

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
RUFUS CHEEKS,
Complainant

v.

Docket No. 94-BEM-0220

MASSACHUSETTS CORRECTION OFFICERS
FEDERATED UNION, RICHARD WETHERBEE, and
GREG BROWN,
Respondents

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

Appearances: Gale Glazer, Esq., and Louis Font, Esq., for
Complainant.
Joseph Fair, Esq., Matthew Dwyer, Esq., and
Kathleen Pennini, Esq., for Respondents.

I. PROCEDURAL HISTORY

On March 29, 1994, Complainant Rufus Cheeks filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission"), against the Massachusetts Correction Officers Federated Union (the "Union" or "MCOFU"), and two Union officers, Richard Wetherbee and Greg Brown. In his complaint, Complainant alleged that Respondents had engaged in unlawful race discrimination and retaliation in violation of M.G.L. c. 151B, §§ 4(1) and (4).

On October 7, 1999, the Commission issued a probable cause finding with respect to Complainant's claims. On August 30, 2002, the Commission certified Complainant's claims for a public hearing. Over the course of ten (10) separate

days from September 2003 to February 2004, the parties appeared before me for a public hearing in Boston, MA. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the public hearing, and the stipulations of the parties. I have likewise considered the Proposed Findings of Fact and Conclusions of Law submitted by the parties after the public hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

1. Complainant, Rufus Cheeks, is an African-American male who has worked for the Commonwealth of Massachusetts Department of Correction (the "DOC") as a Correction Officer I at its facility at MCI-Concord from September 20, 1987 to the present date.
2. Respondent, Massachusetts Correction Officers Federated Union, has served as the bargaining representative for correctional officers employed with the DOC from 1989 to the present time. Complainant has been a dues-paying member of MCOFU since it became the bargaining representative for the correctional officers employed by the DOC. MCOFU is a "labor organization" within the meaning of M.G.L. c. 151B, § 1(3).
3. Respondent Richard Wetherbee, at all pertinent times hereto, has been employed as a sergeant with the DOC at MCI-Concord and served as a chief

steward for the Union at the Concord facility. Respondent Greg Brown was employed as a correctional officer at MCI-Concord from July 1982 to October 2003 and, at all times pertinent hereto, served as a steward for the Union at the Concord facility.

4. The duties of chief stewards are outlined in MCOFU's Constitution and By-Laws. Wetherbee testified credibly that the Union did not give stewards or chief stewards policies or procedures to assist them in the performance of their duties. He also claimed that the Union did not provide stewards with any training regarding how to be a steward or how to represent Union members. Arthur Turner, who served as chief steward at MCI-Walpole from 1993 to 2001, corroborated Wetherbee's testimony regarding the lack of information and training provided by MCOFU to its stewards. Wetherbee claimed that stewards were responsible for processing the grievances of the members and forwarding a copy of the grievance and any response related thereto to MCOFU's grievance coordinator. Wetherbee also testified that between 1990 and 1994, his responsibilities and duties as Chief Steward at MCI-Concord consisted of serving as an advocate for MCOFU members regarding disciplinary issues at the Concord facility; and, conducting monthly informational meetings to inform the membership about the status of a variety of issues including contract negotiations, rights of Union members on the job, ways in which management may violate the contract, the Union's challenges to managerial interpretations of the contract, and social events. Brown testified that his duties as a steward at MCI-Concord involved assisting the chief steward, attending investigatory

meetings with officers, and taking notes at hearings. Brown likewise claimed that he never received any training or a list of guidelines outlining the duties of a steward. I credit Turner, Wetherbee and Brown's testimony.

5. As an initial matter, Complainant admitted that he had problems with his memory while testifying at his deposition and during certain days of the public hearing. For example, at the public hearing on December 4, 2003, Complainant admitted during cross-examination that his deposition testimony, "isn't totally accurate." He claimed that at the time of his deposition in March 2002, he suffered from post-traumatic stress syndrome ("PTSD") and had not been on any medication. Moreover, at the public hearing on December 4, 2003, he claimed "a lot of things during the time of the deposition that may not have been so clear to me, are much clearer to me now because I'm on medication regularly." In addition, he acknowledged having similar memory problems during his direct testimony at the public hearing. Specifically, on September 29, 2003, Complainant testified at length and for most of the day about the events related to his allegations of race discrimination and retaliation. However, during cross-examination on December 4, 2003, he stated that he suffered from the same memory problems while testifying on September 29 that he experienced during his deposition. In particular, he testified that on September 29, his vision was impaired, his mental status was unbalanced, and he suffered from sleep apnea, paranoia, and a deep state of fear for himself and his family. In fact, Complainant admitted that the problems with his memory and his ability to accurately recall events were worse during his direct testimony on September 29,

2003, than at his deposition. Although I credit Complainant's testimony with respect to the emotional and physical problems he experienced both at the time of his deposition and on September 29, 2003, as well as the impact these problems had on his ability to recall events, I find that his admitted memory problems adversely tainted his overall credibility.

6. Complainant testified that in August 1993, the Union asked Complainant to testify at an arbitration hearing on behalf of a fellow African-American correction officer, Eugene Davis.¹ The hearing pertained to disciplinary charges rendered against Davis for falling asleep on the job and being tardy.

Complainant claimed that the charges against Davis were initiated by Captain John Donaher and Lt. Thomas Baker, who also served as Complainant's superior officers. Complainant testified that fellow correctional officers told him that if he testified on behalf of Officer Davis, he would be "the next target." On September 13, 1993, Complainant testified on behalf of Officer Davis at the disciplinary hearing.²

7. Complainant testified that both before and after the Davis hearing, he was "harassed" by staff. The harassment included receiving harassing phone calls, being called names such as "rat" and "snitch", and being shunned by co-workers. He also stated that after he testified on behalf Davis, Lt. Baker became angry at him for no reason.

¹ Complainant offered no credible evidence that Wetherbee or Brown were involved in any way in the Davis hearing.

² Complainant testified that Davis was terminated after the arbitration hearing and, thus, I assume, the arbitrator upheld the DOC's decision to terminate Davis' employment.

8. From the time he started working for the DOC until September 30, 1993, Complainant had never received any disciplinary action. In addition, Complainant claimed that prior to the Davis hearing, Donaher had praised his job performance. However, on September 30, 1993, at approximately 12:30 am, Baker allegedly caught Complainant sleeping on the job. Complainant stated that his superiors then ordered him to leave the prison and report back to the facility later in the morning to see the Superintendent. Complainant adamantly denied sleeping on post. Complainant also believed that he was being falsely accused of sleeping on the job in retaliation for his testimony in the Davis matter.

9. Complainant testified that the charges rendered against him for sleeping on duty were part of a pattern of disparate disciplinary action given to fellow African-American correctional officers at MCI-Concord. Specifically, Complainant believed three other black officers at MCI-Concord – Dougie Yeomans, Gene Floyd, and Anthony Williams – were also inappropriately caught sleeping on the job and given suspensions. He also claimed that two white officers – Conroy and McNutly – were caught sleeping on duty but did not receive suspensions. I decline to give Complainant's testimony on this matter any weight. Complainant was not personally involved in any of the above-referenced suspension cases and his knowledge about the particulars of these cases was based on hearsay. In addition, none of the aforementioned African-American officers testified regarding these matters at the public hearing. Lastly, Complainant failed to introduce any other credible evidence that would corroborate or support his belief that Donaher engaged in a pattern of racial discrimination in this manner.

A. The Union's Representation of Complainant at Disciplinary Hearings.

10. Complainant reported back to MCI-Concord on the morning of September 30, 1993. He claimed that Donaher then told him that he was conducting the "investigatory/disciplinary hearing" instead of the Superintendent. According to Complainant, Donaher told him, "There's no Union [representative] here to represent you" and then ordered him to sign a document that stated, "I, Correction Officer Rufus Cheeks waive my rights to Union Representation." Complainant testified that he felt he had no choice but to sign the waiver. However, during cross-examination, Complainant admitted that at his deposition, he testified that after Donaher told him that no Union representatives were available, Donaher asked him, "Do you want a Union rep.?", and in response, Complainant said, "no, there's no one available, so obviously, no."³ In addition, at his deposition, Complainant stated that after he informed Donaher he did not want a union representative, Donaher "slid [the waiver form] over to me and said, quote, unquote 'sign that.'" Complainant then admitted that Donaher told him he could go out in the hallway and find someone to sit in with him at the hearing. I decline to credit Complainant's testimony that Donaher ordered him to waive his right to Union representation.

11. Wetherbee testified that management sometimes gives Union representatives notice of an investigatory meeting or hearing prior to the time of the meeting. However, he claimed that Union representatives do not typically

³ During cross-examination, Complainant claimed that his testimony given during his deposition regarding this matter was inaccurate. *See, supra*, ¶ 5.

attend investigatory meetings unless their presence is requested by the officer involved. Wetherbee further testified that when the Union receives prior notification of an investigatory or disciplinary hearing, it is not the practice of the Union representatives to seek out the named officer. But, he claimed that if such an officer seeks out a Union representative, the representative will request permission from management to meet with that officer prior to the meeting. Wetherbee stated that when he attended investigatory or disciplinary meetings with an officer, he acted as an advocate for the officer. I credit Wetherbee's testimony regarding this matter.

12. Evidence introduced by Complainant indicated that Union stewards, including Brown, had been at work on September 30, 1993 and arguably could have assisted Complainant at the investigatory hearing. However, Complainant failed to introduce any credible evidence that Brown, Wetherbee or any Union officer knew about the investigatory hearing. In addition, Complainant testified that he never sought out a union official prior to the hearing.⁴ Moreover, I credited both Wetherbee and Brown's testimony that they first learned of the matter days after the hearing.

13. At the conclusion of the investigatory/disciplinary hearing, Donaher told Complainant he was turning the matter over to the Superintendent and recommending that he be suspended for five days. In a memorandum dated October 7, 1993, Donaher wrote to Superintendent DiPaolo regarding the

⁴ Complainant testified that he did not know who the Union stewards were on his shift, from 11:00 pm to 7:00 am. Both Brown and Wetherbee worked from 7:00 am to 3:00 pm.

incident of September 30, 1993. In the memo, Donaher stated that "C.O. Cheeks declined to have a witness present as no MCOFU representatives were on duty." Donaher further wrote that Complainant had denied sleeping on duty and Complainant believed he was being sent home because he testified for Davis.

14. In a letter dated October 29, 1993, DiPaolo notified Complainant that he had adopted Donaher's recommendation and was suspending Complainant without pay for five (5) days. After receiving the letter, Complainant testified that he spoke with Wetherbee in order to obtain the assistance of the Union. Wetherbee admitted that a few days after the investigative hearing, Donaher had told him about the discipline imposed upon Complainant. Wetherbee also acknowledged that Complainant informed him that he had waived his right to Union representation at the hearing. However, Wetherbee testified credibly that Complainant never told him that Donaher had ordered him to sign the waiver. According to Complainant, Wetherbee said that he did not want to get involved in this matter and instead Brown would handle his appeal. Complainant testified that Brown then assured him that he would take care of this matter. I credit Wetherbee's testimony regarding this matter.

15. Complainant testified that Brown subsequently contacted him and told him to come to the Union office. According to Complainant, Brown then told him to get information from his personnel file. Complainant claimed that he also told Brown that he wanted to sit down and work out a plan on how to approach the appeal of his suspension. He further testified that he told Brown he believed he was being suspended in retaliation for his testimony of behalf of Davis and "that

this was a minority issue because minorities seem to get the bulk of suspensions.” On November 10, 1993, Brown filed a timely appeal of Complainant’s suspension to DOC Commissioner Larry DuBois.

16. By letter dated November 18, 1993, Dennis Cullen, the DOC’s Deputy Director of Employee Relations, wrote to Complainant stating that he had been designated by Commissioner DuBois as the hearing officer for the appeal of the five (5) day suspension. Complainant believed that Cullen had also served as the hearing officer in the Davis disciplinary matter.⁵ For this reason, Complainant stated he expressed to Brown that he was uncomfortable with Cullen serving as the hearing officer. Complainant testified that Brown responded, Cullen was “all right” and “a good guy.” Brown claimed that he never had a conversation with the Complainant concerning Cullen serving as the hearing officer. I credit Brown’s testimony.

17. Complainant testified that he believed Wetherbee, Brown, and MCOFU had failed to undertake any investigation with respect to Complainant’s claims of retaliation, racial discrimination and disparate treatment. In particular, Complainant claimed the Respondents failed to investigate his charge that Donaher had discriminated against him and other black officers by regularly disciplining them for sleeping on duty. Wetherbee testified that he conducted an investigation prior to the hearing regarding the allegations specifically related to Baker’s accusation that Complainant was asleep on duty. He stated that he

⁵ Complainant subsequently testified that he did not know what role, if any, Cullen played at the Davis hearing and only recalled seeing him in the room at Davis’ arbitration hearing.

spoke with Baker who reaffirmed that he had caught the Complainant sleeping. According to Wetherbee, Baker also told him that he had previously caught Complainant sleeping on the job. Wetherbee claimed that he also spoke with other officers on the 11 p.m. to 7 a.m. shift to try and determine if anyone else could confirm the allegations. Wetherbee testified that he believed Baker's statement that Complainant had been sleeping on the job because Baker had no reason to lie about this situation. I credit Wetherbee's testimony.

18. Wetherbee admitted that as early as October 1993, Complainant had told him that he believed he was being subjected to discrimination. However, Wetherbee acknowledged that he did not investigate Complainant's allegations concerning black officers being subjected to disparate treatment by Donaher because Baker, not Donaher, had caught Complainant sleeping on post. According to Wetherbee, Complainant never indicated to him that Baker had wrongfully subjected black officers to discipline for sleeping on duty. Wetherbee also acknowledged that he did not investigate Complainant's allegation that Officers Yeomans, Williams, and Floyd were inappropriately suspended for sleeping on duty. Wetherbee testified credibly that Officers Yeomans and Floyd never appealed the disciplinary actions and Officer Williams had admitted that he had been caught sleeping and had accepted his suspension. For these reasons, Wetherbee did not think that Complainant had raised sufficient grounds to support the accusation that he was being discriminated against by Donaher on the basis of race. Moreover, Wetherbee testified that in 1993, the DOC regularly suspended officers for five (5) days for sleeping on duty. Although Baker had

apparently initially recommended that the Complainant be given a verbal reprimand, Wetherbee claimed that the DOC did not typically issue reprimands to officers caught sleeping on duty. Lastly, Wetherbee admitted to not conducting an inquiry into Complainant's claim that the charges against him were issued in retaliation for his testimony on behalf Davis. Wetherbee claimed he had no knowledge of Davis's situation or hearing, and Complainant had not given him any information to substantiate his charge of retaliation. Wetherbee also stated that he had no information that Baker or Donaher had any role in the Davis matter. I credit Wetherbee's testimony.

19. Complainant testified he told Wetherbee that an informal courtesy-call system existed at MCI-Concord in which correction officers alert their colleagues that the Shift Commander was making rounds. Complainant alleged that apparently before Baker entered H-Building on September 30, 1993, he did not receive a courtesy call from any fellow correction officer alerting him that Baker was heading his way. Wetherbee admitted that during his investigation into this matter, he found that an informal warning/courtesy call system did exist. However, if Complainant was not asleep on the job on the night in question as he has alleged, then I fail to see the relevance or the importance of his not having received a "courtesy-call" before Baker showed up at his post.

20. Wetherbee admitted that he also did not investigate whether Donaher had erroneously told Complainant that no Union representatives were on duty at the time of the investigatory hearing on September 30, 1993. As mentioned above, Wetherbee acknowledged that Complainant told him that he had waived his right

to Union representation. But Wetherbee testified credibly that Complainant never told him that Donaher had ordered him to sign the waiver or given him any information regarding the circumstances under which he waived his right to Union representation.

21. On December 8, 1993, Cullen held the Commissioner's appeal hearing. According to Complainant, immediately prior to the hearing, he went to the Union office and saw Wetherbee and Brown. Complainant stated he was surprised to see Wetherbee since Wetherbee had previously stated that he did not want to be involved in Complainant's case. Complainant testified that his meeting with Wetherbee and Brown was very brief.

22. Wetherbee testified that prior to the appeal hearing on December 8, 1993, he had met with Complainant on only two occasions: first, in a brief meeting after Complainant received the five (5) day suspension; and, second, in a meeting with Brown approximately one-half hour before the Commissioner's hearing. Brown testified that he had likewise met with Wetherbee and Complainant just prior to the Commissioner's hearing. Brown also stated that he had a few, short informal conversations with Complainant as they passed each other heading into and out of the facility. In addition, both Wetherbee and Brown testified that on another occasion prior to the Commissioner's hearing, Complainant stopped by the Union office to speak with them, but they were attending to other matters and unable to meet with him at that time. I credit Wetherbee and Brown's testimony.

23. With respect to their meeting with Complainant just prior to the Commissioner's hearing, Wetherbee and Brown stated they met with him for approximately a half hour. Wetherbee testified that during this meeting, he asked Complainant if he had any documentation to corroborate his allegation that he had been suspended due to his race, and Complainant indicated that he did not have any documents. Therefore, Wetherbee determined that Complainant had no basis assert discrimination as a defense to the charge of sleeping on duty. However, Wetherbee told the Complainant that he would have the opportunity to raise this issue at the hearing. Contrary to Complainant's testimony, Wetherbee and Brown both claimed that they never mentioned to the Complainant that he should bring his case to the attention of the NAACP. I credit Wetherbee and Brown's testimony.

24. Wetherbee testified that he prepared an outline for the Commissioner's hearing. He further claimed that at the hearing, he raised the following topics to the hearing officer: the notification system on the midnight shift, the fact that Baker initially recommended that Complainant only be given a verbal warning, and that no one witnessed Complainant sleeping on duty except for Baker. In addition, Wetherbee testified that Complainant made a statement at the hearing that he believed the accusations made against him were in retaliation for his testimony on behalf of Officer Davis. According to Wetherbee, Complainant also told the hearing officer that he believed the DOC had discriminated against him and other Black officers with respect to being suspended for sleeping on duty.

Wetherbee further testified that Complainant informed the hearing officer that the NAACP would be notified about this issue. I credit Wetherbee's testimony.

B. Respondents' Handling of Complainant's Civil Service Appeal

25. Complainant claimed that he told Brown, after the Commissioner's hearing, that if he lost he wanted to appeal the matter to the Civil Service Commission. Additionally, Complainant stated he repeatedly asked Brown for his notes from the hearing. Brown testified that he merely took notes at the Commissioner's hearing and, afterward, he kept the notes in the Union office. Brown claimed that the only conversations he had with Complainant after the Commissioner's hearing concerned Complainant's request for a copy of his notes. According to Brown, Complainant stated he needed the notes from the Commissioner's hearing because he was going to give them to the NAACP. Brown delivered his handwritten notes of the hearing to Complainant sometime during January 1994. I credit Brown's testimony regarding this matter.

26. Complainant testified that on or about December 22, 1993, he received a letter from Commissioner DuBois, dated December 9, 1993, notifying him that the appeal of his suspension had been denied. In particular, DuBois wrote, "I find there is no evidence to believe, as you claim, that your superior officers were singling you out for discipline. The suspension imposed was similar to other like infractions." The letter further stated "you may appeal this decision to the Civil Service Commission within ten (10) days of receipt of the letter." After receiving DuBois' letter, Complainant testified that he had numerous conversations with Brown and asked him to file and handle the appeal to the Civil Service

Commission. According to Complainant, Brown told him, "I'll take care of it." Brown denied that Complainant ever asked him to file an appeal to the Civil Service Commission. Brown also claimed that the only conversations he had with Complainant pertained to the request for his notes. In addition, both Wetherbee and Brown denied receiving independent notification of DuBois' decision. I credit Wetherbee and Brown's testimony regarding this matter.

27. Complainant testified that he subsequently asked Brown about the status of his Civil Service appeal and, in response, Brown told him that the Union had not yet filed the appeal. As a result, Complainant obtained a private attorney and on December 30, 1993, filed the appeal without the assistance of the Union.⁶ Complainant claimed that he sought his own counsel because he believed the Union had refused to file his appeal. According to Complainant, when he discussed with Brown the fast approaching filing deadline, Brown told him that the Union knew someone at the Civil Service Commission who could back-date the appeal. Although the Union clearly did not file an appeal with the Civil Service Commission on Complainant's behalf, Complainant has failed to present any credible evidence that Respondents deliberately failed or refused to file his appeal.

28. Complainant introduced documents indicating that the Union had regularly filed appeals to the Civil Service Commission on behalf of its members.⁷

⁶ If Complainant received the letter from Dubois on or about December 22, 1993, then arguably the appeal to the Civil Service Commission would have to be filed by January 1, 1994, in order to be timely.

⁷ None of the documents indicated that stewards or chief stewards regularly filed appeals on behalf of correctional officers at MCI-Concord during the period in question, 1993-1994.

Respondents acknowledged that the Union often filed these appeals. However, Wetherbee and Daniel O'Neil, the President of MCOFU from 1989 to 1998, testified that in 1993 chief stewards at the correction facilities did not file appeals to the Civil Service Commission on behalf of Union members. In particular, O'Neil testified that MCOFU never gave the stewards at the individual correction facilities a directive to file any such appeals. Moreover, O'Neil stated that MCOFU never instructed stewards on how to file appeals with the Civil Service Commission. O'Neil stated that ordinarily, when an individual requested the assistance of a steward in filing an appeal, the steward would instruct them to contact the main MCOFU office. Wetherbee also believed that chief stewards were not responsible for filing Civil Service appeals for individual officers, since the right to file these appeals was governed by statute, rather than by the collective bargaining agreement.⁸ However, O'Neil testified credibly that if a Union member contacted the main MCOFU office concerning a Civil Service appeal, he would file the appeal on their behalf and he did so many times. Moreover, both Wetherbee and O'Neil acknowledged that the Union was available to represent a member at a Civil Service Commission hearing upon request. According to O'Neil, he represented numerous Union members at Civil Service Commission. I credit Wetherbee and O'Neil's testimony.

29. With respect to Complainant's appeal to the Civil Service Commission, Wetherbee testified that when he and Complainant had their first meeting in

⁸ Wetherbee testified credibly that in 1997, he began filing appeals to the Civil Service Commission on behalf of officers at MCI-Concord because he became concerned about filing deadlines and felt more comfortable in his position. Documents introduced into evidence by Complainant (Exhibits 72 and 73), corroborate Wetherbee's testimony.

October 1993 to discuss the charges, he told Complainant about the possibility of having to take the matter to the Civil Service Commission. Wetherbee also claimed that he and Complainant discussed the possibility of appealing the matter to the Civil Service Commission after the Superintendent issued the five (5) day suspension. In addition, Wetherbee testified that he gave Complainant information in regard to filing an appeal with the Civil Service Commission. According to Wetherbee, when Complainant informed him that the Commissioner DuBois had denied the appeal of the suspension, he specifically told Complainant that he could appeal the decision to the Civil Service Commission. Furthermore, Wetherbee testified that he told Complainant that he was responsible for filing the appeal, but that the President of the Union, Dan O'Neil, was available to represent him in that proceeding. Complainant has failed to establish that the Union would not have filed a timely appeal had he contacted the central MCOFU office. I credit Wetherbee's testimony.

30. On February 1, 1996, the Superintendent of MCI-Concord, William Coalter, informed Complainant that he has "elected to uphold the finding of guilt but reduce the sanction to a written reprimand." Complainant was subsequently repaid for all wages lost as a result of the five (5) day suspension. As a result of the reduction of the disciplinary action to a written reprimand, the DOC moved to dismiss Complainant's appeal. On February 21, 1996, the Civil Service Commission dismissed Complainant's appeal after the parties agreed that the Civil Service Commission no longer had jurisdiction over this matter.⁹

⁹ The Civil Service Commission has jurisdiction to hear appeals of suspensions and terminations, but not reprimands.

C. The Union's Representation of Complainant's Pay Issues.

31. Complainant testified that he also sought the assistance of the Union with respect to some pay issues. Specifically, on or about January 14, 1994, Complainant spoke with Wetherbee about numerous letters he had sent to Superintendent DiPaolo regarding his not getting paid overtime for two days in March 1993. Complainant claimed he never received a response to his letters from the Superintendent. On January 29, 1994, Complainant wrote a memorandum to Wetherbee requesting that the Union file a grievance on his behalf and represent him in this matter. In response, Wetherbee told Complainant that the Union could not process the grievance because it was untimely. Under the collective bargaining agreement between the Union and the DOC, "[a]n employee and/or the Union shall submit a grievance in writing...not later than twenty-one calendar days after the date on which the alleged act or omission giving rise to the grievance occurred or after the date on which there was a reasonable basis for knowledge of the occurrence." Consequently, Wetherbee told Complainant that he could not be paid the overtime since the grievances would be over nine (9) months old. Complainant admitted that he did not go to the Union when he learned that he had not been properly paid for overtime worked in March 1993. Rather, he went to the shift commander and Superintendent and then made requests to the Superintendent for payroll records in November 1993 and January 1994. At the public hearing, Complainant asserted that when he spoke with Wetherbee regarding his overtime issue in January 1994, he was not aware that the grievances had to be filed within twenty-one (21) days of the alleged violation. However, during cross-

examination, Complainant admitted that at his deposition, he stated that when he wrote the memo to Wetherbee, he knew his overtime grievance was untimely. Complainant then testified that he read the grievance time-deadline language in the contract, but did not understand it. I credit Wetherbee's testimony.

32. In a memorandum dated March 18, 1994, Complainant also requested that the Union assist him with respect to another incident where the DOC allegedly failed to pay him overtime. Specifically, Complainant asked the Union to file a grievance regarding his claim that the DOC owed him for overtime incurred earlier in March 1994. Complainant claimed that Wetherbee initially told him that he could probably do something about this issue. However, Complainant asserted that Wetherbee subsequently told him there was nothing he could do about it. Wetherbee denied ever speaking to Complainant regarding this overtime grievance and claimed he never received Complainant's memorandum dated March 18, 1994. As a result, Wetherbee testified that the Union never filed a grievance on Complainant's behalf. However, records from the DOC indicated that Complainant actually did receive payment for the overtime at issue in his paycheck for the week ending March 19, 1994. I credit Wetherbee's testimony.

33. Complainant believed that the Union failed to represent him because he is an African-American. He further testified that the alleged failures of the Union to represent him made him "angry, disappointed and upset." In addition, he claimed that the Union's inaction made him feel alienated, "valueless", and "expendable."

D. Complainant's Complaints of Harassment and Retaliation.

34. On June 23, 1994, after he had already filed a complaint against the Union with the Commission, Complainant submitted a "Complaint Intake Form" to the DOC's Affirmative Action Office regarding the Union's failure to adequately represent him. On August 12, 1994, Complainant received a memo from Tempthia Battle, the Director of Affirmative Action, informing him that she had referred his complaint to MCOFU President, Daniel O'Neil. Complainant testified that O'Neil never contacted him with respect to this complaint. However, O'Neil, Wetherbee, and Brown all denied ever receiving the complaint from the Affirmative Action Office. In addition, O'Neil had no recollection of having any conversation with Battle regarding Complainant's complaint. Battle did not testify at the public hearing. I credit Wetherbee, Brown, and O'Neil's testimony.

35. Complainant alleged that from September 1993 through February 1995, he was subjected to severe and constant harassment by his fellow officers. In particular, he testified that his tires were slashed and screwed, tobacco was spit on his car door handles and windshield, and his time card was sabotaged. Complainant also alleged that his car was deliberately totaled in front of his home. Moreover, he claimed that he received harassing and obscene phone calls from unknown officers, in which he was called a "pig" and a "rat." He also testified that on one occasion, while working by himself in the pedestrian trap, he found an indecent and derogatory picture of him on an incident report. Complainant also alleged that a white correction officer threatened him with bodily harm after the officer was disciplined for an incident involving

Complainant. Complainant further believed that “it was common knowledge to the [Union] officials that I was being harassed.” However, Complainant offered no credible evidence that Wetherbee, Brown, O’Neil or any other Union officer had any involvement in or knowledge of these incidents. Although Complainant filed numerous incident reports regarding these acts of harassment with the DOC, he admitted that he did not provide copies of the incident reports to the Union. Rather, he simply believed that the DOC gave copies of the reports to the Union. He also gave copies of some of the incident reports to Battle and believed that she gave copies of his incident reports to the Union. O’Neil testified that in his capacity as Union President, he only received incident reports submitted to him directly by correction officers or other Union officials and he did not recall seeing any incident reports submitted by or pertaining to Complainant. I credit Wetherbee, Brown and O’Neil’s testimony.

36. In addition, Complainant testified that he believed his fellow officers shunned him in the role call room after he testified on behalf of Officer Davis. Moreover, Complainant alleged that in the winter of 1994, while assigned to the post of pedestrian trap, he found numerous broken windows in his work area. Complainant believed someone deliberately broke the windows in order to expose him to the cold, which adversely affected his sickle cell trait. Again, Complainant offered no credible evidence that Wetherbee, Brown, or any other Union officer had any involvement in any of these incidents. In addition, Complainant failed to offer any credible evidence that Wetherbee, Brown, or any Union official were aware of these matters.

37. Complainant testified that in 1997, he was required to perform demeaning and humiliating tasks while working in the B Control. The duties included cleaning bathrooms, and mopping and cleaning floors. He claimed that other correctional officers saw him performing these tasks and “it was common knowledge” that he was doing this work. Complainant, therefore, believed that Union officials must have known about this matter. I decline to credit Complainant’s testimony that he performed tasks other than those assigned to other correctional officers. Moreover, even if Complainant could establish that the DOC assigned him “demeaning work” in a disparate manner, he has failed to establish that such work was “common knowledge” in the facility. Lastly, Complainant failed to offer any other credible evidence that Respondents knew he was performing these tasks or being assigned this work in an allegedly discriminatory manner.

38. In the summer of 1997, the DOC administratively transferred Complainant from B Control to the East Side, an inmate housing area and, as a result, his days off were changed from Saturday and Sunday to Wednesday and Thursday.¹⁰ Complainant testified that he believed that the DOC did not ordinarily alter the days off for officers when they are administratively transferred to another position. Complainant alleged that he spoke with Wetherbee about this transfer. According to Complainant, Wetherbee told him that the transfer, without notice and with an immediate change in days off, was contrary to the

¹⁰ Complainant's performance evaluation, dated June 16, 1997, indicated that he was being removed from his job pick assignment due to his inability to perform the tasks of the selected job pick. Complainant did not offer any credible evidence to rebut the findings in the performance evaluation.

DOC's normal procedure. Complainant further testified that Wetherbee indicated that he would look into the situation, but he was not sure if the Union could do anything. I decline to credit Complainant's testimony. First, I find it unlikely that Complainant would approach Wetherbee regarding this matter since he had already made serious accusations of race discrimination against Wetherbee and the Union. Moreover, Complainant offered no credible testimony that he approached Wetherbee or any other Union official regarding any other incident since he filed his complaint against the Union in 1994. Lastly, Complainant offered no credible evidence that Wetherbee or any other Union officer had any involvement in the transfer.

39. Complainant believed that the Union failed to vigorously represent him and other African-Americans on account of his race. However, Complainant failed to introduce any credible evidence that Respondents failed to vigorously defend other African-American correctional officers. In addition, Wetherbee testified credibly that Complainant was the only black officer at MCI-Concord who directly raised allegations of race discrimination by the DOC to him. I also credited Wetherbee's testimony that the Union represented many officers of color in a variety of forums, including grievances, disciplinary hearings and Civil Service appeals. Although the Union kept a list of all grievances filed by its members, it did not keep a record of each grievant's race. However, Wetherbee provided detailed and credible testimony regarding the many African-American officers he personally represented, including: Benny Ashley, James Brantly, Terence Buchanan, Steven Evans, Aaron Zackery, James Clark, and Michael

Horton. The Union also represented Ashley in a grievance arbitration and Zackery in a Civil Service appeal. Wetherbee testified that none of these officers ever alleged that the DOC had discriminated against them on the basis of race. Wetherbee and Arthur Turner also testified credibly regarding the large number of African-American correctional officers employed at other DOC facilities that MCOFU likewise represented in a number of different forums. I credit Wetherbee and Turner's testimony regarding these matters.

E. Complainant's Damages

40. Complainant testified that in 1994 he was diagnosed with post-traumatic stress disorder ("PTSD"), which he attributed directly to his experience at MCI-Concord. Complainant also alleged that he suffered severe emotional distress and anxiety as a result of Respondents' unlawful conduct. However, he began experiencing many of stress-related physical symptoms, such as back pain, abdominal pain, decreased sleep, nausea, mood changes and increased aggravation, prior to the Commissioner's hearing in 1993. Complainant also introduced into evidence medical records from various medical facilities, which corroborated his testimony that he had obtained treatment for severe emotional problems and PTSD for many years. His medical records indicated that Complainant complained that the onset of the symptoms related to his stress and PTSD, which began after he testified on behalf of Davis in 1993 and these symptoms continued for many years, which necessitated him being treated with prescription medication and individual psychotherapy. For example, medical notes from April 15, 1997, indicate that he sought medical attention for abdominal

cramps which he attributed to stress at work that started “when he testified on behalf of a fellow corrections officer. He has since faced longstanding verbal abuse at work in what he feels is an attempt to make him quit his job.” In addition, on April 16, 1997, Complainant’s psychiatrist recommended that he take a medical leave of absence for the next two weeks “due to acute stress symptoms.”

41. Complainant’s brother, Anthony Cheeks, likewise testified that Complainant’s demeanor significantly changed from a “happy-go-lucky young man” when he started at the DOC in 1987, to a “miserable person” in 1993. Anthony Cheeks further testified that Complainant became very withdrawn, emotional and complained often of stomach aches and sleeplessness. Doris Cheeks, Complainant’s mother, testified that in 1993 Complainant became a very different person. Mrs. Cheeks also claimed that Complainant stopped going to church, had sleep problems, and developed stomach problems.

42. Both before and during the time of the alleged incidents of discrimination discussed above, Complainant experienced significantly stressful family problems. Specifically, Complainant testified that he and his wife had separated in the fall of 1993 through early 1994, and this was not the first time they had separated. Complainant also had numerous issues concerning his mother-in-law, which caused considerable marital strain between him and his wife. On one occasion, Complainant's mother-in-law physically assaulted and stabbed the Complainant with a knife, which resulted in her arrest. Complainant testified that despite this arrest, Complainant's wife continued to allow her mother to visit

Complainant's home. Complainant admitted that his mother-in-law's continued visits to his home that continued until the time of his divorce, put him in a state of fear.

III. CONCLUSIONS OF LAW

A. RACE DISCRIMINATION

M.G.L. c. 151B, § 4(2) provides that it shall be unlawful for a labor organization to exclude full membership rights to any individual or to discriminate in any way against any of its members on the basis of race. Complainant has alleged that Respondents unlawfully discriminated against him on the basis of race and color by failing to represent him in his disputes with his employer. Specifically, Complainant has alleged that the Union failed to represent him: (1) at the investigatory disciplinary hearing on September 30, 1993; (2) in regard to his internal appeal of the five (5) day suspension to the Commissioner of the DOC; (3) with respect to the filing of his appeal to the Civil Service Commission; and, (4) in regard to several pay grievances.¹¹

In the absence of any direct evidence of discrimination, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Wheelock College v. MCAD, 371 Mass. 130, 136 (1976). In order to establish a prima facie case of discrimination on the basis of race, Complainant must show that (1) he is a member of a protected class; (2) that he was eligible to receive the services from the Union that he requested; (3) that the Union subjected him to adverse

¹¹ See, Complainant's Requests for Findings of Fact and Law, at p. 38.

treatment; and, (4) that he was treated differently from similarly situated persons not of the protected class. Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000), Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 441 (1995), Wheelock College, 371 Mass. at 134-136.

I conclude that Complainant has failed to establish a prima facie case of disparate treatment discrimination. Although Complainant is a member of a protected group by virtue of his status as an African-American, and he was an active member of the Union, he has not established that that he was subject to adverse treatment by the Union or that he was treated differently from similarly situated persons not of his protected class. With respect to the lack of Union representation at the initial investigative hearing on September 30, 1993, I found that Respondents had no knowledge of this hearing until after it occurred and Complainant did not introduce any credible testimony to the contrary. I also specifically rejected Complainant's testimony that Donaher ordered him, against his wishes, to waive his right to union representation.

In regard to Respondents' handling of his internal appeal to the Commissioner, Complainant failed to introduce any credible evidence that Wetherbee, Brown, or any other Union official handled his case differently than it handled similar cases involving non-minorities. In addition, I credited Wetherbee and Turner's testimony that the Union represented many African-American correctional officers in a variety of matters. Even if we assume, arguendo, that Respondents failed to zealously investigate or represent him at the disciplinary

hearings, Complainant offered no credible evidence that Respondents handled his matters any differently from the manner in which they handled the cases of non-minority officers. As previously addressed by the Commission in McIlvane v. Local 1547 Amalgamated Transit Union and Timothy Sullivan, 21 MDLR 255, 257 (1999), the mere failure of a union to exercise more vigorous efforts on behalf of a member “may not be laudable”, but it does not, standing alone, indicate that a union engaged in unlawful discrimination. Complainant has also not introduced any credible evidence that the outcome of the disciplinary hearings would have turned out differently had Respondents taken a more vigorous defense on his behalf.

Further, Complainant has failed to establish that Respondents engaged in discrimination in regard to the handling of his appeal to the Civil Service Commission. First, I credited Wetherbee’s testimony that he gave Complainant information in regard to the filing of his appeal. Moreover, Wetherbee testified credibly that he told Complainant that it was his own responsibility to file an appeal with the Civil Service Commission, but that the President of the Union, Dan O’Neil, was available to represent him in that proceeding. Second, although Complainant believed that Respondents deliberately failed or refused to file the appeal, Complainant failed to produce any credible evidence to support his contention. Even if we accept Complainant’s contention that Wetherbee and Brown had been slow in contacting the main MCOFU office regarding this matter, Complainant failed to introduce any credible evidence that Wetherbee and Brown handled his appeal any differently than they did for non-minority officers during

this time period. Lastly, I believe Complainant sought a private attorney and filed the appeal without the assistance of the Union because he was concerned that the time deadline would toll, and not because he had any reasonable basis to conclude that Respondents would refuse to file his appeal on the basis of his race.

With respect to the pay issues, I credited Wetherbee's testimony that Complainant's first overtime issue, which arose in March 1993, but not brought to the Union's attention until January 1994, was clearly untimely. The collective bargaining unambiguously states that a grievance must be filed within twenty-one days after the date of the act giving rise to the grievance. In this case, Complainant's complaint involved matters that occurred nine months earlier. More importantly, Complainant failed to establish that Wetherbee handled his untimely grievance differently than he would have handled untimely grievances filed by non-minority officers. In regard to the overtime issue that arose in early March 1993, I credited Wetherbee's testimony that Complainant never raised this issue with him. Additionally, Complainant's testimony regarding this particular matter is dubious considering that the DOC actually paid him for the overtime approximately one week after he allegedly told Wetherbee about the matter.

Complainant also testified at length about numerous alleged acts of harassment and retaliation at MCI-Concord by other correctional officers and supervisors. However, he failed to introduce any credible evidence that Respondents were in any way involved in these incidents, knew about these matters, or refused to assist Complainant in addressing his concerns.

Complainant admitted that he did not give copies of his incident reports regarding these matters to Respondents. He also failed to introduce any evidence to corroborate his testimony that the on-going harassment and retaliation was “common knowledge” throughout the facility, or that the Union received copies of his incident reports from others. To the contrary, I credited Wetherbee, Brown, and O’Neil’s testimony that they had no knowledge of these matters. Lastly, even if Complainant could establish that Respondents knew about these matters, he has failed to introduce any credible evidence that he requested the Union’s assistance with respect to these events and Respondents refused or failed to help him.

In summary, Complainant has failed to establish that Respondents engaged in unlawful discrimination on the basis of race and color in violation of G.L. c. 151B, § 4(1).

B. RETALIATION

In his complaint, Complainant also alleged that Respondents engaged in unlawful retaliation.¹² M.G.L. c. 151B, § 4(4) makes it unlawful “for any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under [c. 151B] or because he has filed a complaint, testified, or assisted in any proceeding under [c. 151B, § 5].” Retaliation is a separate

¹² The Investigating Commissioner, in the Certification Order dated August 30, 2002, certified the issue of whether the Respondents subjected Complainant to discrimination “on the basis of race and color, and/or in retaliation for having engaged in protected activity in violation of M.G.L. c. 151B.” Respondents, in their post-hearing brief, addressed the issue of unlawful retaliation in some detail. However, Complainant did not address this issue in any depth in his post-hearing brief other than merely reciting the language in M.G.L. c. 151B, §§ 4(4), (4A) and (5).

claim from discrimination, “motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices.” Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000), *quoting*, Ruffino v. State Street Bank and Trust Co, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In addition, Complainant alleged that Respondents violated Section 4(4A), which makes it unlawful “for 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.” Moreover, section 4(5) provides that it shall be an unlawful practice, “For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or attempt to do so.”

Similar to the race discrimination claim addressed above, in the absence of any direct evidence of retaliatory motive, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665-666 (2000); Wheelock College v. MCAD, 371 Mass. 130, 136 (1976). Consequently, in order to establish a prima facie case of unlawful retaliation, Complainant must prove that: (1) he engaged in protected activity; (2) Respondents knew he had engaged in protected activity; (3) Respondents subjected him to adverse treatment; and,

(4) a causal connection existed between the protected activity, known by the retaliators, and the adverse action. Morris v. Boston Edison Co., 942 F. Supp. 65, 68-69 (D. Mass. 1996); Ruffino, 908 F. Supp. at 1044; Kelley, 22 MDLR at 215; Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

I find that Complainant has failed to establish a prima facie case of retaliation against Respondents. In particular, Complainant has failed to introduce any credible evidence that the Union's purported failure to adequately represent constituted an adverse action. As stated above, Complainant failed to introduce any credible evidence that the outcomes of his disciplinary hearings or the matters related to his pay grievances would have turned out differently had the Union taken a more vigorous defense on his behalf. He also failed to show any credible evidence of a causal connection between Respondents' actions and his testimony in the Davis matter, the filing of his internal complaints of discrimination with the DOC, or the filing of his complaints with the Commission.

Additionally, Complainant failed to introduce any credible evidence that Respondents participated in, aided, abetted or incited the various alleged acts of harassment and retaliation purportedly committed by other employees at MCI-Concord. Complainant has also failed to show that Wetherbee and Brown interfered with his right to work in a harassment and retaliatory free workplace. Again, Complainant has not introduced any credible evidence that Wetherbee and Brown knew about these matters, or refused to assist Complainant in addressing these concerns. Complainant has, therefore, failed to prove that

Respondents engaged in unlawful conduct in violation of M.G.L. c. 151B, §§ 4(4), (4A), or (5).

IV. ORDER

For the reasons set forth above, the complaint in this matter is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 25th day of February, 2005.

Edward R. Mitnick
Hearing Officer