

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION and NELSON VASQUEZ,

Complainants

v.

No. 96-SEM-0389

CITY OF HOLYOKE POLICE DEPARTMENT, et al.,

Respondents

DECISION OF THE HEARING COMMISSIONER

I. Procedural History

On May 29, 1996, Complainant, Nelson Vasquez (hereinafter “Mr. Vasquez” or “Complainant”) filed a complaint alleging discrimination based upon national origin and retaliation with the Massachusetts Commission Against Discrimination (hereinafter “MCAD” or “the Commission”) against his employer City of Holyoke Police Department, Chief Stephen Donoghue, and Lt. Donald Whelihan. The Commission amended Mr. Vasquez’s complaint on January 10, 1997 to include additional allegations of national origin discrimination and retaliation by Respondents. Mr. Vasquez alleges that Respondents subjected him to a hostile work environment and unequal terms and conditions of employment on the basis of his national origin and for opposing Respondents’ discriminatory practices.

On April 17, 1997, the Investigating Commissioner found probable cause to credit Complainant's allegations. Conciliation efforts failed, and the Commission certified this matter to a public hearing on September 16, 1997. A public hearing was held before me on March 10, 11, 12, 13, 14 and 20, 2003. Following the hearing, the parties submitted proposed findings of fact and rulings of law. To the extent that any of the proposed findings are not in accord with my findings and conclusions, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant, Mr. Nelson Vasquez, resides in Springfield, Massachusetts.
2. Respondent, Chief Stephen Donoghue, worked for the Holyoke Police Department from 1969 until December 31, 1997. He served as the Chief of Police from 1994 until his retirement in 1997. Respondent, Lieutenant Donald Whelihan, was hired by the Department in 1970 and became a Lieutenant in 1992. He was still employed by the Holyoke Police Department as a Lieutenant at the time of the public hearing in this matter. Respondent,

City of Holyoke Police Department, is an employer within the meaning of G.L. c. 151B.

3. Mr. Vasquez worked for the City of Holyoke Police Department as a patrol officer from April 25, 1988 until his resignation on February 28, 2001.
4. There are three duty shifts or “watches” at the Department: “days” or “B shift” (8:00 a.m. to 4:00 p.m.); “nights” or “C shift” (4:00 p.m. to 12:00 a.m.); and “the dogwatch” or “A shift” (12:00 a.m. to 8:00 a.m.). Officers may bid to a different shift every six months provided they have the seniority to do so under the union contract. Mr. Vasquez worked on each of these shifts during his employment with the Police Department.
5. Chief Donoghue testified that he came to know Mr. Vasquez in the late 1980s or early 1990s. He testified that he was favorably impressed by Mr. Vasquez’s work ethic and attitude, and believed that he had a bright future with the police department. Chief Donoghue testified that he frequently asked Mr. Vasquez to assist as a Spanish interpreter in various investigations, and was impressed by his skills. He testified that he looked for interpreters who were skilled in two languages, were able to translate verbatim, and could pick up inflections and the nuances of the language that he could not. Chief Donoghue testified that Mr. Vasquez possessed these qualities, and was effective at determining whether a witness was lying. Mr. Donoghue also

testified that Mr. Vasquez was helpful at educating him about the relationships “on the street”. I credit his testimony.

6. Chief Donoghue awarded Mr. Vasquez at least four commendations for his work as a police officer. One of the commendations was awarded in 1997, a year after Mr. Vasquez filed his MCAD complaint.

7. Prior to becoming a Captain in 1991, Captain Paquette was a shift commander on the dogwatch. He testified that the sergeants on that shift told him to watch out for Mr. Vasquez, because Mr. Vasquez was beating the prisoners. Captain Paquette testified that he observed that Mr. Vasquez’s prisoners were coming in with ripped clothes and looking beaten up. He testified that he confronted Mr. Vasquez about the appearance of the prisoners and that Mr. Vasquez replied, “Sometimes they just really piss me off”. I credit his testimony. Captain Paquette testified that he kept Mr. Vasquez off the street on “inside duty” as a result of this conversation.

8. Shortly thereafter, Mr. Vasquez requested a transfer to C shift where Lt. Monfette was the shift commander. Captain Paquette informed Lt. Monfette of the problem of Mr. Vasquez beating up the prisoners. In addition, Lt. Monfette had heard reports from his officers concerning Mr. Vasquez’s conduct. As a result, Lt. Monfette also kept Mr. Vasquez on “inside duty” for a few weeks. Lt. Monfette told Mr. Vasquez that he would put him back

outside if he curbed his behavior. He testified that soon thereafter he put Mr. Vasquez back on the street and had no further problems with him beating up prisoners. I credit his testimony.

9. The testimony reveals that these incidents were never brought to the attention of the Chief at the time. It was the practice for shift commanders to handle these types of issues themselves unless they felt they could not. Both Captain Paquette and Lt. Monfette testified that they felt they had handled the issue by keeping Mr. Vasquez on inside duty, and that they did not experience any further problems with him while he was on their respective shifts.

10. In 1992, Mr. Vasquez was arrested by the Springfield Police Department and charged with assault and battery, breaking and entering, and kidnapping (taking his wife and children across state lines without their permission). Chief Donoghue (then Senior Captain) testified that he was surprised when he found out about the arrest, and immediately asked one of his Lieutenants, Lt. Fletcher, to go check on Mr. Vasquez at the Springfield lock up. Chief Donoghue spoke personally to District Attorney Bennett and asked him to use his discretion to give Mr. Vasquez a break. Ultimately, Mr. Vasquez was not convicted; some of the charges against him were not prosecuted and the remainder of the charges were “continued without a finding”. Mr. Vasquez was issued a five-day suspension for this incident.

11. In 1994, Chief Donoghue was informed by Agent Michael Smith of the FBI and Sgt. John Gibbons of the Massachusetts State Police of the creation of the Western Massachusetts Gang Task Force. They told Chief Donoghue that they were soliciting officers from local communities to be assigned to the task force. Chief Donoghue testified that he had worked with Agent Smith and Sgt. Gibbons in the past and viewed them as outstanding officers. He testified that he viewed the assignment as “career enhancing”, and that he sought feedback from his superior officers as to whom they felt was the best-qualified candidate for the assignment. Against the recommendation of several of his superior officers, Chief Donoghue chose Mr. Vasquez for assignment to the Gang task force on the 4 to 12 shift.

12. The Gang task force was comprised of a number of Hispanic officers, several black officers and a few white officers. Agent Smith and Sgt. Gibbons testified that they were dissatisfied with Mr. Vasquez’s performance on the Gang task force, and that they ultimately contacted Chief Donoghue to request his removal.

13. Agent Smith and Sgt. Gibbons testified that as a member of the task force, Mr. Vasquez was expected to make contacts in the community and initiate cases. They testified that Mr. Vasquez did not initiate any investigations during his tenure on the task force. Members of the task force were instructed to document contacts and report on investigations by generating reports on “302”

forms. Testimony revealed that Mr. Vasquez did not generate any “302” forms.

They also testified that Mr. Vasquez had difficulty getting along with other officers. On two occasions Agent Smith and Sgt. Gibbons had to intervene in a dispute between Complainant and other officers to avoid physical violence. Both officers with whom Mr. Vasquez had altercations were Hispanic. Agent Smith testified that several officers approached him and indicated that they did not want to be paired with Mr. Vasquez, often because they did not like how Mr. Vasquez treated people “on the street.”

In addition, Agent Smith and Sgt. Gibbons testified that they frequently had difficulty locating Mr. Vasquez when he was supposed to be on duty. They testified that they took his assigned vehicle away from him, in part, because of their continued inability to reach or locate him. They also testified that Mr. Vasquez did not fill out time and attendance forms.

Testimony revealed that an incident surrounding the investigation of Ralph Silva was the “final straw,” precipitating the request for Mr. Vasquez’s removal from the task force. Mr. Silva was under surveillance based upon his known association with the Latin King gang, and Mr. Vasquez was on the surveillance team. Gang force members observed Mr. Vasquez talking to Mr. Silva and shaking his hand. When Agent Smith and Sgt. Gibbons confronted him, Mr. Vasquez disclosed that he had grown up with Mr. Silva and was his childhood friend. Mr. Vasquez had not previously disclosed this to the task force and never advised anyone that he had had contact with Mr. Silva. Agent

Smith and Sgt. Gibbons testified that they were concerned that Mr. Vasquez had compromised the task force. I credit the testimony of both Agent Smith and Sgt. Gibbons in its entirety.

14. Mr. Vasquez testified that his ability to work effectively on the task force was undermined by the fact that he had no vehicle. I do not credit this testimony, as there was credible testimony presented by Respondents' witnesses that officers frequently shared vehicles to get their work done. Overall, I did not find Mr. Vasquez to be a credible witness. His testimony was vague and unconvincing, and he continually failed to take responsibility for his performance deficiencies - either by denying that he engaged in inappropriate conduct in the face of overwhelming evidence to the contrary, or by making excuses and blaming others for his poor performance. Mr. Vasquez testified that he was told to request a vehicle from the Holyoke Police Department and that he did so, but that no vehicle was forthcoming. Chief Donoghue denied that Mr. Vasquez requested a vehicle from him and indicated that he would have granted him one had he asked. I credit Chief Donoghue's testimony.

15. Chief Donoghue complied with the request to remove Mr. Vasquez from the task force, and replaced Mr. Vasquez on the task force with Officer Joey Jones, a black officer. Chief Donoghue testified that he was extremely disappointed by Mr. Vasquez's performance on the Gang task force and that he was professionally embarrassed. He testified that his original opinion of

Mr. Vasquez changed, and that he began to view him as a “problem child.” I credit his testimony.

16. Mr. Vasquez returned from the Gang task force on April 21, 1995, and opted to work the midnight to 8:00 a.m. shift (“the dogwatch”) under Lt. Donald Whelihan. Chief Donoghue testified that Officer Whelihan was a “no-nonsense” kind of shift commander, and the best one he had seen in 25 years.

17. From April of 1995 to February of 1996, during the time that Mr. Vasquez was assigned to the dogwatch, Lt. Joseph McCarthy was also assigned to the dogwatch. Lt. McCarthy was senior to Lt. Whelihan, and, thus, was the shift commander of the dogwatch when both he and Lt. Whelihan were working at the same time.

18. Mr. Vasquez testified that Lieutenant Whelihan discriminated against him by refusing to grant him time off when he requested it. The procedure outlined in the union contract for requesting time off provides that patrolmen are permitted time off if they request it 7 days in advance. Lieutenant Whelihan testified that if an officer requests time off with fewer than 7 days notice, the Sergeant would generally grant the request if there was sufficient coverage. Complainant asserted that even when he followed the proper protocol for requesting time off, Lieutenant Whelihan often denied him the time off. He provided no specific examples in terms of dates or times when

he was denied time off, nor did he produce corroborating evidence in support of his assertions. Lieutenant Whelihan disputed this testimony and testified that he has granted Mr. Vasquez time off with fewer than 7 days notice, and that he could not recall a time when he denied a request by Mr. Vasquez for time off. He further testified that he has denied time off to white and Hispanic officers who requested it with fewer than 7 days notice, and further testified that he has granted time off to Hispanic and white employees who have requested time off with fewer than 7 days notice. He testified that his decision depended on the manpower available at the time. Respondents presented witness testimony by Hispanic and white officers to corroborate Lieutenant Whelihan's testimony. I credit his testimony and the testimony of Respondents' witnesses on this issue.

19. Mr. Vasquez alleges that Mr. Whelihan denied him overtime when he requested it, although he could not point to any specific date or time when this occurred. I do not credit his testimony on this issue. Mr. Vasquez presented testimony by Patricia Alicea, a civilian dispatcher, who put out a call for officers who wanted overtime to call dispatch. She testified that on one occasion Mr. Vasquez called in that he would work and a few minutes later, Lt. Whelihan called to say that he was "all set." She testified that she believed Lt. Whelihan "ran the shift short", but could not articulate the basis

for this belief. She did not know whether the slot had already been filled, and, therefore, I do not have sufficient basis to credit her testimony.¹

Lt. Whelihan disputes that he denied Mr. Vasquez overtime in a discriminatory fashion. He testified that the Sergeants on duty generally assign overtime, and asserts that generally he had nothing to do with the assignment of overtime on his shift. I credit this testimony. In addition, Respondents presented credible testimony that Captain McCoy attempted to contact Mr. Vasquez on numerous occasions to work overtime, and that Mr. Vasquez would often take hours to respond or would not respond at all. Moreover, on July 23, 1998 Chief Cournoyer reprimanded Mr. Vasquez for failing to show up for overtime for which he signed up.

20. Mr. Vasquez alleged that he was excluded from “McDonalds runs” on the dogwatch. Officer Morales, a Hispanic officer, testified that he participated on these runs and observed Mr. Vasquez participating, as well. I credit his testimony.

21. Mr. Vasquez testified that Lt. Whelihan gave him the least desirable shift assignments, despite the fact that he was one of the more senior officers. Specifically, Mr. Vasquez alleged that he was forced to “walk the beat” almost nightly, when other officers with his level of seniority were assigned to

¹ The evidence reveals one occasion in 1995 when Lt. Eva O’Connell passed over Mr. Vasquez wrongly for overtime in favor of two other individuals. Upon investigation, it was determined that Lt. O’Connell made a mistake in that she failed to follow a new procedure for assigning overtime that had just been implemented. Respondent Holyoke Police Department ultimately paid Mr. Vasquez for the overtime. There is no evidence that Lt. Whelihan had anything to do with this incident.

a cruiser. Mr. Vasquez also alleges that when on his walking beat, Lieutenant Whelihan drove by to check up on him and denied requests by Mr. Vasquez for a ride back to the station at the end of his shift. In addition he testified that he was assigned to cell watch (monitoring the lock-up) for his entire shift on numerous occasions. He testified that other officers were not assigned to cell watch for an entire shift or as frequently as was Mr. Vasquez. Mr. Vasquez presented witness testimony that walking beats and cell watch duty were considered punishment duty for an officer of Mr. Vasquez's seniority.

Lt. Whelihan testified that shift assignments were not made based upon seniority, but rather were based upon the needs of the department. I credit this testimony. He, and other officers, testified that they "walked the beat" for many years and did not consider it to be "punishment" duty. Lt. Whelihan denied that Mr. Vasquez was assigned to walk the beat every night, and denied that he treated him differently than other officers based upon his national origin.

Mr. Vasquez did not present documentary evidence of how frequently he was assigned to walking beats or cell watch as compared with similarly situated non-Hispanic officers, or any other credible evidence corroborating that he was assigned these undesirable shifts more frequently than similarly situated officers. I do not credit his testimony that he walked the beat "almost every night" as punishment duty. This testimony is contradicted by witness testimony of officers who were on cruiser duty with Mr. Vasquez and documentary evidence of at least nine occasions when Mr. Vasquez was

driving a cruiser. Moreover, it should be noted that Mr. Vasquez volunteered for bike patrol for 6 or 7 years, which required that an officer be assigned to a beat, rather than to a car.

Mr. Vasquez further testified that he was required to perform cell watch for 8-hour shifts on numerous occasions, and that similarly situated white officers were not. He did not provide credible corroborating evidence for this allegation. His testimony is disputed by testimony by numerous non-Hispanic witnesses, who testified that they performed cell watch duty on a frequent basis for 8-hour shifts, just as Mr. Vasquez did, and that they did not consider it to be punishment duty.

Officer Roger Goodreau, a white officer, testified that he frequently had street supervisors drive by to check on him and that he had been denied a ride back to the station at Lt. Whelihan's order.

I did not find Mr. Vasquez's testimony credible with respect to shift assignments. He failed to articulate specifics with respect to his allegations and did not produce credible corroborating evidence in support of his contentions. By contrast, Respondents produced credible witness testimony and some documentary evidence to refute Mr. Vasquez's allegations. I do not find that Lt. Whelihan subjected Mr. Vasquez to punishment duty or otherwise treated him differently than similarly situated officers with respect to shift assignments.

22. In support of his claim that Respondents subjected him to discrimination, Mr. Vasquez alleges that Lt. Whelihan and others made derogatory comments about Puerto Ricans. He alleges that he heard officers tell Hispanic prisoners to “Go back to Puerto Rico”. He alleges that he heard police officers refer to Puerto Ricans as “spics” and make comments like, “they are ruining our city” and “how come all these f-ing Puerto Ricans have all the good f-ing jobs”. He alleges that there was a Christmas tree with pictures of Hispanics called the Hispanic tree. He alleges that Lt. Whelihan made some of the comments. Complainant’s witness, Edward Sustache, testified that he heard police officers make negative comments about Puerto Ricans over the years, but he did not ever hear Lt. Whelihan make any such comments. Edgar Lopez testified that he also heard officers make comments about Puerto Ricans, including comments that “they should go back to their country” and that they are all “on welfare”. He also asserted that he never heard Lt. Whelihan make any negative comments about Puerto Ricans. Respondents’ witnesses, of whom there were many, all testified that they never heard Lt. Whelihan make racially derogatory comments. I credit the testimony of these witnesses.

23. Emil Morales, a Puerto Rican officer, worked for 10 years on the dogwatch shift under the command of Lt. Whelihan. He testified that he worked with Mr. Vasquez on overtime. He testified that Mr. Vasquez spent the entire shift driving the cruiser, stopping to talk to girls on the street, and pointing out and making disparaging comments about members of the public. He testified that

at the end of the shift Mr. Morales told the commanding officer that he did not want to ride with Vasquez if he worked overtime, and that if he had to ride with him, he would refuse the overtime. Morales testified that he never heard Lt. Whelihan make any racial remarks towards himself, Mr. Vasquez or the prisoners. He further testified that members of the public, particularly the Hispanic community, made citizen complaints about how Mr. Vasquez treated them.

24. Sergeant Tammy Walker is a black female supervisor on the dogwatch who works with Lt. Whelihan. At the time of the public hearing, she had a pending MCAD complaint. She alleges that she never heard either Chief Donoghue or Lt. Whelihan make racist comments to anyone. She has worked on the dogwatch at various times as well as the 4-12 shift, and has had occasion to work with Mr. Vasquez. She alleges that on one occasion she and Mr. Vasquez were walking a beat and a brick flew past her head from a fourth floor window. The people who threw the brick yelled that it was not meant for her, but for Mr. Vasquez. She testified that, on another occasion, she was riding with Mr. Vasquez when he got into an altercation with a citizen who was either of Hispanic or Dominican descent. She testified that Mr. Vasquez told him that he looked like an “Ethiopian mother fucker”. She alleges that after this incident, she informed two supervisors and Lt. Whelihan that she did not want to work with him any longer. I credit her testimony.

25. Officer Edwin Sustache, a Holyoke police officer of Puerto Rican descent, testified that he had no problems with either Lt. Whelihan or Chief Donoghue during his eleven-year tenure with the police department, and that he never heard them make racist remarks to officers or prisoners.
26. Officer Edgar Lopez, also a Puerto Rican officer with the Department, testified that he worked under Lt. Whelihan for a number of years and that he never heard Lt. Whelihan make racist remarks to himself, Mr. Vasquez or any prisoners. He also testified that he observed Mr. Vasquez “coming down” on the Hispanic community, telling Hispanic prisoners to “cut the crap and stop doing drugs”, and to get off welfare and to find a job. He testified that he also made comments of this type to Hispanic prisoners. I credit his testimony.
27. Captain Fletcher testified that on one occasion Mr. Vasquez called him to report that he had been in an accident on his way home from Court and that he got injured. Captain Fletcher asked what time the accident took place, to which Mr. Vasquez responded, “5:00 pm.” Fletcher testified that he responded, “you are telling me, your commanding officer, that you were involved in an accident at 5:00 p.m. in Springfield on your way home from Court when Court got out at 11:00 a.m.?” He alleges that Mr. Vasquez hung up and did not put in for “injured on duty” pay. I credit his testimony.

28. In 1995, Lt. Whelihan told Chief Donoghue that Mr. Vasquez was probably going to come to him to complain that he (Lt. Whelihan) was picking on him. Lt. Whelihan told Mr. Donohue that Mr. Vasquez was not “towing the line” like everyone else.

29. It is undisputed that Mr. Vasquez complained on several occasions to Chief Donoghue in 1995 about the treatment he was receiving from Lt. Whelihan. Both Chief Donoghue and Mr. Vasquez allege that Mr. Vasquez complained that Mr. Whelihan was picking on him, and that he was unfair in his assignments. Mr. Vasquez told Chief Donoghue that he was unfairly assigned to walking beats, he was denied cruiser duty, he was assigned to eight hour cell watches and that he was denied time off unfairly. Mr. Vasquez testified that he also complained about racial issues and recalled specifically that he complained about overhearing racially derogatory comments to the prisoners. I do not credit this testimony. Chief Donoghue testified that Mr. Vasquez never complained that Mr. Whelihan made racially derogatory remarks towards him or anyone else, nor did he allege in these complaints that he believed Mr. Whelihan’s behavior to be motivated by discriminatory animus. I credit Chief Donoghue’s testimony.

Chief Donoghue testified that he told Mr. Vasquez that he gives his shift commanders complete discretion in making assignments, and assumes they have good reasons for the assignments they make. Chief Donoghue testified that he told Mr. Vasquez to do what he was told, follow the rules and

try and get along with Lt. Whelihan. He alleges that he further told Mr. Vasquez that Lt. Whelihan was tough, but fair, and if Mr. Vasquez did what he was told, he would not have any problems.

30. Respondents allege that Mr. Vasquez left early on December 15, 1995 without getting permission from any supervisor. Sgt. Cournoyer testified that on December 17, 1995 and December 20, 1995 he ordered Mr. Vasquez to submit a report regarding his whereabouts on December 15, 1995. He alleges that Mr. Vasquez failed to submit the report on the 17th and had to be reminded to submit it on the 20th. Sgt. Cournoyer also testified that on December 20, 1995, he observed Mr. Vasquez sleeping in his cruiser while his partner was answering a domestic call. In addition, Lt. Whelihan testified that he received an anonymous telephone call that Mr. Vasquez was driving with an expired license, and that when he checked on Mr. Vasquez's license status, he learned that Mr. Vasquez's license was indeed expired.

On or about January 4, 1996, Chief Donoghue met with Mr. Vasquez, Lt. Whelihan, Union President Arthur Therrien and at least one other officer, and issued Mr. Vasquez discipline for operating a cruiser on nine separate occasions after his operator's license had expired, leaving early without permission, failing to file a report after being ordered to do so, and sleeping on duty. Chief Donoghue testified that he was especially upset that Mr. Vasquez was driving with an expired license and the possible liability that could create for the Holyoke Police Department. He testified that Sgt. Cournoyer and Lt.

Whelihan recommended that discipline be taken against Mr. Vasquez, and Chief Donoghue followed the recommendation by issuing Mr. Vasquez a three-day suspension and two punishment duty tours. (Exhibit 7, 8)

Captain Fletcher testified that after the January 1996 disciplines, Captain Fletcher saw Mr. Vasquez at the bank, and Mr. Vasquez told him, "I'll get even with him if it's the last thing I ever do". I credit his testimony.

31. Mr. Vasquez denied that he was sleeping on duty, and denies that he was ever asked to prepare a report regarding his departure on December 15th until December 20th 1995. He alleges that he prepared the report as soon as it was requested. Mr. Vasquez further alleged that it was common practice for officers to leave early when they are reassigned to the "early car". He alleges that many other officers have left early without permission and have not been disciplined for doing so.

According to Lt. Whelihan, the procedure for officers reporting for duty is to attend roll call with a superior officer. Before leaving a shift, officers gather before the commanding officer of that shift and the next shift and await permission to be dismissed. Officers are generally permitted to leave as soon as their relief comes in. If an officer leaves at the end of his shift without permission from the commanding officer, he will be disciplined. I credit his testimony and conclude, that if it was common practice for officers to leave early, it was not a practice that was condoned or approved by Lt. Whelihan.

32. Mr. Vasquez concedes his license was expired, but alleges that Lt. Whelihan conducted computer checks to get information to use against him. In support of this assertion, he alleges that Lt. Whelihan gave conflicting information regarding how he learned of the expired license², and he asserts that the department conducted a large number of computer checks on another Hispanic officer (Luis Flores).

Respondents presented testimony that it is not unusual for there to be multiple computer checks of a license plate in a short period of time. A number of officers testified as to possible reasons for “running a plate” on the computer multiple times: to check if a vehicle is licensed or insured, if a vehicle is spotted by more than one officer driving around or parked in a high crime or high drug area, if a car is parked in a handicapped space or any time an officer makes a traffic stop. Lt. Whelihan denied that he conducted random computer inquiries to “get something” on Mr. Vasquez or other Hispanic officers. I found him to be credible on this point, and do not find sufficient credible evidence to conclude that that Lt. Whelihan conducted or directed officers to conduct computer checks on Mr. Vasquez.

33. Mr. Vasquez, through Arthur Therrien (the union president), grieved his disciplines. He appealed to the Mayor of Holyoke, Daniel Szostkiewicz, and to the Civil Service Commission. Mr. Vasquez was represented at both

² In support of this assertion, he asserts that Lt. Whelihan had first indicated that a policeman had given him the information regarding Mr. Vasquez’s license status, and then later stated that an anonymous Spanish-sounding woman called him at home and told him that Mr. Vasquez was driving with an expired license. (Exhibit 19)

proceedings by union counsel and by Arthur Therrien. At no time did Complainant allege that the discipline was issued against him for discriminatory reasons, nor did he make any other allegations of discrimination or general racist behavior. The discipline against Mr. Vasquez was upheld in part, and reversed in part. The Commission found that there was no just cause for issuance of the punishment duty, but upheld the three-day suspension for driving a cruiser with an expired license.

34. After Mr. Vasquez was disciplined for driving with an expired license, Chief Donoghue immediately ran a check of the license status of everyone in the Department, including himself. No officer was driving with an expired license. Eight officers came up on the license check as being “non-renewable”. If a license is non-renewable, it is still valid; however, there is a problem that must be rectified prior to renewal (i.e. unpaid parking tickets). Of the eight officers listed as non-renewable, five were white, two were Hispanic, and one was black. Each of the eight officers took care of their problems and was able to renew their licenses. Since Mr. Vasquez was found to be driving with an expired license, the policy at the Holyoke Police Department has become that every 90 or 120 days, the department checks the license status of its officers.

35. Shortly following the discipline, Mr. Vasquez requested a transfer to C shift. His request was granted, and Lt. Whelihan no longer supervised him. Mr.

Vasquez testified that he requested the transfer to get away from Lt. Whelihan.

36. On or about February 28, 1996, Chief Donoghue received a letter from Ana Martinez, President of the Teopfert Tenants' Association, complaining of Vasquez's conduct in dealing with the residents. (Exhibit 32).

37. Mr. Vasquez filed a race discrimination claim with the MCAD on May 29, 1996. Mr. Therrien testified that prior to this complaint being filed, he had never heard any allegations from Mr. Vasquez of race discrimination by Lt. Whelihan or Chief Donoghue. I credit his testimony.

38. Mr. Vasquez testified that after he filed his MCAD complaint, Lt. Whelihan intentionally bumped into him with his shoulder. Lt. Whelihan denies the incident. I do not credit Mr. Vasquez's testimony with regard to this incident.

39. On October 3, 1996, Mr. Vasquez filed a citizen complaint alleging that Lt. Whelihan spit on him and gave him the finger. To corroborate his version of events, Mr. Vasquez submitted evidence that Lt. Whelihan also spit at and gave the finger to Luis Flores, another Hispanic officer.³

³ October 14, 1996, Luis Flores filed a citizen/employee complaint with the Holyoke Police Department alleging that Lt. Whelihan yelled at him from a motor vehicle, "You fucking Puerto Rican asshole, rat", spit at Mr. Flores' car, "flipped him the bird", and said, "I'll get you". (Exhibit 45). Captain Paquette investigated Mr. Flores' complaint, and determined that there were no witnesses to the incident. Lt. Whelihan agreed to take a polygraph, but Mr.

On October 16, 1996, Chief Donoghue assigned Captain Paquette to investigate the allegations. There were no witnesses to the incident. Lt. Whelihan denied the allegations, and offered to take a polygraph test. Captain Paquette asked Mr. Vasquez to take a polygraph, but Mr. Vasquez refused. As a result, Mr. Vasquez's charges were found "unsubstantiated" on October 24, 1996. I do not credit Mr. Vasquez's testimony regarding this incident.

40. Chief Donoghue has asked various individuals, including white, black and Hispanic officers, to take polygraph tests. During his testimony, he could recall approximately 6 white officers from whom he requested a polygraph. I credit his testimony.

41. As of October 9, 1996, Mr. Vasquez was on the sick leave abuser's list and received a reprimand for his use of sick time on August 26, 1996. (Exhibit 29)

42. Mr. Vasquez returned to work in mid-November 1996 and applied for "injured on duty" pay due to stress caused by Lt. Whelihan. Chief Donoghue denied the request, based upon his disbelief of Mr. Vasquez regarding Lt. Whelihan's conduct, the fact that there were no witnesses or other complaints about Lt. Whelihan and the fact that Mr. Vasquez was transferred off Lt. Whelihan's shift 9 months prior to his request for the injured on duty pay. The record reveals that during this time period, Mr. Vasquez's wife left him

Flores refused. Thus, his complaint was found to be unsubstantiated. I do not credit Mr. Flores' testimony with respect to this incident.

and took his children to an undisclosed location. He spoke to his social worker at Project Concern regarding his stress over this issue. He returned to work after he found out the whereabouts of his wife and children.

43. On November 12, 1996, Arthur Therrien filed a grievance on behalf of Mr. Vasquez on the issue of his denial of injured on duty pay. Mr. Therrien testified that Mr. Vasquez never informed him he believed he was being discriminated against on the basis of his race in any of his complaints, grievances or appeals. Mr. Therrien indicated that there seemed to be a mutual dislike between Lt. Whelihan and Mr. Vasquez, but that, based upon what he “dug up”, race was not a determining factor.

44. Arthur Therrien testified that in representing Mr. Vasquez in the various grievances that he filed, Mr. Vasquez failed to cooperate with him and give him documentation or witness names. I credit his testimony. Mr. Therrien testified that he advised Mr. Vasquez that if he did not cooperate with him and supply the necessary information, he would be unable to pursue his grievances. Arthur Therrien testified that, after one of his exchanges with Mr. Vasquez, Mr. Vasquez threatened him over the phone. As a result, Mr. Therrien filed a complaint, required that all future correspondence between he and Mr. Vasquez be in writing, and that all meetings have a witness present. Mr. Vasquez gave him a letter of apology and Mr. Therrien withdrew his complaint.

45. On July 23, 1998, Mr. Vasquez was reprimanded for failing to show up for overtime assignments on two occasions.
46. On August 26, 1998, a citizen, Eliseo Ortiz, filed a citizen's complaint against Mr. Vasquez alleging that Mr. Vasquez had pulled him over and issued him a citation for a non-existent stop sign, and that Mr. Vasquez threatened him. After receiving the complaint form from Lt. Fournier, Mr. Ortiz and his witness left the police station and were confronted by Mr. Vasquez, who had seen them speaking to Lt. Fournier. He told them their complaints were "toilet paper" and further threatened them.
47. An investigation of this incident by Captain Paquette revealed that there was no stop sign at the intersection for which Mr. Ortiz was cited. There were no witnesses to corroborate Mr. Ortiz's allegation that Mr. Vasquez threatened him during the "stop sign" incident, and, thus, that portion of complaint was found unsubstantiated. There was, however, a witness to the "toilet paper" incident and, therefore, that allegation was sustained. As a result, Chief Cournoyer issued Mr. Vasquez a letter of reprimand and ordered him to attend sensitivity training. (Exhibit 29, 40).

48. On August 20, 1998, due to some breaches in the records department, Chief Cournoyer issued a Special Order prohibiting all personnel from the records bureau with the exception of records personnel and those officers authorized by the Chief's office. Mr. Vasquez asserts that this rule was selectively enforced, and that he was denied access to the records department when similarly situated officers were not. I do not credit his testimony.
49. In January 2000, Lt. Monfette testified that he received a complaint from one of the Springfield Juvenile Court officers. The complaint concerned an allegation that Mr. Vasquez attempted to bring his weapon into court while a care and protection proceeding was moving forward with respect to his children. Lt. Monfette went to the Juvenile Court to investigate the complaint and spoke to one of the head court officers, Glendon Barrow. Based on the statement he received from Mr. Vasquez and the information he gathered from Mr. Barrow, Lt. Monfette recommended that the complaint be dismissed. Mr. Vasquez was never reprimanded for this incident.
50. In 2000, Nelson Vasquez was charged criminally with assault and battery with a dangerous weapon and other charges arising out of disciplining his son with a belt. A jury convicted Mr. Vasquez in 2001. As a result, he was no longer qualified to be a police officer, and he resigned from the police department.

51. Mr. Vasquez testified that the Holyoke Police Department treated him differently than it treated other police officers that had faced criminal charges in that no other police officers were arrested in uniform at the police department. Moreover, Mr. Vasquez asserts that the police department even submitted a memorandum to the District Attorney's office in favor of a heavier sentence. Mr. Vasquez did not present specific evidence of similarly situated comparators with respect to this allegation, and I do not credit his allegations.

52. To further support his claim that Lt. Whelihan harbored discriminatory animus against Hispanics, Mr. Vasquez presented testimony by Luis Flores, a Parks police officer in the City of Holyoke. Mr. Flores testified that Lt. Whelihan and the Holyoke Police Department discriminated against him on the basis of his national origin. Mr. Flores presented evidence of a series of incidents he had with Respondents. Some of his allegations are similar to those made by Mr. Vasquez (i.e. that Lt. Whelihan spit on him and gave him the finger, and that Respondents directed computer checks against him in order to "get something" on him). I did not find Mr. Flores to be a credible witness with respect to any of his allegations. None of Mr. Flores' testimony leads me to the conclusion that Lt. Whelihan treated him poorly on the basis of his national origin, and I conclude that Lt. Whelihan acted reasonably with respect to all of his interactions with Mr. Flores. I do not find that Lt. Whelihan's actions towards Mr. Flores were discriminatory.

III. CONCLUSIONS OF LAW

G.L. c. 151B, sec. 4(1) provides that it shall be an unlawful practice for an employer to discriminate in the “terms, conditions or privileges of employment” on the basis of race and national origin.

Individual claims of employment discrimination based upon disparate treatment may be analyzed by a three stage order of proof set forth in Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000). A complainant has the initial burden of establishing a *prima facie* case of discrimination by establishing that: (1) he is a member of a protected class; (2) he performed his job at an acceptable level (3) he was terminated; and (4) similarly situated individuals not of his protected class were treated more favorably under the circumstances. Id. at 116. Once the complainant establishes a *prima facie* case of discrimination, the respondent may rebut the presumption of discrimination created by the complainant’s initial showing by articulating a non-discriminatory reason for its actions supported by credible evidence. Id. The complainant is then afforded an opportunity to demonstrate by a preponderance of evidence that the respondent’s articulated reason is a pretext for discrimination. Id. at 117.

I conclude that Mr. Vasquez has failed to establish a *prima facie* case of disparate treatment in this matter, as he cannot satisfy the second or fourth prong of the *prima facie* case. Mr. Vasquez cannot establish that he was performing his job satisfactorily or that similarly situated individuals were treated differently than he. The evidence reveals that Mr. Vasquez had difficulty getting along with many of his co-workers, he was “rough” with prisoners and inappropriate with members of the community he served, he refused to be held accountable, was difficult to locate, and committed many other infractions warranting discipline.

I do not credit his testimony that he was passed over for overtime on a regular basis as he suggests, although I credit the testimony of Respondent’s witnesses that he did not respond to requests to work overtime. I do not credit his testimony that he was routinely denied time off and similarly situated officers were routinely granted it. The evidence reveals that all officers were granted or denied time off based on the needs of the department. For the reasons previously stated, I do not find that Mr. Vasquez has established by a preponderance of evidence that he was forced to “walk the beat”, perform cell watch or otherwise given undesirable shift assignments more than similarly situated police officers.

Even if Lt. Whelihan had denied him a cruiser and assigned him to cell watch more frequently than other officers with his level of seniority, I would have concluded that it was for legitimate non-discriminatory reasons. At least two of Mr. Vasquez’s superior officers testified that they

kept him on “inside duty” and under stricter control as a result of his performance deficiencies. I conclude that Mr. Vasquez’s significant performance deficiencies and need for supervision would have justified denying him a cruiser and keeping him on inside duty (i.e. cell watch).

I do not credit Mr. Vasquez’s testimony that he was excluded from McDonald’s runs or the records department. I do not credit his testimony that Respondent engaged in unauthorized computer checks of him to “get something on him”, that his superiors issued him unjustified discipline, that they asked him to take a lie detector test and did not ask similarly situated non-Hispanic officers to take one, that they treated him worse than they treated similarly situated officers faced with serious criminal charges, or that Lt. Whelihan pushed him, gave him the finger or otherwise harassed him.

I conclude that Respondents’ disciplinary and other actions towards Mr. Vasquez were motivated by non-discriminatory reasons. I am not persuaded, based on the evidence presented, that any of Respondent’s actions were a pretext for discrimination.

For similar reasons, I conclude that Mr. Vasquez’s retaliation claim also fails. Retaliation claims arise under G.L. c. 151B, sec. 4(4) which provides that an employer may not discriminate against any person because he has opposed any practice forbidden under G.L. c. 151B or because he has filed a complaint, testified at, or assisted in any proceeding alleging a violation of G.L. c. 151B. In addition, G.L. c. 151B sec. 4(4A)

makes it unlawful for any person to coerce, intimidate, threaten or interfere with another person for exercising any right under the chapter or for providing assistance or encouragement in the exercise of any right protected by this chapter. See Bain v. Springfield, 424 Mass. 758, 765 (1997). Retaliation is a separate claim from discrimination, “motivated, at least, in part, by a distinct intent to punish or rid a workplace of someone who complains of an unlawful practices.” Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000), citing Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In the absence of direct evidence of a retaliatory motive, 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 College v. MCAD, 371 Mass. 130 (1976). See also Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 655-666 (2000). In order to establish a *prima facie* case of discrimination based on retaliation, a Complainant must establish by credible evidence that: (1) he participated in protected activity; (2) he suffered an adverse employment action after his participation; (3) Respondent knew about Complainant’s participation in the protected activity prior to taking the adverse employment action; and (4) a causal connection can be inferred between Complainant’s activity and the

adverse employment action. Josey v. Crystal Transport, Inc., 26 MDLR 10, 12 (2004).

Once Complainant establishes a *prima facie* case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate non-retaliatory reason for the alleged conduct. If Respondent meets this burden, Complainant must then show by a preponderance of evidence that the proffered reason is a pretext for discrimination. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2002); Abramian, 432 Mass. at 116-118.

I do not credit Mr. Vasquez's testimony that he complained of race discrimination as early as 1995, but rather credit Respondents' testimony that they learned that Mr. Vasquez was alleging race discrimination when he filed his MCAD complaint, on or about May 29, 1996. Mr. Vasquez alleges that after he filed his MCAD complaint, Lt. Whelihan retaliated against him by denying him overtime, pushing him with his shoulder, spitting at him and giving him the finger. I do not believe that Lt. Whelihan took any of these actions, and I do not credit any of Mr. Vasquez's testimony with respect to these incidents. Mr. Vasquez also alleges that Chief Donoghue harbored retaliatory motive when he dismissed Mr. Vasquez's 1996 citizen employee complaint, requested Mr. Vasquez take a polygraph and when he denied him paid leave for the stress he suffered as a result of the incident set forth in his citizen's complaint. I find that Chief Donoghue's actions were reasonable under

the circumstances, and I do not conclude that any of his actions were motivated by retaliatory intent. I conclude that Mr. Vasquez has failed to establish a *prima facie* case of retaliation in this matter in that he cannot establish a causal connection between his complaints of discrimination and any adverse action taken against him.

Even if Mr. Vasquez had established a *prima facie* case of discrimination, I conclude that Respondents have articulated legitimate non-discriminatory reasons for all of their actions with respect to Mr. Vasquez. I find that Respondents' articulated reasons for their actions are supported by credible evidence, and I do not find that that Mr. Vasquez has established by a preponderance of evidence that any of Respondents' articulated reasons for its actions were pretextual.

For all of the above reasons, I conclude that Chief Donoghue and Lt. Whelihan did not discriminate against Mr. Vasquez, subject him to a hostile work environment, or retaliate against him. Therefore, I decline to impose individual liability against either of these individuals under G.L. c. 151B 4(4A) or (4(5)).

ORDER

Complainant has failed to persuade me that he was discriminated against on the basis of his national origin or subjected to unlawful retaliation. Therefore, I hereby order that the above-referenced matter be dismissed.

So Ordered this 16th day of December, 2004.

Cynthia A. Tucker
HEARING COMMISSIONER