendent Gallagher received Complainant's application materials and considered him for one of the vacant sergeant-detective positions. Superintendent Gallagher did not receive Complainant's resume nor did he have any information beyond Complainant's sparse application materials.

199. Superintendent Gallagher recommended and selected five candidates under this vacancy announcement. I credit Superintendent Gallagher's testimony that he selected the five sergeants because of the "comfort level" he had with them and his strong belief that they could best achieve the results he wanted in the DCU. I also credit Superintendent Gallagher's testimony that he trusted their competency and judgment because he supervised two of these sergeants, worked with one sergeant and received favorable recommendations from officers whom he respected about two of the sergeants.

200. I credit Superintendent Gallagher's testimony that he did not choose Complainant for one of these vacancies because he did not have any personal experience working with Complainant nor

did anyone within the Department, inside or outside of the DCU, recommend him for this position. There were several other candidates whom Superintendent Gallagher did not recommend for these vacancies. On October 29, 1997, the Department reassigned Superintendent Gallagher's five sergeants to the DCU. (Complainant's Exhibit No. 82).

201. On October 29, 1997, the Department reassigned a sergeant-detective from the Central Drug Depository, BIS, to a vacant sergeant-detective position in the Financial Evidence Office, DCU. (Complainant's Exhibit No. 82).

202. On August 4, 1998, Commissioner Evans issued a Commissioner's Memorandum, No. 98-88, for a sergeant or a sergeant-detective position in the DCU. The position was open to sergeants and sergeant-detectives. The posting directed candidates to send their written notices of interest to Superintendent Gallagher no later than August 14, 1998. (Complainant's Exhibit No. 16).

203. Superintendent Gallagher received letters of interest from 15 applicants for this position, including Complainant. (Complainant's Exhibit No. 36 and Respondent's Exhibit No. 20). I credit Superintendent Gallagher's testimony that he considered Complainant's application but that he recommended two sergeants to Superintendent Devine whom the Department ultimately reassigned to the DCU on September 4, 1998. (Complainant's Exhibit No. 83).

204. I credit Superintendent Gallagher's testimony that he had supervised one of the sergeants whom he recommended and knew that he was an excellent officer. I also credit Superintendent

Gallagher's testimony that he had also worked with the other sergeant whom he recommended and considered him to be an "excellent worker."

205. I credit Complainant's testimony that he discussed this vacancy with Superintendent Gallagher who told him that "we'll see what we can do" and did not indicate that he would block Complainant's transfer in anyway. I also credit Complainant's testimony that he never heard back from the Department regarding this position.

206. On January 14, 2000, Commissioner Evans issued a Commissioner's Memorandum, No. 00-003, for a sergeant-detective position in the DCU. The position was open to all sergeant-detectives. The posting directed candidates to send their written notices of interest to Superintendent Gallagher no later than January 28, 2000. (Complainant's Exhibit No. 21). Gallagher testified that he authorized then Superintendent Crosson to recommend candidates to him for this position.

207. On January 28, 2000, Complainant submitted a letter of interest for this position. (Complainant's Exhibit No. 42). I credit Superintendent Gallagher's testimony that he did not see Complainant's application materials for this position. Superintendent Crosson sent a letter to Complainant and the other applicants to acknowledge receipt of their letters of interest. (Complainant's Exhibit No. 43).

208. I credit Superintendent Crosson's testimony that he did not conduct interviews for this position and did not consider any candidates who were sergeants, including Complainant, because Commissioner Evans did want to increase the number of

sergeant-detectives at that time. I credit Superintendent Crosson's testimony that he recommended two candidates who were already sergeant-detectives for this position whom Commissioner Evans ultimately approved. I also credit Superintendent Crosson's testimony that he also recommended these candidates based on their prior work experience. One candidate worked in the IAD immediately prior to the DCU and also had worked on the Power Patrol which was the predecessor to the Youth Violence Task Force. The Department rescinded the assignment of the second sergeant-detective to the DCU because he gave up his detective rating and went to the Department's Motorcycle Unit.

209. On March 3, 2000, Commissioner Evans issued a Commissioner's Memorandum, No. 00-015, for sergeant-detective positions in the DCU. The position was open to all sergeants and sergeant-detectives. The posting directed candidates to send their written notices of interest to Superintendent Crosson no later than March 16, 2000. This posting was for candidates who would supervise DCU squads that were located in the police districts. (Complainant's Exhibit No. 23).

210. On March 7, 2000, Complainant submitted a letter of interest for this position. Complainant simultaneously submitted a written request for a transfer to the DCU that was approved by Deputy Superintendent Bradley. (Complainant's Exhibit No. 44).

211. Superintendent Crosson and Lieutenant Michael Crosson, his brother, conducted interviews for 15 or 16 candidates, including two sergeant-detectives. I credit Superintendent Crosson's testimony that he sought good, level-headed supervisors who had some knowledge of the drug trade. Crosson also testified that a

candidate's prior detective work or prior DCU work experience was not necessarily a consideration in making his selection decisions.

212. I credit Superintendent Crosson's testimony that he recommended one candidate because she was a sergeant-detective and had prior experience in drugs and had worked on the Youth Violence Task Force. I also credit Superintendent Crosson's testimony that he recommended a sergeant whom he had worked with in District 2. The sergeant had also worked in the DCU for approximately six or seven years and was the Department's expert regarding car and mechanical hides where drug dealers secrete guns and money. I credit Superintendent Crosson's testimony that he considered this candidate to be a skilled supervisor who had a good rapport with his subordinates.

213. I credit Superintendent Crosson's testimony that the other recommended sergeant had also worked recently in the DCU and had work experience in the Customs Bureau. I also credit Superintendent Crosson's testimony that the sergeant's work experience at Customs may be helpful to the DCU and he assigned him to the Department's East Boston office nearby Logan Airport.

214. On May 8, 2000, Commissioner Evans approved Superintendent Crosson's recommendations and reassigned them to the DCU, effective as of May 15, 2000.<sup>6</sup> (Complainant's Exhibit No. 12).

215. Superintendent Gallagher testified that, while he was the commander of the DCU and has been superintendent of the BIS, no

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<sup>6</sup>On May 15, 2005, the Department reassigned Complainant to District E-18 pursuant to the same personnel order as the reassignments made under Commissioner's Memorandum No. 00-015. (Complainant's Exhibit No. 23).

one in the Department told him not to hire Complainant in the DCU or that Complainant should remain in the Operations Division. Gallagher also testified that he did not receive Complainant's resume and not know that Complainant had a bachelor's degree and master's degree in criminal justice and had worked in the joint drug control task force.

216. When Superintendent Gallagher made his recommendations to fill the two DCU vacancies during 1997 and 1998, he knew that Complainant had sued the Department but he did not recall that it involved a discharge from his DCU position and that Complainant was returned to his position with money. Superintendent Gallagher also knew that Complainant's lawsuit involved Commissioner Roache. I credit Superintendent Gallagher's testimony that his knowledge of Complainant's lawsuit was not a factor in his decision not to select Complainant for a position within the DCU. I also credit Superintendent Gallagher's testimony that the fact that Complainant worked in the Operations Division did not eliminate him from consideration for DCU positions.

217. Since January 1996, Paul J. Farrahar has served as the Commander of the Homicide Unit and is a deputy superintendent. In the early 1980's, Commander Farrahar worked with Complainant on shifts while he patrolled Area A. Prior to assuming his position as commander of the Homicide Unit, Commander Farrahar heard that Complainant had sued the Department but he did not recall the date of the lawsuit or anything about it.

218. During his tenure, Commander Farrahar has made 12 recommendations to fill vacancies for detective and sergeant-detective positions in the Homicide Unit. Commissioner Evans

has approved all of Commander Farrahar's recommendations.

219. I credit Commander Farrahar's testimony that, beginning in 1996, he only considered candidates who were currently sergeant-detective detectives. I also credit Commander Farrahar's testimony that he did not consider sergeants because he believed it was important to have sergeant detectives in the Homicide Unit who had experience in supervising detectives who were accustomed to dealing with violent crime.

220. On June 15, 1998, Commissioner Evans issued a Commissioner Memorandum, No. 98-69, for an open sergeant detective position in the Homicide Unit (days). The position was open to all sergeant-detectives. The posting directed candidates to submit a written notice of interest to Commander Farrahar by June 29, 1998. (Complainant's Exhibit No. 63).

221. Five candidates responded to Commissioner's Memorandum No. 98-69: Complainant, two sergeants and two sergeant-detectives. (Respondent's Exhibit No. 6). On July 3, 1998, Commander Farrahar sent a letter to Complainant and the two other sergeants to thank them for their interest and inform them that the vacancy was limited to sergeant detectives. (Respondent's Exhibit No. 7). I credit Commander Farrahar's testimony that he ultimately recommended one of the sergeant-detectives based, in part, on his work as a sergeant-detective in Mattapan "doing drug work."

222. On August 5, 1999, Commissioner Evans issued a Commissioner Memorandum, No. 99-64, for another sergeant detective position in the Homicide Unit. The position was open to all sergeant-detectives. The posting directed candidates to

submit a written notice of interest to Commander Farrahar by August 20, 1999. (Complainant's Exhibit No. 18). Commander Farrahar did not recall receiving a written notice of interest from Complainant for this vacancy.

223. On March 8, 1999, Commissioner Evans issued a Commissioner's Memorandum, No. 99-25, in which the Department sought sergeants and above to participate as oral interviewers for the Baltimore Police Department's 1999 oral examination for sergeant positions. The Commissioner's Memorandum had a closing date of March 22, 1999 for candidates to submit a written notice of interest, including job history and past promotional assessment training and experience. (Complainant's Exhibit No. 64).

224. On March 10, 1999, Complainant submitted a letter of interest in response to Commissioner's Memorandum No. 99-25. (Complainant's Exhibit No. 38). Commissioner Evans did not recall receiving Complainant's letter of interest for this position. I credit Commissioner Evans' testimony that the Department preferred to have assessors who had already successfully performed as a sergeant and held the next highest rank of lieutenant.

#### Complainant's Work Hours

225. The Department's guidelines allowed police officers to work up to 90 hours a week or 320 hours in a four-week period. While Complainant worked in Operations Division, he worked 80 hours a week, on average, in his regular assignments plus details and overtime in the districts. Complainant sometimes worked overtime "on the streets" or as a patrol supervisor in

some of the districts.

226. During 1997 to 2000, Complainant worked the following detail hours: 1997-1269 hours and \$37,495.68 earned; 1998-1413 hours and \$41,875.86 earned; 1999-1471 hours and \$43,690.00 earned; 2000-1658 hours and \$54,406.33 earned. (Respondent's Exhibit No. 18).

227. During 1997 to 2000, Complainant worked the following overtime hours: 1997-510 hours; 1998-607.50 hours; 1999-831.50 hours; 2000-1,025.75 hours. (Respondent's Exhibit No. 19).

228. During 1998, Complainant earned \$134,153.47 and had the 4<sup>th</sup> highest total earnings within the Department. During 1999, Complainant earned \$141,037.19 and had the 29<sup>th</sup> highest total earnings within the Department. (Respondent's Exhibit No. 17).

229. Within the Department, overtime was governed by the collective bargaining agreement and was first given out to individuals in the districts. If there is no one in the district who takes the overtime, it is announced area wide and then through Operations Division.

230. Complainant testified that no doctor, therapist, social worker or a religious person ever counseled him for emotional distress related to this case. Complainant testified that he talked to his fellow officers about his emotional distress and discussed the alleged retaliation with the Stress Unit.

231. Complainant testified that he did not suffer any physical manifestations because of stress related to this case. Complainant also testified that he did not have problems with

his sleeping, stomach, vomiting, his marital relations or drinking. Complainant testified that he put on 25 pounds because of his case and that his weight has remained unchanged since the Department reassigned him to District E-18. Complainant has been able to successfully work in the Operations Division for 40 hours each week while working an additional 40 hours a week on details and overtime. Complainant testified that he was able to be a hard worker from 1995 to 2000.

### III. CONCLUSIONS OF LAW

Complainant alleges that the Department retaliated against him for his participation in protected activity when it confined him to a sergeant's position in the Operations Division from March 1995 until May 2000.<sup>7</sup> Complainant also alleges that he suffered emotional distress when the Department forced him to spend five years working in the Operations Division as a supervisor of lay and uniformed dispatchers and unlawfully refused to transfer him to a patrol supervisor's position in one of the Department's districts.

Massachusetts General Laws, Chapter 151B, §4(4), prohibits an employer from retaliating against an employee who has participated in protected activity. This provision makes it unlawful "[f]or any person, employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five." See Kelley v. Plymouth County Sheriff's Department, et. al., 22 MDLR 208, 215 (2000), citing Bain v.

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<sup>7</sup>While Complainant also alleges that the Department retaliated against him by confining him to desk duty since it unlawfully discharged him in 1988, my analysis and conclusions are limited to the period of time that Complainant worked in the Operations Division: March 8, 1995 to May 8, 2000.

Springfield, 424 Mass. 758, 765 (1997). In addition, Chapter 151B, §4, paragraph 4(A) makes it unlawful “[f]or any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.” Retaliation is a separate and independent claim of discrimination, “motivated, at least in part, by a distinct intent to punish or rid the workplace of someone who complains about an unlawful [employment] practice.” See Pontremoli v. Spaulding Rehabilitation Hospital, 51 Mass. App. Ct. 622, 625 (2001); Abramian v. President & Fellows of Harvard, supra.; Fountas v. Medford Public Schools, 22 MDLR 264 (2000), citing Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

The Commission and courts broadly interpret Chapter 151B’s anti-retaliation provision to apply to both informal and formal actions opposing unlawful employment practices. See e.g., Auborg v. American Drug Stores, 21 MDLR 238, 242 (1999). The anti-retaliation provision applies to instances where an individual participates in an employment discrimination proceeding under G.L. c. 151B (the “participation” clause). “Participation” includes a formal action such as filing a discrimination complaint, submitting an affidavit or testifying in a Commission hearing. Massachusetts Commission Against Discrimination & Ramos v. New World Security Associates, Inc., 26 MDLR 173 (2004).

In the absence of direct evidence of an unlawful motive based on retaliation, as in this case, the Commission follows

the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976).<sup>8</sup> See also Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34 (2005); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001)(Chapter 151B has four elements that an employee must prove to prevail on a claim of discrimination in employment: membership in a protected class, harm, discriminatory animus, and causation); Abramian v. President & Fellows of Harvard College, 432 Mass. 104 (2000); Wynn & Wynn v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-666 (2000).

To establish a prima facie case of unlawful retaliation in the absence of direct evidence of a retaliatory motive, as in this case, Complainant must show by credible evidence that: (1) he participated in protected activity; (2) the Department knew about Complainant's participation in protected activity prior to taking the adverse employment action(s) at issue in this complaint, e.g., failing to transfer or reassign Complainant from a desk job in the Operations Division; (3) Complainant suffered an adverse employment action(s) after he participated in protected activity; (4) a causal connection exists or can be inferred between Complainant's participation in protected activity and his inability to secure a transfer or reassignment from the Operations Division. See Wareing and Massachusetts Commission Against Discrimination v. New Bedford School Department, supra.; Hudson v. Pembroke/Hanover Elks Lodge, et.

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<sup>8</sup>Complainant may prove unlawful discrimination by either direct evidence or, indirectly, by circumstantial evidence such as evidence that the reasons articulated by the employer for its actions are false. See Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-667 (2000)(direct evidence is evidence that "if believed, results in an inescapable, or least highly probable, inference that a forbidden bias was present in the workplace"); Price Waterhouse v. Hopkins, 490 U. S. 228, 247 (1989); Johansen v. NCR Contem, Inc., 30 Mass. App. Ct. 294, 301-302 (1991).

al., 22 MDLR 45 (2000) citing Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

Since a link between protected activity and the adverse employment action(s) at issue is not always explicit, the Commission can infer "a causal connection where the timing of events makes an inference reasonable." See Ritchie v. Department of State Police, 60 Mass. App. Ct. 599 (2004) ("close temporal proximity between the protected activity and the adverse employment action permits an inference of the casual nexus necessary for a finding of retaliation"); Kealy v. City of Lowell, Department of Public Schools, 21 MDLR 19 (1998), citing Cimino v. BLH Electronics, Inc., 5 MDLR 1263, 1287 (1983) (finding retaliation where the discharge occurred within 15 months after the protected activity); Salvanelli v. Ares-Serono, Inc., 17 MDLR 1138, 1144-1145 (1995) (termination taken within six weeks of participation in protected activity); Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222 (1<sup>st</sup> Cir. 1976).

If Complainant establishes a prima facie case of unlawful retaliation, the burden shifts to the Department to articulate a legitimate, non-discriminatory reason(s) for its actions. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2001); Abramian, 432 Mass. at 116-118. If the Department meets its burden of production, Complainant must then show by a preponderance of the evidence in the record that the Department's proffered reason(s) was not the real reason for his confinement to the Operations Division and that the Department acted with a retaliatory intent, motive or state of mind. See Lipchitz, 434 Mass. at 504; Blare v. Husky, 419 Mass. 437, 443

(1995). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by [Respondent] for making the adverse decision is false." Lipchitz, supra. Complainant retains the ultimate burden of proving that his confinement to the Operations Division was the result of a retaliatory animus. Id.; Abramian, 432 Mass. at 117.

There is no dispute in the hearing record that Complainant participated in protected activity prior to his assignment to the Operations Division on March 8, 1995. Complainant filed a lawsuit, on October 31, 1988, against Commissioner Roache and the Department in which he alleged that they discriminated against him when they unlawfully discharged him in violation of Massachusetts General Laws, Chapter 151B, §4(9A). On September 27, 1991, Complainant also filed a petition for contempt and/or a motion to clarify and enforce Judge Cratsley's decision that Complainant's discharge was unlawful and violated General Laws, Chapter 151B, §4(9A). Complainant next filed a civil action on March 13, 1992, in which he alleged that the Department, Commissioner Roache and the Department's psychologist retaliated against him for his lawsuits in 1988 and prior protected activity and discriminated against him based on his handicap when it required him to undergo a psychological examination to determine his fitness to carry a service revolver. (Complainant's Exhibit Nos. 68 and 69). Finally, Complainant filed the instant retaliation claim on June 27, 1997. I also find that the Department, including Commissioner Evans, members of his command staff and superior officers, knew about these lawsuits at all times relevant to the instant complaint.

To satisfy the third element of his prima facie case, Complainant must establish by credible objective evidence that he suffered an adverse employment action(s) after he filed his discrimination complaints in 1988, 1991 and 1992. To be adverse, an employment action must materially change the terms and conditions of Complainant's employment at the Department. See Blackie v. Maine, 75 F.3d 716, 725 (1<sup>st</sup> Cir. 1996) ("work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's acts or omission does not elevate that act or omission to the level of a materially adverse employment action"). This element requires a showing that the Department took "something of consequence" from Complainant by discharging or demoting him, reducing his salary or grade, divesting him of significant responsibilities or making a change in the objective terms and conditions of employment that "materially disadvantage[s]" or threaten[s] to disadvantage Complainant. See e.g., Bain v. City of Springfield, 424 Mass. 758, 765-766 (1997)(a threat to "get rid of" a complainant is retaliatory under Chapter 151B but behaving coldly and conveying hostile body language is not); MacCormack v. Boston Edison, 423 Mass. 652, 663 (1996)(a change in work assignments is not retaliatory).

While adverse employment actions are not limited solely to monetary considerations such a loss of salary or benefits, a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or a minor alteration of job responsibilities. Material changes include "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees." Gu & Santoro v. Boston Police Department, et. al., 312 F.3d 6 (1<sup>st</sup> Cir. 2002).

Accordingly, a lateral transfer or reassignment that does not involve a demotion in form or substance or only involves minor or temporary changes in working conditions will not rise to the level of a "materially adverse employment action" for purposes of Chapter 151B. Marrero v. Goya of Puerto Rico, 304 F.3d 7 (1<sup>st</sup> Cir. 2002).

Based on the totality of the evidence in the record, I find that Complainant has not objectively proved that his transfer to the Operations Division in 1995 was sufficient to constitute an adverse employment action. First, I reject Complainant's contention that the Operations Division was a "substantially disadvantageous long-term assignment" for officers within the Department. To the contrary, the undisputed evidence in the record establishes that the Operations Division serves a critical and essential role related to the planning, coordination and delivery of services to the public and police officers throughout the City of Boston. Second, Complainant has produced no objective evidence to establish that his duties and responsibilities as a sergeant in the Operations Division were not consistent with those listed in the Department's rules. Complainant has also not shown that his duties in the Operations Division were not comparable in form or substance to those that he would have performed as a patrol supervisor in a district, except for the sole task related to the supervision of the duties and actions of patrol officers at crime scenes. (Respondent's Exhibit No. 2). Third, Complainant received a \$40 stipend above his usual sergeant's salary during his assignment in the Operations Division. In addition, there is no dispute that Complainant was one of the highest paid sergeants in the Department during 1995 to 2000 based on the number of details

and overtime he performed. (Respondent's Exhibit Nos. 18 and 19).

I recognize that the Department routinely reassigned officers into the Operations Division who had personal, mental or physical conditions or disciplinary issues. I conclude, however, that the Department made such assignments to meet the overall needs of the Department and to accommodate the legitimate needs of its police officers. I also summarily reject Complainant's contention that the Operations Division was a "dumping ground" for sergeants or superior officers in 1995 through 2000 and his rank speculation that his work for five years as a sergeant in the Operations Division somehow limited his opportunity for future, long-term advancement within the Department. I credit the unrebutted testimony of the Department's witnesses that Complainant's work experience in the Operations Division was valuable, made him an attractive candidate to work as a patrol supervisor and prepared him to satisfactorily perform such duties. Finally, Complainant's contention is contradicted by the uncontroverted evidence and testimony of the Department's witnesses that several members of Commissioner Evans' command staff and many of the superior officers had worked in the Operations Division during their tenure at the Department and prior to 1995.

Complainant does not contend that the Department demoted him or reduced his salary. While Complainant may have felt that he was stigmatized, frustrated and punished by his inability to transfer out of the Operations Division, I conclude that his subjective feelings are insufficient, in the absence of objective evidence of a "material employment disadvantage," to transform his transfer into an "adverse employment action." I

also conclude that Complainant has failed to establish that the Department "took something of consequence from" him such as reducing his salary, or divesting him of significant responsibilities," or that "it withheld from [him] an accouterment of the employment relationship, . . . by failing to follow a customary practice." See MacCormack, supra.; Marrero, supra. While the Department generally sought to accommodate transfer requests, Complainant has not shown, by objective evidence, that the Department granted transfers invariably to other sergeants, when requested and without consideration of its best interests and operational needs. Randlett v. Shalala, Secretary, Department of Health and Human Services, 118 F.3d 857 (118 F.3d 857 (1997)). To the contrary, I credit the Department's testimony that sergeants had little control over where the Department reassigned them and it was not uncommon for them to be unhappy or dissatisfied with their assignments. Accordingly, I conclude that Complainant has not established, by objective evidence, that he was subjected to an adverse employment action by the Department's failure to transfer him out of the Operations Division between 1995 and 2000.

I also conclude that Complainant has not met the final element of his prima facie case because he has not proved that a causal connection exists or can be inferred between his participation in protected activity and his inability to secure a transfer or reassignment from the Operations Division. First, I reject Complainant's contention that Commissioner Evans' statement that "[Complainant] is suing the Department again" is sufficient evidence, by itself, of a retaliatory animus. I also reject Complainant's contention that Commissioner Evans made this statement during a discussion with Superintendent Claiborne regarding a proposed transfer for Complainant. In addition,

Complainant provided no evidence of the timing of or the context for Commissioner Evans' statement.

Second, Complainant cites to three instances where the Department did not approve three Captains' requests to transfer Complainant under his command: Captain Stapleton's request in March 1996; Captain Gifford's request in 1997 or 1998; Captain Daniel's request in 1998. For the following reasons, I am not persuaded that Commissioner Evans' actions or responses to these transfer requests, the only ones that he received, establish that he acted with the requisite retaliatory motive.

Captain Stapleton's transfer request included Complainant and two other sergeants<sup>9</sup> and none of them were transferred to District E18. From the totality of the evidence, it is reasonable to conclude that Commissioner Evans' denial of the request was based on Superintendent Claiborne's failure to make a favorable recommendation to Commissioner Evans on this request and not a retaliatory animus by Commissioner Evans.

I fully credit Superintendent Claiborne's testimony that Commissioner Evans was willing to approve Complainant's transfer to District B2 in 1997 or 1998, as part of a proposed three-way "swap" involving Complainant and two other sergeants. There is no evidence in the record that Commissioner Evans' verbal assent to the "swap" was not made in good faith.

I also credit Superintendent Claiborne's testimony that he reasonably interpreted Commissioner Evans' "smile" and movement to other matters to mean that he had denied Captain Daniels'

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<sup>9</sup> Complainant submitted no evidence to establish whether the two sergeants participated in protected activity before March 1996.

request. Based on the totality of the evidence in the record, I conclude, however, that Superintendent Claiborne's treatment of Commissioner Evans' ambiguous response as a "denial," is insufficient, in the absence of other objective evidence, to establish that Commissioner Evans' denial was based on a retaliatory animus. First, I find that Commissioner Evans had already indicated his willingness to consider a transfer for Complainant when he approved Captain Daniels' earlier request to transfer Complainant to District B2. Second, Commissioner Evans ultimately approved Complainant's transfer to District E18 on May 8, 2000 after receiving a favorable recommendation from the then Superintendent of the BFS based his determination that the transfer was in the Department's best interests.<sup>10</sup> I also credit Commissioner Evans' testimony that he considered and granted the sole transfer request for which he received a favorable written recommendation from Superintendent Claiborne. While I also recognize that Complainant disputes the underlying actions for Commissioner Evans' assessment of Complainant's judgment as a patrol supervisor in the districts, I credit Commissioner Evans' testimony that he did not take the extraordinary step, for him, of initiating a transfer for Complainant because he reasonably believed Complainant had exercised poor judgment on at least two occasions.<sup>11</sup>

Third, I am also not persuaded by Complainant's contention that the Department's transfer of several sergeants, including

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<sup>10</sup>I reject Complainant's contention that Commissioner Evans approved Complainant's transfer District E18 in response to the Commission's probable cause finding in December 1999.

<sup>11</sup>I reject Complainant's contention that Captain Dunford's dissatisfaction with Complainant's actions on December 24, 1995 could have served as the basis, in part, for his unwillingness to take Complainant when asked by Superintendent Claiborne at some unspecified time after July 24, 1995. As discussed herein, the Department often took several months to act on a transfer request so that it could be handled as part of a Department-wide promotion of new sergeants.

Fitzgerald and McCarthy, from the Operations Division prior to Complainant's transfer shows that they were treated differently based on a retaliatory animus. I credit Superintendent Claiborne's testimony that he made these transfers based on the Department's existing operational needs. I also credit Superintendent Claiborne's testimony that he did not exercise his discretion to transfer Complainant because he considered him to be a "valuable" sergeant and he did not want to create a staffing shortage in the Operations Division.<sup>12</sup>

I also reject Complainant's contention that the volume of his transfer requests, during 1995 to 2000, indicates that the Department discriminated against him based on his participation in protected activity. I fully credit the un rebutted testimony of the commanders of the specialized units to whom Complainant submitted written notices of interest during 1996 to 2000 that they did not believe he was the best candidate for the multiple open posted positions at issue in this complaint. Based on a totality of evidence in the record, I find that the commanders outside of the BFS did not chose Complainant to fill an open position in a specialized unit for legitimate non-discriminatory reasons: he was unqualified, i.e., was not a sergeant-detective, he did not apply for or he was not considered the best candidate based on his credentials, experience and interview, where appropriate, or because of the commander's prior work experience with other candidates. In addition, Complainant submitted no evidence to rebut the credible testimony of the commanders that no one within the department, including Commissioner Evans, ever

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<sup>12</sup>I note also that Complainant states, unequivocally, in his brief, that he is not claiming or asserting that Superintendent Claiborne retaliated against Complainant but he contends that Commissioner Evans and other unspecified individuals retaliated against him. (Complainant's brief, page 5, footnote 3).

instructed them to not select Complainant for an open position or that Complainant was to remain in the Operations Division.

Based on the foregoing analysis, I conclude that Complainant has not proven by credible evidence that the Department acted with a retaliatory intent, motive or state of mind and that its discriminatory animus was the determinative cause of his inability to secure a transfer out of the Operations Division during 1995 to 2000. Assuming *arguendo* that Complainant has established a prima facie case of discrimination based on retaliation, I also conclude that the Department has produced legitimate, non-discriminatory reasons for its actions, as described above. Accordingly, I conclude Complainant has not proved that the Department unlawfully retaliated against him based on his protected activity when it failed to transfer him out of the Operations Division from March 1995 through May 2000.

#### IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the complaint is hereby dismissed. This decision constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the full Commission within ten (10) days of receipt of this order and a Petition of Review with the full Commission within thirty (30) days of receipt of this order.

SO ORDERED this 3rd day of January, 2006.

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Kenneth B. Grooms  
Hearing Officer

