COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

STEVEN GRAY,
Complainant

v. Docket No. 04 BEM 03173

CITY OF MEDFORD,
Respondent

Appearances: Caitlin Sheehan, Esq., Commission Counsel, Esq.
Anthony Santoro, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 26, 2004, Steven Gray ("Complainant"), filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") charging that Respondent City of Medford discriminated against him on the basis of age by failing to promote him in September of 2004.

The MCAD issued a probable cause finding on May 26, 2006 and certified the case for public hearing on February 2, 2007.

A public hearing was conducted on September19, 20, and 27, 2007. The parties introduced ten (10) joint exhibits into evidence. An additional exhibit identified as Complainant's Exhibit 1 was also accepted into evidence.

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent the testimony of various

witnesses is not in accord with or is irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant lives in Medford, Massachusetts. He was born on November 25, 1945.

2. Prior to working for the City of Medford, Complainant worked as a supervisor and/or store manager at J.M. Fields Department Store, Kings Department Store, Ames Department Store, Ann & Hope, Toys 'R' Us, and Auto Palace. Complainant supervised numerous individuals in his positions as a retail supervisor and/or store manager. Complainant testified that he sought employment with the City of Medford because he was tired of working in retail sales after twenty-five years. However, Complainant continued to work part-time at Auto Zone after he began to work for the City of Medford. From 1998 to 2004, Complainant's part-time work at Auto Zone consisted of working some weekday evenings from 5:00 p.m. to 9:00 p.m. and some weekends on Saturdays and Sundays from 2:00 p.m. to closing.

3. Complainant applied for a civil service labor service job with the City of Medford in 1995.[1] In 1996, he interviewed with the Mayor of Medford and Commissioner Gere for a position as a Motor Equipment Operator 1 (MEO1) in the Parks Division. After taking and passing a medical examination,

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[1] Complainant's father-in-law, Cosmo Volpe, was Superintendent of the Parks Department prior to his retirement from the City of Medford in 1992.

Complainant was hired in January of 1997. In the same year, Complainant obtained a Commercial Drivers License (CDL) but not at the City's request.

4. As a MEO1, Complainant picked up litter in Medford parks, emptied trash barrels, and occasionally "marked" (i.e., drew or painted lines on) athletic fields. The cleaning of parks constituted approximately 95% of Complainant's duties. MEO1s are required to have a standard driver's license. The job has no supervisory responsibilities.
5. The City of Medford has twenty-six (26) parks with baseball diamonds, soccer fields, football fields, a stadium, a public pool, a pond, and tennis courts. The care and maintenance of these parks is divided among the employees of the Parks Division of the City of Medford's Department of Public Works.
6. Paul Gere has been the City of Medford's Commissioner of Public Works since 1997. Gere oversees seven divisions within the Department of Public Works, including the Parks Division.
7. The Superintendent of the Parks Division is Joseph Nowak. Nowak, whose DOB is 3/11/61, has been Parks Superintendent since 2002. Prior to 2002, he was a MEO3 in the parks Division. As Parks Superintendent, Nowak is the day-to-day manager of the Parks Division. Nowak reports to DPW Commissioner Gere. Nowak sends out crews in the morning to complete specific assignments.
8. Within a year of hire by the City of Medford, Complainant was promoted to MEO2. The CDL license, which Complainant had already obtained, was required for the position. Complainant was approximately fifty-four years old

at the time of promotion. According to Complainant, his duties as a MEO2 are essentially the same as his duties as a MEO 1. They consist primarily of picking up trash at parks, emptying trash barrels, painting benches, raking leaves, and grooming fields. Complainant testified that he only occasionally marks athletic fields, because Nowak does not assign him to this work. According to Complainant, he asked Nowak to increase the variety of his tasks and permit him to learn how to operate more equipment but that nothing changed, even after he filed a grievance. I do not credit Complainant's testimony regarding his efforts to learn how to operate equipment. Instead, I credit Nowak's testimony that he has, in the past, asked Complainant if he wanted to get "into the equipment" and Complainant declined.

9. Complainant obtained a Hoisting License in 1998. A Hoisting License is not required for an MEO2 position.
10. Since 2002, Complainant has been supervised by Parks Superintendent Joseph Nowak. Complainant testified that Nowak began to treat him with animosity after being promoted to Superintendent.
11. In April of 2004, the Parks Department posted an opening for a MEO3 position. Joint Exhibit 7. The position required a hoisting license and a CDL license. The job duties of a MEO3 include operating front-end loaders/backhoes in connection with park projects, repairing and erecting playground equipment, laying out athletic fields, maintaining tennis courts and park buildings, supervising a crew of up to six men, assisting in setting up voting booths, shoveling snow, sanding icy areas, operating a bob cat clearing sidewalks,

cutting grass, trimming trees, preparing flower beds, cleaning parks, emptying trash barrels, and raking leaves.

12. The 2001-2003 Collective Bargaining Agreement between the City of Medford and Local 492, Building Service Employees International Union, provides in Article XVIII, section 2 that, "Employees [sic] work records, including but not limited to . . . attendance records, . . . and job performance shall be reviewed and shall be factor(s) in the promotional process. Where work qualifications and referenced factors are substantially equ**al**, the seniority of the employee(s) shall be the determining factor.
13. Eleven individuals applied for the MEO3 position. Of the individuals who applied, Complainant, Michael Nestor, and one other individual had the necessary licenses.
14. There was no interview for the position. Nowak recommended to DPW Commissioner Gere that Nestor be promoted. Nowak testified that he did so based on Nestor's accuracy, neatness, speed, and attendance. Nowak testified that he was familiar with Complainant's job performance based on having worked along side him from 1997 to 2002 and having supervised him from 2002 to 2004. Nowak testified that he declined to recommend Complainant because his work wasn't "up to standard." According to Nowak, Complainant would only do what he was told and nothing more, and he declined to learn how to operate bobcats and other equipment. Nowak testified that reliable attendance is a key factor in a supervisory employee and characterized Complainant's attendance as poor. Nowak acknowledged that he did not allow

Complainant to supervise crews as a fill-in MEO3 because of the unsatisfactory quality of his work. Nowak described Nestor's initiative, technical knowledge, and a work ethic as far superior to Complainant's. In deciding which candidate to recommend for promotion in 2004, Nowak did not consider the candidates' supervisory experience prior to working for the City.

15. Between the time that Nestor was hired in 2001 and when he was promoted to MEO3 in 2004, he never took a sick day. Joint Exhibit 10.
16. Promotions in the Parks Division are based on recommendations initiated by Superintendent Nowak, reviewed by Commissioner Gere, and passed on to the Mayor. Gere testified that the following factors are relevant to selecting an MEO3 in the Parks Division: attendance, initiative, knowledge of equipment, and knowledge of marking athletic fields. Gere testified that he relied on Nowak's recommendation in 2004 regarding the promotion of Michael Nestor to MEO3. According to Gere's credible testimony, Nowak recommended Nestor because he was a "go-getter," a "hustler," was dependable, and had perfect attendance in contrast to Complainant who lacked initiative and dependability.
17. Gere did not interview any of the candidates for the position of Parks Division MEO3. His only contact with the candidates was to inform them that Nestor had received the promotion.
18. Complainant's work day begins at 7:00 a.m. and ends at 4:00 p.m. He generally arrives at work by 5:00 a.m. and watches television until 7:00 a.m. Complainant testified that he begins his work day by touring all the parks he is

assigned to clean prior to returning to each park in order to empty trash barrels and sweep up glass and debris. Nowak testified that he has told Complainant not to tour parks in the morning prior to picking up trash, and that in response, Complainant smiles, smirks, and shrugs. I credit Nowak's testimony.

19. MEO2s are offered overtime opportunities by Nowak. Complainant testified that he does not generally turn down these opportunities.
20. MEO3s in the Parks Division perform work similar to MEO1s and 2s but are also "working foremen," i.e., responsible for supervising crews of MEO1s and MEO2s. Typical duties include taking out crews to paint soccer fields and baseball diamonds, raking leaves, removing trash, repairing structures, placing wood chips in tot lots, and painting benches.
21. If a MEO3 is absent, a MEO2 who has a hoisting license, is selected to fill in. Complainant testified that he once filled in as an MEO3 before Nowak became Parks Superintendent, but that after Nowak was promoted to Superintendent, the fill-in opportunities were given to Nestor.
22. The 2001-2003 Collective Bargaining Agreement between the City of Medford and Local 492, Building Service Employees International Union, provides in Article XXV, section 2 (a) that employees accrue sick leave days at a rate of 18 days per year.
23. Complainant testified that he has various medical conditions causing him to take day sick days, including cancerous polyps in his colon, a burst AVM artery, high blood pressure, back pain, migraines, diabetes, and acid reflux. Complainant testified that Nowak is aware of some, but not all, of his medical

conditions.   According to Complainant, he has never been required to bring in doctor's notes and has never been disciplined or reprimanded for attendance issues.

24. Complainant's sick leave usage consists of the following: 2 sick days in 1997; 1 sick day in 1998; 1 sick day in 1999; 13 sick days in 2000; 34 sick days in 2001; 25 and 1/2 sick days in 2002; 19 sick days in 2003; and no sick days in the first four months of 2004 prior to the posting of the MEO3 position. Joint Exhibit 8

25. Michael Nestor, who was in his late twenties when he was promoted to MEO3, commenced employment with the Parks Department in 2001 as a MEO2. Prior to working for the City of Medford, he worked as an assistant manager for Olympia Sports, as a security guard at Bradlees Department Store, and as a truck driver at Rosev Dairy. He volunteered as a Little League coach and from that experience learned about field conditions. Nestor received his CDL license in or about 1998 and a hoisting license in 2002.

26. As a MEO2, Nestor operated lawn mowers, emptied trash barrels, drove trucks, replaced swings, fixed playground equipment, and worked on athletic fields. When Nestor filled in as an out-of-grade MEO3, prior to his promotion, he operated front end loaders, bobcats, and back end hoes.

27. Complainant testified that he heard Nowak make the following comments: "I told Paul Gere to hire me younger guys," "[Complainant] came to the City to retire," and "[Complainant was] too fat and too old to bend over" and/or "too fat and too old to do the job." According to Complainant, these remarks were

made in the presence of Michael Harvey, Joseph Susi, and Charlie McHugh. Complainant testified that the remarks were made prior to 2004 but that he could not recall when. Joseph Susi testified that he heard Nowak say, "Paul [Gere} should hire younger people" and that Complainant "came here to retire." Michael Harvey testified that when he and Complainant were hired, Nowak said that both of them "came to the City to retire." Harvey acknowledged that Nowak may have been joking when he directed the remark to him [Harvey] because he was twenty-three at the time and his mother worked at City Hall. I credit the testimony of Complainant, Susi, and Harvey that Nowak made some disparaging age-related statements prior to 2004.[2] Nowak testified that he did not recall making any statements about the unproductiveness of people over fifty years old or about people coming to the City to retire, but his denials were not credible.

28. After Complainant failed to receive the 2004 promotion to MEO3, he testified that he became upset, depressed, quiet, moody, irritable; had less ambition, drive and initiative; became a less effective employee; had problems sleeping for approximately six months; and began to argue with his wife. His wife testified that Complainant became very upset, depressed, and quiet after he failed to get the MEO3 promotion whereas before he was fun loving and talkative. His father-in-law testified that Complainanat became depressed, irritable, and upset after he failed to get the promotion and that his moodiness lasted for about six months.

[2] There was also testimony that Nowak made a disparaging comment about individuals over fifty after the 2004 promotion, but I am excluding this evidence as irrelevant to the events at issue.

29. Complainant testified that MEO3s make about thirty to forty dollars more per week than MEO2s, plus overtime.

III. CONCLUSIONS OF LAW

A. Age Discrimination

M.G.L. c. 151B, sec. 4(1C) makes it unlawful "[f]or the commonwealth or any of its political subdivisions, by itself or its agent, because of the age of any individual, to refuse to hire or employ or to bar or discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless pursuant to any other general or special law." The statute protects persons of age forty (40) and over.

Complainant may meet his burden of proving a prima facie case of unlawful discrimination by direct evidence or by circumstantial evidence. See Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000). Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace." Wynn & Wynn, 431 Mass. at 667 *citing* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991). In a direct evidence case, the Complainant does not have to adhere to the three-stage burden shifting paradigm because Complainant does not need the benefit of an inference. In such instances, a mixed-motive analysis is employed. See Wynn & Wynn, 431 Mass. at 666. Under a mixed-motive analysis, Complainant must first offer direct evidence that an impermissible reason played a motivating part in the employment decision. Id. at 670. Once Complainant offers such evidence, the burden of persuasion shifts to the Respondent to show that it would have acted in the same manner even without the illegitimate motive. Id.

Complainant has offered direct evidence of age discrimination in the form of alleged statements by Joseph Nowak that, "I told Paul Gere to hire me younger guys," that "[Complainant] came to the City to retire," and that "[Complainant was] too fat and too old to bend over" and/or "too fat and too old to do the job." The allegations that Nowak expressed support for the hiring of younger people and accused Complainant of coming to the City to "retire" i.e., to take it easy, are credible in that they are corroborated by Joseph Susi and Michael Harvey. While there is no evidence that these remarks were expressly made in the context of the decision to promote Nestor rather than Complainant to the position of MEO3, they reveal a general age-related bias on the part of Nowak. This bias casts concern on all of the personnel decisions in which Nowak played a role.

Since Complainant has offered some credible evidence of age playing an impermissible part in the selection of Nestor for the MEO3 position, the burden shifts to Respondent to show that it would have selected Nestor even without the age-related animus revealed by Nowak's comments. I conclude that Respondent has satisfied this burden. Notwithstanding Nowak's distasteful comments relating to the age of his employees, legitimate factors overwhelmingly support Nestor's promotion to MEO3 such as his perfect attendance, mastery of equipment, and work ethic. Nowak testified credibly that in comparison to Nestor, Complainant lacked initiative, his work was inferior, he declined to learn how to operate bobcats and other equipment, and he had a poor attendance record. Complainant argues that the City should have considered his management experience in the private sector prior to 1997, but such experience had limited, if any, relevance to Complainant's potential as a supervisory employee in the Parks Division in 2004. More relevant than the Complainant's private sector experience

years earlier was Complainant's job performance as a member of the Parks Division from 1997 to 2004. Since Complainant and Nestor had both worked for the City for a significant period of time prior to the 2004 promotional appointment, Nowak appropriately focused on how they performed as MOE2s.

In assessing the candidates' relative performance, one of the key factors Nowak scrutinized was their attendance in the years prior to 2004. Complainant discounts the importance of attendance, but it stands to reason that a supervisor must be present to organize, motivate, and oversee his crew of workers. Whether or not Complainant had legitimate reasons for all of his absences prior to 2004, Nowak was legitimately concerned about whether Complainant's frequent absences would conflict with the Department's need for a reliable working foreman. I do not believe that Nowak's concern about Complainant's poor attendance was a defacto expression of age bias. Compare Johansen v. NCT Comten, Inc., 30 Mass. App. Ct. 294, 300-302 (1991) (interpreting the words "high energy level" as a possible code for youth); Flanagan v. Lawrence School Department, 29 MDLR 107, 112 (2007) (preference for "energetic" and "flexible" candidate held to be a veiled reference to youth). The parties' collective bargaining agreement focuses on attendance as a relevant factor in evaluating candidates for promotion and therefore supports the legitimacy of Nowak's comparison between Complainant's problematic attendance record and Nestor's perfect one. Complainant operates under the misconception that because his labor contract grants him eighteen days of sick leave per year, he is entitled to use the entire allotment without his absences being considered during the promotional appointment process. Such a position ignores the fact that sick days represent a privilege to be judiciously used, not a right to be exploited.

Complainant also points to the fact that he had four more years of seniority than Nestor in order to argue that Nestor's promotion was evidence of age animus. This argument ignores the limited role of seniority under the parties' collective bargaining agreement. Pursuant to the contract, seniority is to be used as a tie breaker where the candidates are "substantially equal" in their qualifications. The evidence in this case establishes that Nestor's qualifications were superior to Complainant's and, thus, seniority does not come into play.

In sum, Respondent has convincingly demonstrated that Nowak would have selected Nestor for promotion even if he and Complainant were both the same age. Under these circumstances, I conclude that Nowak's age-based comments do not go to the heart of the selection process. See Wynn & Wynn, 431 Mass. 655, 667 (2000) *quoting* Johansen v. NCT Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991) (defining direct evidence as "strong evidence" that "'if believed, results in an inescapable, or at least highly probable inference that a forbidden bias was present in the workplace'").

Turning to indirect evidence of discrimination, Complainant may establish a prima facie case through the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976). See Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 655-666 (2000); Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 444-445 (1995). In order to establish a prima facie case of age discrimination, Complainant must demonstrate that he is a member of a protected class, was adequately performing the responsibilities of his position, and was treated differently from others who were substantially younger. See Abramian v. President and Fellows of

Harvard College, 432 Mass. 107 (2000); Murphy v. Pub Ventures, 15 MDLR 1098, 110-11 (1993).

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support legitimate, nondiscriminatory reasons for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent meets this burden, then Complainant must show by a preponderance of evidence that Respondent's articulated reasons were not the real ones but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003). In other words, Complainant must show that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass. at 504. If the Complainant presents such circumstantial evidence, the trier of fact may, but is not compelled, to infer discrimination. Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

Complainant has established a prima facie case of discrimination based on the fact that Complainant was fifty-nine years old at the time he applied for promotion to MEO3. As acknowledged by his supervisors, he was a satisfactory, if not stellar, employee in the Parks Division. His record is devoid of any discipline or reprimands. Complainant has approximately four more years of seniority than Michael Nestor, who was promoted to

MEO3. Nestor was under thirty years old at the time of his promotion. These factors are sufficient to make out a prima facie case of discrimination.

The burden of production, thus, shifts to Respondent to articulate and produce credible evidence to support legitimate, nondiscriminatory reasons for its action. For the reasons set forth above, I conclude that Respondent has provided legitimate, nondiscriminatory reasons for the promotion of Nestor which are not a cover-up for a discriminatory motive.

IV. ORDER

The case 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 1st day of April, 2008

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Betty E. Waxman, Hearing Officer